MISSISSIPPI CODE 1972
Annotated

Trusts and Estates
Domestic Relations
Torts

Titles 91 to 95

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME TWENTY

TRUSTS AND ESTATES

DOMESTIC RELATIONS

TORTS

§§ 91-1-1 to 95-15-1

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2018 REGULAR
LEGISLATIVE SESSION

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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. Summer
Attorney General

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PUBLISHER'S FOREWORD

This 2018 Replacement Volume 20 of the Mississippi Code of 1972 Annotated represents material appearing in the original 1973 bound volume, the 1994 Replacement Volume 20, the 2004 Replacement Volume 20, and the 2013 Replacement Volume 20, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2018 Regular Legislative Session.

This volume contains the text of Titles 91 through 95, of the Mississippi Code of 1972 Annotated, as amended through the 2018 Regular Legislative Session.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals decisions and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 3rd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal 2nd Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

PUBLISHER'S FOREWORD

A comprehensive Index appears at the end of this volume.

Visit the LexisNexis website at http://www.lexisnexis.com for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, 701 E. Water St., Charlottesville, VA 22902-5389.

September 2018 LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- — Advance Code Service
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- — Amendment Notes
- — Analyses
- — Code Status
- — Comparable Legislation from other States
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- — Editor's Notes
- — Effective Dates
- — Federal Aspects
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- — Judicial Decisions
- — Opinions of the Attorney General
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If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

Amendment notes are retained online indefinitely.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooperation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States* and *Federal Aspects.*

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates.*

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States.*

HISTORY NOTES

Each section of the Code is followed by a brief note showing the acts of the Legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The history note follows the section text, preceding any other annotations for the section. Information in the history note is listed in chronological order, first by Codes, then by Laws, with the most recent information listed last. If a section has been renumbered, the former number will appear in the history note.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

OPINIONS OF THE ATTORNEY GENERAL

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Opinions of the Attorney General."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

STATUTE HEADINGS

Headings or "catchlines" for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
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CHAPTER 1.

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§ 91-1-1. What law to govern.

All personal property situated in this state shall descend and be distributed according to the laws of this state regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other states, and notwithstanding the domicile of the deceased may have been in another state, and whether the heirs or persons entitled to distribution be in this state or not. The widow of such deceased person shall take her share in the personal estate according to the laws of this state.

HISTORY:

Codes, 1857, ch. 60, art. 110; 1871, § 1950; 1880, § 1270; 1892, § 1542; 1906, § 1648; Hemingway's 1917, § 1380; 1930, § 1401; 1942, § 467.

Cross References —

Computation of relationship according to civil law, see §§ 1-3-71, 1-3-73.

Refund of federal and state taxes to survivor of deceased, see § 27-73-9.

Petition to establish title of property acquired by descent, see §§ 91-1-27 et seq.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Application.
3. —Particular personalty.

1. In general.

Courts cannot ingraft exceptions on the statute. Williams v. Lee, 130 Miss. 481, 94 So. 454, 1922 Miss. LEXIS 225 (Miss. 1923).

Wife not estopped by silence with knowledge of pretended second marriage to assert right of inheritance. Williams v. Lee, 130 Miss. 481, 94 So. 454, 1922 Miss. LEXIS 225 (Miss. 1923).

Payment of debt having situs in Mississippi to foreign administrator is no defense against heirs. Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 1920 Miss. LEXIS 472 (Miss. 1920).

The effect of the statute is to abolish ancillary administrations in this state altogether. Carroll v. McPike, 53 Miss. 569, 1876 Miss. LEXIS 118 (Miss. 1876); Partee v. Kortrecht, 54 Miss. 66, 1876 Miss. LEXIS 12 (Miss. 1876).

The statute makes the local law the rule of distribution. Wilson v. Cox, 49 Miss. 538, 1873 Miss. LEXIS 142 (Miss. 1873).

2. Application.

Although the Uniform Commercial Code may govern whether a certificate of deposit passes to the estate or under a presumed joint tenancy, it does not determine who takes a certificate of deposit once it is in the estate. Matter of Zimmerman v. Corely, 519 So. 2d 430 (Miss. 1988).

But where the owner of the debt so deals with it as to establish an intention to locate it here, or if the debt arose as an incident to a business conducted in this state, the statute applies. Jahier v. Rascoe, 62 Miss. 699, 1885 Miss. LEXIS 127 (Miss. 1885).

The statute does not per se localize here all debts which are due by residents of this state to persons domiciled out of it. Speed v. Kelly, 59 Miss. 47, 1881 Miss. LEXIS 73 (Miss. 1881).

The statute applies in cases of partial intestacy. Wilson v. Cox, 49 Miss. 538, 1873 Miss. LEXIS 142 (Miss. 1873).

The statute applies only to the estates of intestates. The renunciation of a will by a widow will not make the statute applicable. Slaughter v. Garland, 40 Miss. 172, 1866 Miss. LEXIS 60 (Miss. 1866).

3. —Particular personalty.

Stock in Mississippi corporation, owned by person domiciled in Minnesota at the time of death, has its situs in Mississippi, and distribution is controlled by law of the state. Ewing v. Warren, 144 Miss. 233, 109 So. 601, 1926 Miss. LEXIS 342 (Miss. 1926).

Money, deposited in a bank within the state, belonging to person domiciled in another state at time of death, will be distributed under Mississippi law. Ewing v. Warren, 144 Miss. 233, 109 So. 601, 1926 Miss. LEXIS 342 (Miss. 1926).

Rent on land in Mississippi is a debt governed by its laws. Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 1920 Miss. LEXIS 472 (Miss. 1920).

Descent of the leasehold interest in school lands situated within the state, owned by testatrix domiciled outside of the state, is to be governed by the laws of the state, and of legacy of such interest lapses on the death of the legatee without children, though under the statute of the domicile of testatrix it would not lapse. Neblett v. Neblett, 112 Miss. 550, 73 So. 575, 1916 Miss. LEXIS 145 (Miss. 1916).

Stock of Mississippi bank owned by nonresident had situs in Mississippi and was liable to claims of creditors of estate, and was not exempt to widow. Jane v. Martinez, 104 Miss. 208, 61 So. 177, 1913 Miss. LEXIS 20 (Miss. 1913).

The personal estate of a young unmarried man who leaves his parental home in another state and in search of health, or a suitable field of labor, acquires a domicile in this state but abandons it and returns to his original domicile, is not distributable according to the laws of this state. Mayo v. Equitable Life Assurance Soc., 71 Miss. 590, 15 So. 791, 1893 Miss. LEXIS 123 (Miss. 1893).

RESEARCH REFERENCES

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Conflict of laws regarding election for or against will, and effect in one jurisdiction of election in another. 69 A.L.R.3d 1081.

Am. Jur.

23 Am. Jur. 2d, Descent and Distribution §§ 12, 13.

CJS.

26B C.J.S., Descent and Distribution §§ 7, 8.

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1987 Mississippi Supreme Court Review, Trusts. 57 Miss. L. J. 555, August, 1987.

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§ 91-1-3. Descent of land.

When any person shall die seized of any estate of inheritance in lands, tenements, and hereditaments not devised, the same shall descend to his or her children, and their descendants, in equal parts, the descendants of the deceased child or grandchild to take the share of the deceased parent in equal parts among them. When there shall not be a child or children of the intestate nor descendants of such children, then to the brothers and sisters and father and mother of the intestate and the descendants of such brothers and sisters in equal parts, the descendants of a sister or brother of the intestate to have in equal parts among them their deceased parent's share. If there shall not be a child or children of the intestate, or descendants of such children, or brothers or sisters, or descendants of them, or father or mother, then such estate shall descend, in equal parts, to the grandparents and uncles and aunts, if any there be; otherwise, such estate shall descend in equal parts to the next of kin of the intestate in equal degree, computing by the rules of the civil law. There shall not be any representation among collaterals, except among the descendants of the brothers and sisters of the intestate.

HISTORY:

Codes, Hutchinson's 1848, ch. 44, art. 2 (50); 1857, ch. 60, art. 110; 1871, § 1948; 1880, § 1271; 1892, § 1543; 1906, § 1649; Hemingway's 1917, § 1381; 1930, § 1402; 1942, § 468; Laws, 1952, ch. 252, § 1.

Cross References —

Computation of relationship according to civil law, see §§ 1-3-71, 1-3-73.

Fraudulently producing child with intent to intercept inheritance, see § 97-19-45.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. Construction and application in general.
2. Application in particular circumstances.
3. —Relatives of half blood.
4. —Exempt property.

1. Construction and application in general.

Under Miss. Code Ann. § 91-1-3, since decedent had no spouse or children, his heirs at law were his brother, sisters, mother and the descendants of his deceased brother and sister in equal parts; the decedent's illegitimate children, having failed to file suit to determine legitimacy within the limitation period, had made moot any consideration of whether or not they were legitimate heirs. In re Estate of Thomas, 881 So. 2d 257, 2003 Miss. App. LEXIS 996 (Miss. Ct. App. 2003), rev'd, 883 So. 2d 1173, 2004 Miss. LEXIS 1269 (Miss. 2004).

Collateral heirs, under statute of descent and distribution for real property, may take only if there is no surviving spouse or child. Daniel v. Snowdoun Asso., 513 So. 2d 946, 1987 Miss. LEXIS 2840 (Miss. 1987).

The nephews and nieces of an intestate decedent, who were children of his whole-blood brothers, succeeded to his entire estate to the exclusion of his half-blood sister, under §§ 91-1-5 and 91-1-3, since his whole-blood brothers would have been his sole and only surviving legal heirs to the exclusion of his half-blood sister, and their children occupied the same position as their parents, by right of representation. Jones v. Stubbs, 434 So. 2d 1362, 1983 Miss. LEXIS 2741 (Miss. 1983).

A claim of inheritance based upon an alleged oral contract of adoption made many years prior to the death of the intestate, will not be recognized. Brassiell v. Brassiell, 228 Miss. 243, 87 So. 2d 699, 1956 Miss. LEXIS 509 (Miss. 1956).

Husband is heir of wife, but not of wife's parents, and he inherits no interest in lands of wife's parents where wife predeceased parents, children of wife inheriting share of their mother. Dunaway v. McEachern, 37 So. 2d 767 (Miss. 1948).

The statutes on descent and distribution are not suspended by, and have no application to, the refusal of a court to set aside a divorce decree in an action brought by the surviving party to the divorce action. Stanley v. Stanley, 201 Miss. 545, 29 So. 2d 641, 1947 Miss. LEXIS 418 (Miss. 1947).

The right of an heir to the estate of a deceased person does not originate in the lifetime of the decedent. Covington v. Frank, 77 Miss. 606, 27 So. 1000, 1900 Miss. LEXIS 45 (Miss. 1900).

In a suit by the creditor of a deceased person to foreclose a mortgage, persons whose heirship is denied are competent witnesses to prove relationship. Covington v. Frank, 77 Miss. 606, 27 So. 1000, 1900 Miss. LEXIS 45 (Miss. 1900).

An equitable right to a cause of action on a debt accruing to two or more persons by descent from the creditor is a joint right. Stauffer v. British & American Mortg. Co., 77 Miss. 127, 25 So. 299, 1899 Miss. LEXIS 46 (Miss. 1899).

Preference is not given by the statute to relations of one side over those of the other. Doe ex dem. Hickey v. Gilbert, 2 Miss. 32, 1834 Miss. LEXIS 8 (Miss. 1834).

2. Application in particular circumstances.

Brother clearly had standing to challenge the transfer of the family farm from their mother to a revocable trust on the basis of undue influence because he was one of his mother's heirs at law; if the conveyance of the property from his mother to the trust was set aside, the brother presumptively stood to inherit a child's share of the property. Hodnett v. Hodnett, — So. 3d —, 2018 Miss. App. LEXIS 189 (Miss. Ct. App. Apr. 17, 2018).

Although grandfather of two deceased children qualified as a "statutory heir" under Miss. Code Ann. § 91-1-3, he did not qualify as a listed relative under Miss. Code Ann. § 11-7-13, and would not have standing as such to bring a wrongful-death action. Burley v. Douglas, 26 So. 3d 1013, 2009 Miss. LEXIS 538 (Miss. 2009).

Chancery court did not err in ruling that appellee was entitled to two shares of a decedent's estate; while Miss. Code Ann. § 91-1-3 preserved appellee's right to inherit his mother's portion of the decedent's estate as his mother's sole descendant, Miss. Code Ann. § 93-17-13 provided that appellee would be treated as the decedent's adopted brother for inheritance purposes. Jenkins v. Jenkins, 990

So. 2d 807, 2008 Miss. App. LEXIS 557 (Miss. Ct. App. 2008).

Question of whether party asserting interest in property, which had been inherited through Mississippi laws of descent and distribution, should be prohibited in equity from doing so was not appropriate matter for decision on motion for summary judgment, where heir at law did not intend to relinquish any inherited rights by signing final estate decree and signed for sole purpose of settling will contest between children and widow, where evidence existed that persons taking under estate decree also knew of and recognized interest of heir at law in property, and he took action to assert his interest in that property. Sumrall v. Doggett, 511 So. 2d 908, 1987 Miss. LEXIS 2612 (Miss. 1987).

When a person dies intestate his or her property passes in the manner provided by this section [Code 1942, § 468], unless there has been a statutory adoption of the child claiming the right of inheritance, and in the manner provided by the statute of adoption then in force. Brassiell v. Brassiell, 228 Miss. 243, 87 So. 2d 699, 1956 Miss. LEXIS 509 (Miss. 1956).

Where a testator bequeathed a portion of his estate to his brothers and sisters, with a share of any of brother or sister predeceasing the testator to go to his surviving child living at the time of the testator's death, but provided also that where a brother or sister left no children the share should go to surviving brothers and sisters in equal shares, and where none of his brothers and sisters survived the testator, a bequest to his sister who left no children surviving her, lapsed. Meyers v. Teichman, 219 Miss. 860, 70 So. 2d 17, 1954 Miss. LEXIS 395 (Miss. 1954).

Where the grantor conveyed land to his daughter for and during her natural life and after her death the remainder in fee simple of children of her body, and the daughter had two children who predeceased her, but left children of her own surviving them, and the daughter died intestate, the grandchildren of the daughter took fee simple estate per stirpes and not per capita. Rodgers v. Rodgers, 218 Miss. 655, 67 So. 2d 698, 1953 Miss. LEXIS 584 (Miss. 1953).

A chart sets forth relationships and degrees of kindred according to the civil law. Owen v. State, 255 Ala. 354, 51 So. 2d 541, 1951 Ala. LEXIS 2 (Ala. 1951).

Title remained in grantor after executing deed of trust, and, on his death, property descended to his heirs. Wright v. Wright, 160 Miss. 235, 134 So. 197, 1931 Miss. LEXIS 202 (Miss. 1931).

Where land was devised by will to a husband for life and he died before the testatrix, there being no life estate in the property at the time of her death, it vested at once on her death in her legal heirs. Harvey v. Johnson, 111 Miss. 566, 71 So. 824, 1916 Miss. LEXIS 339 (Miss. 1916).

Where an intestate decedent left surviving uncles and aunts and cousins the descendants of aunts, who had died in his lifetime, the uncles and aunts inherited his property to the exclusion of his cousins, under this section [Code 1942, § 468]. Grantham v. Statham, 83 Miss. 176, 35 So. 423, 1903 Miss. LEXIS 28 (Miss. 1903).

3. —Relatives of half blood.

Second cousins of the whole blood and a first cousin of the half blood were collateral kindred to the intestate, as against the contention that descendants of first cousins of the whole blood should take to the exclusion of a first cousin of the half blood. Toomey v. Turner, 184 Miss. 831, 186 So. 301, 1939 Miss. LEXIS 54 (Miss. 1939).

Surviving parent of an unmarried intestate dying without issue inherited his real estate to the exclusion of his half-blood kindred. Aycock v. Aycock, 119 Miss. 641, 81 So. 482, 1919 Miss. LEXIS 42 (Miss. 1919).

Illegitimate son of sister of whole blood took intestate's personalty to exclusion of children of sister of half blood. Davidson v. Brownlee, 114 Miss. 398, 75 So. 140, 1917 Miss. LEXIS 45 (Miss. 1917).

4. —Exempt property.

Bill attempting partition of exempt lands without widow's consent, not demurrable where it also asks accounting for timber cut by widow. Gavin v. Gavin, 116 Miss. 197, 76 So. 879, 1917 Miss. LEXIS 307 (Miss. 1917).

Homestead not subject to an execution for alimony. Jackson v. Coleman, 115 Miss. 535, 76 So. 545, 1917 Miss. LEXIS 230 (Miss. 1917).

Consent of widow without which exempt property cannot be partitioned, being without consideration, may be withdrawn in the absence of intervening estoppel, any time before the property has been divided. Tiser v. McCain, 113 Miss. 776, 74 So. 660, 1917 Miss. LEXIS 152 (Miss. 1917).

Exempt property of decedent descending to the widow with others is used by her so long as its income is used for her support, whether or not she resides on it. Tiser v. McCain, 113 Miss. 776, 74 So. 660, 1917 Miss. LEXIS 152 (Miss. 1917).

Bill for partition, alleging land not homestead nor exempt, held good against demurrer. Tiser v. McCain, 113 Miss. 776, 74 So. 660, 1917 Miss. LEXIS 152 (Miss. 1917).

RESEARCH REFERENCES

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Descent and distribution to and among cousins. 54 A.L.R.2d 1009.

Descent and distribution to and among uncles and aunts. 55 A.L.R.2d 643.

Descent and distribution from stepparents to stepchildren or vice versa. 63 A.L.R.2d 303.

Right of heir or devisee to have realty exonerated from lien thereon at expense of personal estate. 4 A.L.R.3d 1023.

Am. Jur.

23 Am. Jur. 2d, Descent and Distribution § 18.

Am. Jur. 2d, Desk Book, Document No. 184, Tables of descent and distribution – computation of degrees of kindred.

8A Am. Jur. Pl & Pr Forms (Rev), Descent and Distribution, Forms 1 et seq. (petition or application – determination of heirship).

CJS.

26B C.J.S., Descent and Distribution §§ 7, 8.

§ 91-1-5. Half-bloods.

There shall not be, in any case, a distinction between the kindred of the whole and half-blood, except that the kindred of the whole-blood, in equal degree, shall be preferred to the kindred of the half-blood in the same degree.

HISTORY:

Codes, Hutchinson's 1848, ch. 44, art. 2 (50); 1857, ch. 60, art. 110; 1871, § 1949; 1880, § 1271; 1892, § 1544; 1906, § 1650; Hemingway's 1917, § 1382; 1930, § 1403; 1942, § 469.

Cross References —

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability to illegitimates.

1. In general.

The nephews and nieces of an intestate decedent, who were children of his whole-blood brothers, succeeded to his entire estate to the exclusion of his half-blood sister, under §§ 91-1-5 and 91-1-3, since his whole-blood brothers would have been his sole and only surviving legal heirs to the exclusion of his half-blood sister, and their children occupied the same position as their parents, by right of representation. Jones v. Stubbs, 434 So. 2d 1362, 1983 Miss. LEXIS 2741 (Miss. 1983).

Under the rule of the civil law, a first cousin, although of the half-blood, is nearer in degree of kindred to an intestate than a second cousin of the whole-blood. Mississippi State Highway Dep't v. Meador, 184 Miss. 381, 185 So. 816, 186 So. 642, 1939 Miss. LEXIS 47 (Miss. 1939).

Term "brothers and sisters" embraces brothers and sisters of whole and half-blood. Darrow v. Moore, 163 Miss. 705, 142 So. 447, 1932 Miss. LEXIS 85 (Miss. 1932).

Surviving parent of unmarried intestate took his real estate to the exclusion of half-blood kindred. Aycock v. Aycock, 119 Miss. 641, 81 So. 482, 1919 Miss. LEXIS 42 (Miss. 1919).

The descendants of the brothers and sisters of the whole-blood take in exclusion of the brothers and sisters of the half-blood. Scott v. Terry, 37 Miss. 65, 1859 Miss. LEXIS 4 (Miss. 1859).

By the common law, the kindred of the half-blood could not inherit real property. The object of the statute was to change that rule. Those of the whole-blood are preferred to those of the half-blood; but if there be none of the whole-blood, then those of the half-blood inherit. Fatheree v. Fatheree, 1 Miss. 311, 1828 Miss. LEXIS 4 (Miss. 1828); Hulme v. Montgomery, 31 Miss. 105, 1856 Miss. LEXIS 41 (Miss. 1856).

2. Applicability to illegitimates.

Where proponents of a will never denied that contestants were the natural grandchildren of the testator, and where, although there was no record of a divorce between the testator's son, through whom the grandchildren sought to inherit, and his first wife, there was a ceremonial marriage between the son and his second wife, from which union the grandchildren were born, there was no impediment to their inheriting as lawful heirs-at-law of the testator's son. Webster v. Kennebrew, 443 So. 2d 850, 1983 Miss. LEXIS 3056 (Miss. 1983).

This section [Code 1942, § 469] and Code 1942, § 474, are in pari materia and should be construed together. Taylor v. Jackson, 194 Miss. 441, 12 So. 2d 144, 1943 Miss. LEXIS 62 (Miss. 1943).

This statute is applicable to illegitimates as well as to legitimates when determining blood relationship for the purpose of inheritance, and permits the rights of illegitimates inter sese to be determined on the same basis as if they were legitimate and some of them were related to the intestate as of the whole-blood and some of the half-blood. Taylor v. Jackson, 194 Miss. 441, 12 So. 2d 144, 1943 Miss. LEXIS 62 (Miss. 1943).

Where it appeared that the father of an intestate and the mothers of several groups of claimants to intestate's property were all illegitimate children of the same mother, but that the mother of one group had the same father as the intestate's father, the latter group was entitled to take the property to exclusion of the other groups of claimants, since, although children of an illegitimate, they were kindred of the whole-blood to the intestate, while the other groups, also being children of illegitimates, were kindred of the half-blood by reason of their mothers having a different father. Taylor v. Jackson, 194 Miss. 441, 12 So. 2d 144, 1943 Miss. LEXIS 62 (Miss. 1943).

The legitimate children of an illegitimate father were entitled to inherit from the half-sister of their father, who died intestate, regardless of whether such half-sister was legitimate or illegitimate, where the intestate had no kindred of the whole-blood. Malone v. Pope, 189 Miss. 46, 196 So. 319, 1940 Miss. LEXIS 109 (Miss. 1940).

Illegitimate son of sister of whole-blood took intestate's personalty to exclusion of children of sister of half-blood. Davidson v. Brownlee, 114 Miss. 398, 75 So. 140, 1917 Miss. LEXIS 45 (Miss. 1917).

RESEARCH REFERENCES

ALR.

Descent and distribution: rights of inheritance as between kindred of whole and half blood. 47 A.L.R.4th 561.

Am. Jur.

23 Am. Jur. 2d, Descent and Distribution §§ 71, 104-106.

9 Am. Jur. Proof of Facts, Pedigree, Proof No. 1 (establishing family relationship – testimony of party whose pedigree is in issue).

9 Am. Jur. Proof of Facts, Pedigree, Proof No. 2 (establishing family relationship – testimony of third person).

§ 91-1-7. Descent of property as between husband and wife.

If a husband die intestate and do not leave children or descendants of children, his widow shall be entitled to his entire estate, real and personal, in fee simple, after payment of his debts; but where the deceased husband shall leave a child or children by that or a former marriage, or descendants of such child or children, his widow shall have a child's part of his estate, in either case in fee simple. If a married woman die owning any real or personal estate not disposed of, it shall descend to her husband and her children or their descendants if she have any surviving her, either by a former husband or by the surviving husband, in equal parts, according to the rules of descent. If she have children and there also be descendants of other children who have died before the mother, the descendants shall inherit the share to which the parent would have been entitled if living, as coheirs with the surviving children. If she have no children or descendants of them, then the husband shall inherit all of her property.

HISTORY:

Codes, Hutchinson's 1848, ch. 44, art. 3, 4; 1857, ch. 17, art. 1; 1871, § 1788; 1880, § 1771; 1892, § 1545; 1906, § 1651; Hemingway's 1917, § 1383; 1930, § 1404; 1942, § 470.

Cross References —

Provision in will for husband or wife, see § 91-5-23 et seq.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general; legality of marriage.
2. Rights of widow.
3. Rights of widower.
4. Rights of children.
5. Divorce or separation as affecting rights of surviving spouse.

1. In general; legality of marriage.

No right to property vests by virtue of the marriage relationship alone prior to entry of a judgment or decree granting equitable or other distribution pursuant to dissolution of the marriage; thus, the rights of alienation and the laws of descent and distribution are not affected by the recognition of marital assets. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

While this statute [Code 1972, § 91-1-7] controls the general descent of property as between husband and wife, the statute is not applicable to the descent of exempt property; Code 1972, § 91-1-19 specifically controls the descent of exempt property. Weaver v. Blackburn, 294 So. 2d 786, 1974 Miss. LEXIS 1828 (Miss. 1974).

In the absence of proof of a subsequent bigamous marriage which could work an estoppel, one spouse is not barred from inheriting from the other on account of his or her abandonment, desertion, nonsupport, or adultery, and evidence of a wife's adulterous conduct did not preclude her from taking her deceased husband's estate as his sole heir at law. Rowell v. Rowell, 251 Miss. 472, 170 So. 2d 267, 1964 Miss. LEXIS 365 (Miss. 1964).

Where testator's intention was that a class described as his heirs should be ascertained at the termination of a life estate given his widow, she does not take in virtue of this section [Code 1942, § 470]. Dailey v. Houston, 246 Miss. 667, 151 So. 2d 919, 1963 Miss. LEXIS 492 (Miss. 1963).

One who enters into a ceremonial marriage with another without obtaining a divorce from a former spouse is estopped from asserting a right to inherit from such former spouse. Harrison v. G. & K. Inv. Co., 238 Miss. 760, 115 So. 2d 918, 1959 Miss. LEXIS 546 (Miss. 1959), cert. denied, 363 U.S. 844, 80 S. Ct. 1614, 4 L. Ed. 2d 1728, 1960 U.S. LEXIS 822 (U.S. 1960).

Third ceremonial wife of deceased and his only child, the child of first ceremonial wife, are entitled to share deceased's estate equally under laws of descent and distribution in this state, when presumption that all prior marriages of deceased had been dissolved prior to third ceremonial marriage is not overcome by competent evidence to contrary. Wallace v. Herring, 207 Miss. 658, 43 So. 2d 100, 1949 Miss. LEXIS 377 (Miss. 1949).

Marriage between white person and Negro valid in the State of Illinois where it was contracted and the parties continued to live, will be recognized in this state to the extent of permitting one spouse to inherit property from the other in this state. Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140, 1948 Miss. LEXIS 325 (Miss. 1948).

Code of 1892, §§ 4496, 1545 (Code 1942, §§ 668, 470), must be construed together in determining rights of widow renouncing will. Callicott & Norfleet v. Callicott, 90 Miss. 221, 43 So. 616, 1907 Miss. LEXIS 83 (Miss. 1907).

Where testator had portioned off to and accepted releases from 3 of his 6 children, widow upon renouncing will was entitled to a one-fourth part of the estate. Callicott & Norfleet v. Callicott, 90 Miss. 221, 43 So. 616, 1907 Miss. LEXIS 83 (Miss. 1907).

2. Rights of widow.

The recording of a deed from the defendants' predecessor's widow to the complainants' predecessor was the equivalent of actual knowledge by the defendant heirs that the complainants' predecessor claimed adversely to them, where by its terms the deed purported to convey the entire interest, and the legal presumption that one cotenant holds property for the benefit of his cotenants as well as for himself was refuted and an ouster was affected. Hardy v. Lynch, 258 So. 2d 414, 1972 Miss. LEXIS 1495 (Miss. 1972).

Where a cotenant's widow in possession claimed the property to the exclusion of the other cotenants for more than 10 years after the death of her husband, who had claimed the entirety of the property, and during such period the widow had received all benefits flowing from the land and had made all expenditures without accounting to anyone, there was the equivalent of an ouster of the other cotenants and she had clear full title by adverse possession, the fiduciary relationship usually presumed to exist between cotenants having no application here; since the circumstances surrounding the widow's acquisition of title completely negated any such relation to the extent that it was the equivalent of an ouster of the other cotenants. Bayless v. Alexander, 245 So. 2d 17, 1971 Miss. LEXIS 1349 (Miss. 1971).

Where a husband and wife lived together for approximately 40 years, had no children, and where the husband predeceased the wife by approximately eight years, the wife became the owner of the property of her husband and had every right to devise it in any manner that she desired so long as the devise was not contrary to public policy, and the fact that her holographic will referred to a request of her husband, was no more than an explanation as to her reason for devising the property as she did, and was not an expression of the testamentary intent of the husband. Carlisle v. Carlisle, 233 So. 2d 803, 1970 Miss. LEXIS 1680 (Miss. 1970).

Evidence of a wife's adulterous conduct did not preclude her from taking her deceased husband's estate as his sole heir at law. Rowell v. Rowell, 251 Miss. 472, 170 So. 2d 267, 1964 Miss. LEXIS 365 (Miss. 1964).

A Tennessee court decree adjudging complainant to be the widow of the deceased and awarding her $6,000 in full settlement of any and all rights in the decedent's estate and all rights to dower and homestead in the decedent's real property, and which vested out of complainant all interest in the described Tennessee real property, but made no mention of decedent's real property located in Mississippi, did not deprive complainant of her fee simple title to the Mississippi property, which she had acquired upon the death of a life tenant since the decedent left no children. Gillum v. Gillum, 230 Miss. 246, 92 So. 2d 665, 1957 Miss. LEXIS 364 (Miss. 1957).

Where the husband, as devisee under his mother's will, had been vested at the time of his death with a fee simple title to a one-fourth interest in a plantation, his wife succeeded to that interest. Martin v. Eslick, 229 Miss. 234, 90 So. 2d 635, 1956 Miss. LEXIS 604 (Miss. 1956).

Wife as devisee of the usufruct of land under husband's will, which made no further disposition, held entitled to absolute estate as heir upon death of husband without children or descendants. Lemon v. Rogge, 11 So. 470 (Miss. 1892).

3. Rights of widower.

Decedent's husband was entitled to inherit an interest in land owned by his wife, even though he had entered into a consent decree in Michigan in which he relinquished his rights as heir of his wife, where the parties did not intend the Michigan decree to cover Mississippi lands; the testimony of husband that he shot his wife accidentally was properly admitted in evidence as an exception to the dead man's statute; insofar as the shooting was not wilful, the husband was not barred from inheriting by statute. Bianchi v. Scott, 363 So. 2d 289, 1978 Miss. LEXIS 2191 (Miss. 1978).

Devise of a life estate in the whole of the property to husband does not militate against his inheriting a fraction of the remaining fee simple title which was not disposed of by the will. Williams v. Gooch, 208 Miss. 223, 44 So. 2d 57, 1950 Miss. LEXIS 241 (Miss. 1950).

Where testatrix devised a life estate in land to her husband then gave 50 per cent of the remainder in fee to two others leaving 50 per cent undisposed of, the undevised 50 per cent in fee descended to husband as sole heir at law of testatrix. Williams v. Gooch, 208 Miss. 223, 44 So. 2d 57, 1950 Miss. LEXIS 241 (Miss. 1950).

Husband is heir of wife, but not of wife's parents, and he inherits no interest in lands of wife's parents where wife predeceased parents, children of wife inheriting share of their mother. Dunaway v. McEachern, 37 So. 2d 767 (Miss. 1948).

Estate by curtesy abolished in 1880, and subsequent to that date land of wife passed to husband and children as tenants in common, and conveyance by husband vested grantee with an undivided interest. Hauer v. Davidson, 113 Miss. 696, 74 So. 621, 1917 Miss. LEXIS 147 (Miss. 1917).

4. Rights of children.

Son, one of ten adult heirs of deceased father, who paid to his mother $400 which was owing to father on purchase of homestead, there being no administrator and no agent appointed by heirs authorized to receive payment, is not entitled to be credited with $250 paid to mother as allowance to widow, as widow had only a one-tenth interest in this $400, in suit in which heirs claim balance due them on purchase price of land. Davis v. Davis, 205 Miss. 794, 39 So. 2d 486, 1949 Miss. LEXIS 465 (Miss. 1949).

Unadopted illegitimate child of deceased veteran who, while in army, declared in writing that child was his in order to obtain allotment for her, held not entitled to inherit share payable under veteran's war risk policy as "heir" within World War Veterans' Act construed in connection with Mississippi laws of descent and distribution, there being no conflict between federal and state laws. Moyse v. Laughlin, 177 Miss. 751, 171 So. 784, 1937 Miss. LEXIS 153 (Miss. 1937).

Word "child" means child with right to share in estate of intestate father; it does not include children portioned off or who have released their interest in the estate. Callicott & Norfleet v. Callicott, 90 Miss. 221, 43 So. 616, 1907 Miss. LEXIS 83 (Miss. 1907).

Children cannot have partition of exempt property while occupied or used by widow, nor an accounting by her for its use. Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66, 1906 Miss. LEXIS 167 (Miss. 1906).

5. Divorce or separation as affecting rights of surviving spouse.

A decree of divorce from an insane wife, obtained by a husband who had previously entered into a ceremonial marriage with another, will not be disregarded in determining whether the husband may inherit because obtained to avoid a prosecution for bigamy. Harrison v. G. & K. Inv. Co., 238 Miss. 760, 115 So. 2d 918, 1959 Miss. LEXIS 546 (Miss. 1959), cert. denied, 363 U.S. 844, 80 S. Ct. 1614, 4 L. Ed. 2d 1728, 1960 U.S. LEXIS 822 (U.S. 1960).

Where the husband had legally married the intestate and they had lived together as man and wife in a home owned by the wife from the time of the marriage until two months prior to the wife's death when the husband left the home because of fear of the wife's brother, who had shot and driven the husband from the home, the husband was not estopped from asserting title to the home. Parsons v. Butler, 230 Miss. 830, 94 So. 2d 320, 1957 Miss. LEXIS 428 (Miss. 1957).

Contract between husband and wife in contemplation of divorce, whereby wife released all claims for alimony or property adjustment, held not to have affected rights of wife as widow where divorce was not granted before husband's death. Kirby v. Kent, 172 Miss. 457, 160 So. 569, 1935 Miss. LEXIS 151 (Miss. 1935).

RESEARCH REFERENCES

ALR.

Validity and effect of will clause disinheriting children if surviving spouse elects to take against will. 32 A.L.R.2d 895.

Right of illegitimate child to take under testamentary gift to "children". 34 A.L.R.2d 4.

Effect of divorce, separation, desertion, unfaithfulness, and the like, upon right to administer upon estate of spouse. 34 A.L.R.2d 876.

Separation agreement as barring rights of surviving spouse in other's estate. 34 A.L.R.2d 1020.

Abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 446.

Adultery on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 A.L.R.3d 486.

Validity of inter vivos trust established by one spouse which impairs the other spouse's distributive share or other statutory rights in property. 39 A.L.R.3d 14.

Conflict of laws regarding election for or against will, and effect in one jurisdiction of election in another. 69 A.L.R.3d 1081.

Effect of invalidity of provision conditioning testamentary gift upon divorce of beneficiary, on alternative provision conditioning gift upon spouse's death. 74 A.L.R.3d 1095.

Devolution of gift over upon spouse predeceasing testator where gift to spouse fails because of divorce. 74 A.L.R.3d 1108.

Rights in decedent's estate as between lawful and putative spouses. 81 A.L.R.3d 6.

Estoppel or laches precluding lawful spouse from asserting rights in decedent's estate as against putative spouse. 81 A.L.R.3d 110.

Am. Jur.

23 Am. Jur. 2d, Descent and Distribution § 109 et seq.

CJS.

26B C.J.S., Descent and Distribution §§ 67, 68 et seq.

Law Reviews.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March 1979.

§ 91-1-9. Descent of trust estates.

If any cestui que trust shall die leaving a trust in lands, tenements, or hereditaments in fee simple or in freehold, the trust shall descend as real estate if not disposed of by will, or if not inconsistent with the declaration of the trust.

HISTORY:

Codes, 1880, § 1272; 1892, § 1546; 1906, § 1652; Hemingway's 1917, § 1384; 1930, § 1405; 1942, § 471.

Cross References —
Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

§ 91-1-11. Personal estate to descend as real estate.

When any person shall die possessed of goods and chattels or personal estate not bequeathed, the same shall descend to and be distributed among his or her heirs in the same manner that real estate not devised descends.

HISTORY:
Codes, Hutchinson's 1848, ch. 44, art. 2 (52); 1857, ch. 60, art. 111; 1871, § 1951; 1880, § 1273; 1892, § 1547; 1906, § 1653; Hemingway's 1917, § 1385; 1930, § 1406; 1942, § 472.

Cross References —
Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

The assignment to an insurance company by the widow of a claim for the destruction of an automobile owned by her deceased husband does not give the assignee any claim in preference to the creditors of the estate of the decedent. Potts v. Montgomery, 237 So. 2d 124, 1970 Miss. LEXIS 1505 (Miss. 1970).

Where no administrator is appointed, personalty descends to heir as if realty. Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 1920 Miss. LEXIS 472 (Miss. 1920).

Illegitimate son of sister of whole-blood took intestate's personalty to exclusion of children of sister of half-blood. Davidson v. Brownlee, 114 Miss. 398, 75 So. 140, 1917 Miss. LEXIS 45 (Miss. 1917).

The representatives of deceased heirs are entitled to share with the living heirs a sum of money appropriated by Congress to the administrator of their common ancestor in payment of a claim against the government. Nutt v. Forsythe, 84 Miss. 211, 36 So. 247, 1904 Miss. LEXIS 28 (Miss. 1904).

An equitable right to a cause of action on a debt accruing to two or more persons by descent from the creditor is a joint right. Stauffer v. British & American Mortg. Co., 77 Miss. 127, 25 So. 299, 1899 Miss. LEXIS 46 (Miss. 1899).

RESEARCH REFERENCES

Am. Jur.
23 Am. Jur. 2d, Descent and Distribution §§ 20, 22.

CJS.
26B C.J.S., Descent and Distribution §§ 7, 8, 16.

§ 91-1-13. Estate of testator not disposed of by will to descend.

All estate, real and personal, not devised or bequeathed in the last will and testament of any person shall descend and be distributed in the same manner as the estate of an intestate; and the executor or administrator shall administer the same accordingly.

HISTORY:
Codes, 1857, ch. 60, art. 112; 1871, § 1952; 1880, § 1274; 1892, § 1548; 1906, § 1654; Hemingway's 1917, § 1386; 1930, § 1407; 1942, § 473.

Cross References —
Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Application in particular circumstances.

1. In general.

Devise of a life estate in the whole of the property to husband does not militate against his inheriting a fraction of the remaining fee simple title which was not disposed of by the will. Williams v. Gooch, 208 Miss. 223, 44 So. 2d 57, 1950 Miss. LEXIS 241 (Miss. 1950).

Where testatrix devised a life estate in land to her husband then gave 50 per cent of the remainder in fee to two others leaving 50 per cent undisposed of, the undevised 50 per cent in fee descended to husband as sole heir at law of testatrix. Williams v. Gooch, 208 Miss. 223, 44 So. 2d 57, 1950 Miss. LEXIS 241 (Miss. 1950).

In suit to confirm title to land, seeking construction of will to effect that it did not convey title to the land because it was devised to no named legatees, all the beneficiaries should have been under valid process. Dorsey v. Sullivan, 199 Miss. 602, 24 So. 2d 852, 1946 Miss. LEXIS 231 (Miss. 1946).

When no administrator is appointed, or necessary, personal property descends directly to heir the same as real property. Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 1920 Miss. LEXIS 472 (Miss. 1920).

2. Application in particular circumstances.

Property that a Chapter 13 debtor inherited from her mother, pursuant to Miss. Code Ann. § 91-1-3, before the debtor declared bankruptcy was part of the debtor's bankruptcy estate. The property passed to the debtor and her siblings when their mother died, the debtor lived on the property, and she had a possessory interest in the property that was sufficient to satisfy the requirements of 11 U.S.C.S. § 541. Jackson v. Priority Trs. Servs. of Miss. L.L.C. (In re Jackson), 392 B.R. 666, 2008 Bankr. LEXIS 2239 (Bankr. S.D. Miss. 2008).

§ 91-1-15. Descent among illegitimates; definitions.

(1) The following terms shall have the meaning s ascribed to them herein:

(a) "Remedy" means the right of an illegitimate to commence and maintain a judicial proceeding to enforce a claim to inherit property from the estate of the natural mother or father of such illegitimate, said claim having been heretofore prohibited by law, or prohibited by statutes requiring marriage between the natural parents, or restrained, or enjoined by the order or process of any court in this state.

(b) "Claim" means the right to assert a demand on behalf of an illegitimate to inherit property, either personal or real, from the estate of the natural mother or father of such illegitimate.

(c) "Illegitimate" means a person who at the time of his birth was born to natural parents not married to each other and said person was not legitimized by subsequent marriage of said parents or legitimized through a proper judicial proceeding.

(d) "Natural parents" means the biological mother or father of the illegitimate.

(2) An illegitimate shall inherit from and through the illegitimate's mother and her kindred, and the mother of an illegitimate and her kindred shall inherit from and through the illegitimate according to the statutes of descent and distribution. However, if an illegitimate shall die unmarried and without issue, and shall also predecease the natural father, the natural mother or her kindred shall not inherit any part of the natural father's estate from or through the illegitimate. In the event of the death of an illegitimate, unmarried and without issue, any part of the illegitimate's estate inherited from the

natural father shall be inherited according to the statutes of descent and distribution.

(3) An illegitimate shall inherit from and through the illegitimate's natural father and his kindred, and the natural father of an illegitimate and his kindred shall inherit from and through the illegitimate according to the statutes of descent and distribution if:

(a) The natural parents participated in a marriage ceremony before the birth of the child, even though the marriage was subsequently declared null and void or dissolved by a court; or

(b) There has been an adjudication of paternity or legitimacy before the death of the intestate; or

(c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under Sections 91-1-27 and 91-1-29. However, no such claim of inheritance shall be recognized unless the action seeking an adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less; and such time period shall run notwithstanding the minority of a child. This one-year limitation shall be self-executing and may not be tolled for any reason, including lack of notice. If an administrator is appointed for the estate of the intestate and notice to creditors is given, then the limitation period shall be reduced to ninety (90) days after the first publication of notice, if less than one (1) year from the date of the intestate's death; provided actual, written notice is given to all potential illegitimate heirs who could be located with reasonable diligence. No claim of inheritance based on an adjudication of paternity, after death of the intestate, by a court outside the State of Mississippi shall be recognized unless:

(i) Such court was in the state of residence of the intestate at the time of the intestate's death;

(ii) The action adjudicating paternity was filed within ninety (90) days after the death of the intestate;

(iii) All known heirs were made parties to the action; and

(iv) Paternity or legitimacy was established by clear and convincing evidence.

(d) The natural father of an illegitimate and his kindred shall not inherit:

(i) From or through the child unless the father has openly treated the child as his, and has not refused or neglected to support the child.

(ii) Any part of the natural mother's estate from or through the illegitimate if the illegitimate dies unmarried and without issue, and also predeceases the natural mother. In the event of the death of an illegitimate, unmarried and without issue, any part of the illegitimate's estate inherited from the mother shall be inherited according to the statutes of descent and distribution.

A remedy is hereby created in favor of all illegitimates having any claim existing prior to July 1, 1981, concerning the estate of an intestate whose death occurred prior to such date by or on behalf of an illegitimate or an alleged illegitimate child to inherit from or through its natural father and any claim by a natural father to inherit from or through an illegitimate child shall be brought within three (3) years from and after July 1, 1981, and such time period shall run notwithstanding the minority of a child.

The remedy created herein is separate, complete and distinct, but cumulative with the remedies afforded illegitimates as provided by the Mississippi Uniform Law on Paternity; provided, however, the failure of an illegitimate to seek or obtain relief under the Mississippi Uniform Law on Paternity shall not diminish or abate the remedy created herein.

(4) The children of illegitimates and their descendants shall inherit from and through their mother and father according to the statutes of descent and distribution.

(5) Nothing in this section shall preclude the establishment of paternity solely for the purpose of the illegitimate receiving social security benefits on behalf of the illegitimate's natural father after one (1) year following the natural father's death.

HISTORY:

Codes, Hutchinson's 1848, ch. 35, art. 2 (4); 1857, ch. 60, art. 115; 1871, § 1955; 1880, § 1275; 1892, § 1549; 1906, § 1655; Hemingway's 1917, § 1387; 1930, § 1408; 1942, § 474; Laws, 1924, ch. 162; Laws, 1981, ch. 529, § 1; Laws, 1983, ch. 339; Laws, 2005, ch. 543, § 1; Laws, 2008, ch. 388, § 1, eff from and after July 1, 2008.

Editor's Notes —

The Preamble to Chapter 339, Laws, 1983, provides as follows:

"WHEREAS, The Mississippi Legislature passed an act amending Section 91-1-15, Mississippi Code of 1972, and other sections of said code pertaining to the rights and claims of illegitimates, during the 1981 Regular Session, said amendment being effective from and after July 1, 1981; and

"WHEREAS, Section 91-1-15 was so amended to provide for intestate succession among an illegitimate and the natural father and his kindred with certain limitations, and to afford unto all illegitimates without classification a remedy whereby they could enforce their substantive rights and claims of intestate succession as provided for in said amendment; and

"WHEREAS, the Legislature recognized that the decisions and statutes of this state existing prior to said amendment placed an insurmountable barrier to inheritance by illegitimates when compared to the rights of a legitimate person, and that said decisions and statutes effectively barred an unnecessarily large number of illegitimates from inheritance through their natural father as a result of certain classifications into which the illegitimate may be categorized in violation of equal protection under the law; and

"WHEREAS, it now appears that there is confusion as to the legislative intent in amending Section 91-1-15, Mississippi Code of 1972, and said section is now interpreted by some segments of the judiciary to mean that the Legislature did not intend to create a new, separate and distinct remedy for the benefit of all illegitimates without any classification and said amendment as now codified in Section 91-1-15, Mississippi Code of 1972, is interpreted by some segments of the judiciary to be prospective only rather than retrospective and prospective in effect and is interpreted not to have created a new, separate and distinct remedy for the claims of all illegitimates without classification; and

"WHEREAS, the Legislature recognized at the time it was considering said amendment, that by creating said remedy the Legislature was opening the door to the possible litigation of stale or fraudulent claims and that a further effect of bestowing said remedy upon all illegitimates would possibly be to create a certain amount of confusion and uncertainty as to the status of titles to real property; however, the Legislature intended to bestow upon illegitimates a new and additional remedy whereby such illegitimates could maintain their rights of inheritance notwithstanding such interests of the state in preventing stale and fraudulent claims and avoiding uncertainty as to the titles of real property and, accordingly, the Legislature enacted appropriate periods of limitations within which illegitimates could bring their claims;.

"NOW, THEREFORE, in order to eliminate any ambiguity in Section 91-1-15, Mississippi Code of 1972, and to conform said section to express the true legislative intent,

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:"

Cross References —

Computation of relationship according to civil law, see §§ 1-3-71, 1-3-73.

Effect of establishment of right to inherit from deceased under this section on right to maintain action for injuries producing death, see § 11-7-13.

Mississippi Uniform Law on Paternity generally, see §§ 93-9-1 through 93-9-49.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Legitimation of children born out of wedlock.
3. Inheritance by illegitimates.
4. Inheritance through illegitimates.

1. In general.

Individual overcame a presumption that a man married to his mother when he was born was his biological father as his mother testified the decedent was his father, and his aunts and other documentary evidence supported that conclusion. Smith v. Bell, 876 So. 2d 1087, 2004 Miss. App. LEXIS 611 (Miss. Ct. App. 2004).

Father's claim against his unborn child's estate was barred by his failure to comply with Miss. Code Ann. § 91-1-15(3)(c); the father had taken no action to be declared the father of the child within one year of her death and there was no evidence that the administratrix took any action as an administratrix de son tort prior to May 31, 2000. Tew v. Estate of Doe, 859 So. 2d 347, 2003 Miss. LEXIS 599 (Miss. 2003).

Deceased musician's half-sister became executrix de son tort of decedent's unprobated estate by entering agreement, in which she purported to be sister and only surviving heir of decedent, for assignment of decedent's works, photographs, and materials in exchange for share of royalties. Johnson v. Harris (In re Estate of Johnson), 705 So. 2d 819, 1997 Miss. LEXIS 381 (Miss. 1997), cert. denied, Harris v. Johnson, 522 U.S. 1109, 118 S. Ct. 1037, 140 L. Ed. 2d 104, 1998 U.S. LEXIS 888 (U.S. 1998).

Status as executrix de son tort, in favor of alleged illegitimate child of deceased musician, was assumed when irrevocable power of attorney was accepted from decedent's half-sister after half-sister had assigned all rights to musician's copyrights, as well as by later accepting appointment as personal representative of half-sister's estate. Johnson v. Harris (In re Estate of Johnson), 705 So. 2d 819, 1997 Miss. LEXIS 381 (Miss. 1997), cert. denied, Harris v. Johnson, 522 U.S. 1109, 118 S. Ct. 1037, 140 L. Ed. 2d 104, 1998 U.S. LEXIS 888 (U.S. 1998).

Since personal representative of decedent was expressly authorized by statute to commence wrongful death action for benefit of all heirs entitled to recover, personal representative had sufficient standing to determine heirship of testator's reputed illegitimate children for purposes of wrongful death statute. Jones v. Estate of Richardson (In re Estate of Richardson), 695 So. 2d 587, 1997 Miss. LEXIS 240 (Miss. 1997).

The administrator of an estate is required to provide actual notice to known or reasonably ascertainable legitimate children who are potential heirs and whose claims would be barred by the running of the 90-day period from the notice of publication to creditors under the nonclaim statute, § 91-1-15(3)(c). To hold otherwise would encourage administrators and executors to benefit as heirs at law by setting in motion the shortest filing period which, unbeknownst to the potential heir, has significantly shortened the time for the potential heir to meet with the statutory requirements to inherit as an heir. Smith v. Estate of King, 579 So. 2d 1250, 1991 Miss. LEXIS 250 (Miss. 1991).

A claimant's timely filing, 3 days after the decedent's death, of a sworn Petition for Letters of Administration in which he alleged that he was the son and sole surviving heir of the deceased, sufficiently complied with the provisions of §§ 91-1-15, 91-1-27 and 91-1-29 and therefore his claim of heirship was not barred by the statute of limitations of § 91-1-15(3)(c). The fact that the claimant did not precisely state that he was the "illegitimate" or "born-out-of-wedlock" son, as opposed to simply declaring himself to be "the son," was a matter of semantics which made no difference; the indication that he was the sole surviving heir was sufficiently clear. Wash v. McIntosh, 566 So. 2d 1208 (Miss. 1990).

A party may combine a suit to determine heirship with a suit to contest a will. Dees v. Estate of Moore, 562 So. 2d 109, 1990 Miss. LEXIS 257 (Miss. 1990).

Section 91-1-15(3)(c), which requires that an action seeking adjudication of paternity be filed within 90 days after the first publication of notice to creditors, does not require that notice be given within the 90-day period. An out-of-wedlock child who brought a claim for heirship after her father's death complied with the filing requirement by petitioning to be appointed administratrix and seeking to be declared the sole and only heir-at-law, where other persons, who would inherit from the decedent, had actual knowledge of the claim of heirship as evidenced by their hiring of an attorney, and, before the estate was closed, were properly allowed by the court to file their claim. The summons by publication requirement of § 91-1-29 was met, and all parties were given their day in court. This procedure sufficiently complied with the notice requirements of § 91-1-27 and § 91-1-29, and the filing requirements of § 91-1-15(3)(c). Perkins v. Thompson, 551 So. 2d 204, 1989 Miss. LEXIS 360 (Miss. 1989).

The six-year statute of limitations is inapplicable to suits brought by illegitimates under § 91-1-15 whose cause of action accrued prior to July 1, 1981. Re In re Estate of Smiley, 530 So. 2d 18, 1988 Miss. LEXIS 333 (Miss. 1988).

A prior action on a petition to determine heirship, in which the petitioners sought to establish that they were the children of the deceased from a common law marriage, did not bar, under the doctrine of res judicata, the children's action to share in the decedent's estate pursuant to § 91-1-15 since that statute as amended in 1981 created a totally new cause of action in favor of illegitimate children. In re Estate of Stutts, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

When mother of decedent's alleged illegitimate child moved to intervene in case brought under Federal Employers Liability Act, it was incumbent on her to file petition in chancery court under § 91-1-27 and proceed under § 91-1-29, and intervention should have been denied because these statutes had not been followed; where parties agreed for circuit judge to hear issue of paternity on merits, case would not be reversed because wrong court decided issue; on merits, circuit judge was correct in dismissing proposed intervention because there was no clear and convincing evidence that decedent was child's natural father. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

Mississippi law compels equal treatment of legitimates and illegitimates, and illegitimate child is therefore entitled to social security benefits. Jones v. Heckler, 754 F.2d 519, 1985 U.S. App. LEXIS 13727 (4th Cir. Md. 1985).

Under the terms of § 91-1-15, the Department of Welfare, which had the authority under §§ 43-19-31 and 43-19-35 to institute paternity proceedings to obtain repayment for support of a dependant child under the Aid to Dependent Children program (ADC) from the person legally obligated to pay that support, would be held to a standard of proof by preponderance of the evidence where the proceeding was brought prior to the death of the putative father, rather than the standard of clear and convincing evidence that applies to an adjudication after the death of the father to establish heirship. Ivy v. State Dep't of Public Welfare, 449 So. 2d 779, 1984 Miss. LEXIS 1694 (Miss. 1984).

In a proceeding to determine heirship, the trial court erred in declaring § 91-1-15 unconstitutional of its own volition, where appellee, in his pleadings, did not claim that he was entitled to inherit from the decedent as his illegitimate son, and did not attack the constitutionality of the statute. Witt v. Mitchell, 437 So. 2d 63, 1983 Miss. LEXIS 2859 (Miss. 1983).

The chancellor erred in passing upon the constitutionality of the statute where the issue of constitutionality had not been specially pleaded. Estate of Miller v. Miller, 409 So. 2d 715, 1982 Miss. LEXIS 1862 (Miss. 1982).

A Section of the Illinois Probate Act barring illegitimate children to inherit by intestate succession from their fathers violated the Equal Protection Clause, although not a "suspect classification", a statutory classification based on illegitimacy must, at minimum, bear some rational relationship to a legitimate state purpose, in view of which the provision in question could not be justified on the ground that it promotes legitimate family relationships since a state may not attempt to influence the actions of men and women by imposing sanctions on children born of their relationships, nor do the difficulties of proving paternity in some situations justify the total statutory disinheritance of illegitimate children whose fathers die intestate. The fact that an illegitimate child's father could have provided for her by making a will did not save the provision from invalidity. Finally, the provision could not stand validated on the theory that it represents the legislature's attempt to mirror the intent of the state's decedents. Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31, 1977 U.S. LEXIS 77 (U.S. 1977).

A state's intestate succession statutes which provide that an illegitimate child, acknowledged but not legitimated by the father, cannot claim the right of a legitimate child and may take the father's property only to the exclusion of the state when the father has left no descendants, ascendants, collateral relatives, or surviving wife, while legitimate children have a right of forced heirship in the father's estate, which statutes have the effect of barring an acknowledged illegitimate child from sharing in the father's estate with surviving collateral relatives, are not violative of constitutional due process and equal protection provisions, such statutes having a rational basis in the state's interest in promoting family life and in directing the disposition of property left within the state. Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31, 1977 U.S. LEXIS 77 (U.S. 1977).

This section [Code 1942, § 474], being in derogation of the common law, must be strictly construed. Akers v. Estate of Johnson, 236 So. 2d 437, 1970 Miss. LEXIS 1493 (Miss. 1970).

This section [Code 1942, § 474] and Code 1942, § 469, are in pari materia and should be construed together. Taylor v. Jackson, 194 Miss. 441, 12 So. 2d 144, 1943 Miss. LEXIS 62 (Miss. 1943).

2. Legitimation of children born out of wedlock.

Chancery court did not err in determining an illegitimate child was the natural daughter of a decedent who died intestate because there was evidence the putative father openly acknowledged and treated the child as his natural daughter, as exhibited by declarations the putative father made to others outside the family and by the fatherly conduct he bestowed on the child since the time she was a young girl; the weight to be given the DNA results, which were inconclusive as to paternity, was for the chancellor. In re Estate of Kendrick v. Gorden, 46 So. 3d 386, 2010 Miss. App. LEXIS 585 (Miss. Ct. App. 2010).

Although an intestate decedent acknowledged an illegitimate daughter by spoken words and actions, this acknowledgment of possible paternity was insufficient under Miss. Code Ann. § 91-1-15(3) where the paternity was never adjudicated by a court of law within the appropriate time limits. Prout v. Williams, 55 So. 3d 195, 2011 Miss. App. LEXIS 21 (Miss. Ct. App. 2011).

There is no statutory requirement that putative father acknowledge child in order for child to establish its right to inherit, although open acknowledgment has great bearing in determining factual issue of paternity. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

Under former provisions of the statute, in an action by an illegitimate child demanding that she be declared the heir of her natural father, capable of inheriting from him under the Mississippi laws of descent and distribution, the order entered in favor of the illegitimate daughter would be reversed and the suit dismissed where the time for bringing the action was six years from the date of the daughter's majority (§ 15-1-49) but the action was not commenced until 18 years after that date. Knight v. Moore, 396 So. 2d 31, 1981 Miss. LEXIS 1984 (Miss.), cert. denied, 454 U.S. 817, 102 S. Ct. 95, 70 L. Ed. 2d 86, 1981 U.S. LEXIS 3122 (U.S. 1981).

Any child legitimized by Code 1972, § 91-1-15 is a child of the marriage within the meaning of Code 1972, § 93-11-65. Harper v. Harper, 300 So. 2d 132, 1974 Miss. LEXIS 1602 (Miss. 1974).

In a proceeding on a petition by an alleged son seeking to be declared the sole heir of a decedent, where the decedent and the petitioner's mother were married and the alleged father acknowledged that the petitioner, born out of wedlock, was his son, and the alleged father was subsequently adjudicated non compos mentis and had a guardian appointed for his estate not long after the marriage and acknowledgment, the petitioner became the alleged father's sole heir at time of his death. Nickles v. Nickles, 247 So. 2d 836, 1971 Miss. LEXIS 1461 (Miss. 1971).

Where proof is clear, convincing, and unambiguous that the decedent acknowledged and believed over a long period of time that a child, conceived by a woman whom he subsequently married, was his daughter, she is entitled to be regarded as one of his heirs at law and to participate in his estate. Crosby v. Triplett, 195 So. 2d 69, 1967 Miss. LEXIS 1427 (Miss. 1967).

Where evidence clearly shows a decedent's recognition and acknowledgment of plaintiff as his child over a long period of time, by statements, acts, and abiding belief that she was his daughter, it was incumbent upon the defendant to contradict or refute by credible, clear, and convincing evidence that no such acknowledgment ever took place, and in the absence of such a refutation the child is entitled to be acknowledged as one of decedent's heirs at law. Crosby v. Triplett, 195 So. 2d 69, 1967 Miss. LEXIS 1427 (Miss. 1967).

Where a decree of chancery court annulled a marriage between an employee and mother of child who was born out of wedlock before such marriage, and the decree made the marriage void ab initio, on the ground that it had been entered into as result of coercion and duress and the parties had not lived together as man and wife, the child could not claim it was legitimate under the provisions of this section [Code 1942, § 474]. Stanford v. Stanford, 219 Miss. 236, 68 So. 2d 275, 1953 Miss. LEXIS 385 (Miss. 1953).

Under a former version of this statute, for one born out of wedlock in another state to become a lawful heir as the child of a decedent in this state, it must be shown first that such person was the natural child of decedent, that both parents were later lawfully married and that the father acknowledged such person as his child in this state. Thomas v. Thomas, 200 Miss. 96, 25 So. 2d 710, 1946 Miss. LEXIS 271

(Miss. 1946), and see In re Estate of Stutts, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

Under former provisions of this statute, in a suit by appellee to establish sole heirship by reason of being the legitimate daughter of deceased, evidence was insufficient to show that appellee, born in another state prior to marriage of her mother with decedent, was the natural child of deceased or that he ever acknowledged her as his own daughter. Thomas v. Thomas, 200 Miss. 96, 25 So. 2d 710, 1946 Miss. LEXIS 271 (Miss. 1946), and see In re Estate of Stutts, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

Where decedent and his alleged surviving widow, in good faith and with the bona fide intention of becoming man and wife, had entered into a ceremonial marriage in 1896 under a regular license, thinking that his first wife was dead, when, in fact, she did not die until 1923, such marriage became lawful and valid upon the death of the first wife, without any new or different understanding or intention between them, so that second wife was his lawful widow and their offspring became and were legitimate children, entitled to share in his estate with the offspring of the first marriage. Johnson v. Johnson, 196 Miss. 768, 17 So. 2d 805, 1944 Miss. LEXIS 255 (Miss. 1944).

3. Inheritance by illegitimates.

Miss. Code Ann. § 91-1-15(3)(c)'s 90-day limitations period for an illegitimate child to seek a determination of paternity was tolled while the child did not have notice of the estate proceeding, but it began to run when he filed a motion to remove the administrator and expired 90 days later, over a month before he sought a paternity determination. In re Estate of Elmore, 150 So. 3d 709, 2013 Miss. App. LEXIS 795 (Miss. Ct. App. 2013), aff'd on other grounds, 150 So. 3d 700, 2014 Miss. LEXIS 547 (Miss. 2014).

Where an illegitimate daughter of an intestate decedent did not follow the plain language of Miss. Code Ann. § 91-1-15(3), she had no claim to the decedent's estate even though the decedent executed a delayed birth certificate because the birth certificate did not meet the requirements for adjudication of paternity under § 91-1-15(3). Prout v. Williams, 55 So. 3d 195, 2011 Miss. App. LEXIS 21 (Miss. Ct. App. 2011).

Miss. Code Ann. § 91-1-15 does require certain criteria, including an option to prove paternity of any illegitimate children within a restricted period after the putative father's death, Miss. Code Ann. § 91-1-15 (2004); these requirements place a higher burden on illegitimate children to inherit from their fathers than legitimate children. However, the State has a legitimate interest in protecting the family and the estates of the deceased by requiring adjudication of paternity within a reasonable timeframe; the purpose of § 91-1-15 in the context of intestate succession is to (1) avoid litigation of stale or fraudulent claims, (2) cause fair and just disposal of property, and (3) facilitate repose of title to real property. In re Estate of McCullough v. Yates, 32 So. 3d 403, 2010 Miss. LEXIS 82 (Miss. 2010).

It is true that illegitimate children do have the right to inherit from their natural fathers; nonetheless, the illegitimate child must prove paternity by clear and convincing evidence, Miss. Code Ann. § 91-1-15(3)(c) (1994). Further, the child must make his claim to the estate of his father within one year from the time of his father's death, Miss. Code Ann. § 91-1-15 (1994). In re Estate of McCullough v. Yates, 32 So. 3d 403, 2010 Miss. LEXIS 82 (Miss. 2010).

Appellants failed properly to adjudicate themselves as the illegitimate children of their putative father in the time prescribed by Miss. Code Ann. § 91-1-15 and as such, the petition to be determined heirs of the decedent was barred by the time provision of § 91-1-15; additionally, § 91-1-15 did not violate the Equal Protection Clause or the Due Process Clause of the United States Constitution. Further, appellants were not deprived of either their procedural or substantive due process rights as Mississippi had a legitimate state interest in the legislation propounded in § 91-1-15, therefore, the statute did not violate any substantive due process rights; in addition, appellants had notice of the putative father's death and would have been afforded a hearing for adjudication of paternity, however, they failed to make such a petition within the statutory limits of § 91-1-15. In re Estate of McCullough v. Yates, 32 So. 3d 403, 2010 Miss. LEXIS 82 (Miss. 2010).

Language of Miss. Code Ann. § 93-9-28 satisfies the requirements of Miss. Code Ann. § 91-1-15(3)(a), such that the minor can inherit from his natural father where the father has executed an acknowledgment of paternity; therefore, substantial evidence supported a finding that a decedent's illegitimate minor son was his sole heir at law because, although the son's mother did not institute paternity proceedings within the required time under Miss. Code Ann. § 91-1-15, the father acknowledged paternity pursuant to Miss. Code Ann. § 93-9-28 before his death. In re Estate of Farmer, 964 So. 2d 498, 2007 Miss. LEXIS 516 (Miss. 2007).

Decedent's administratrix's failure to notify decedent's illegitimate children of the administration of their father's estate resulted in tolling of the 90-day statute. In re Estate of

Thomas, 883 So. 2d 1173, 2004 Miss. LEXIS 1269 (Miss. 2004).

Illegitimate children's claim that the administratrix's failure to provide them with actual notice tolled the running of the one-year statute of limitations could not be supported and they were barred from recovery under the decedent's estate. In re Estate of Thomas, 881 So. 2d 257, 2003 Miss. App. LEXIS 996 (Miss. Ct. App. 2003), rev'd, 883 So. 2d 1173, 2004 Miss. LEXIS 1269 (Miss. 2004).

Claim for heirship was barred because the alleged illegitimate son filed the claim more than 18 years after the father's death. Delaying out of respect for the widow did not excuse failing to take timely action to establish paternity. Mann v. Mann, 853 So. 2d 1217, 2003 Miss. LEXIS 412 (Miss. 2003).

The plaintiff's claim that she was the illegitimate child and sole heir of the decedent was barred by the statute where she failed to assert her claim until 14 years after the death of the decedent, notwithstanding her assertion that she was too young at the time of his death and that she did not know any better than to wait to stake any claim she might have had until after the death of his alleged common law wife. In re Estates of Davidson, 794 So. 2d 261, 2001 Miss. App. LEXIS 75 (Miss. Ct. App. 2001).

Evidence was sufficient to support a chancellor's determination that the appellee was the illegitimate son of a jazz musician who died in 1938. Harris v. Johnson (In re Estate of Johnson), 767 So. 2d 181, 2000 Miss. LEXIS 151 (Miss. 2000), cert. denied, 532 U.S. 959, 121 S. Ct. 1489, 149 L. Ed. 2d 376, 2001 U.S. LEXIS 2752 (U.S. 2001).

The appellants failed to meet their burden of proof by clear and convincing evidence that they were the illegitimate twin children of the decedent where the chancellor considered both genetic evidence of paternity as well as non-genetic or social evidence. In re Estate of Grubbs v. Woods, 753 So. 2d 1043, 2000 Miss. LEXIS 25 (Miss. 2000).

The administratrix of an estate had sufficient actual knowledge of the potential right of heirship of a child to have required her, within a reasonable time after the child's birth, to comply with the formalities of §§ 91-1-27 and 91-1-29 by making the child a party to the administration proceeding; therefore, the administratrix was precluded from raising the 90 day time bar set out in subsection (3)(c) of this section. Balsara v. Adams (In re Estate of Brewer), 755 So. 2d 1108, 1999 Miss. App. LEXIS 255 (Miss. Ct. App. 1999).

Evidence that both executrixes de son tort held themselves out as representatives of deceased musician's estate and took actions to chill interest of copyright purchasers in locating musician's rightful heirs waived three-year statutory bar to claim by musician's alleged illegitimate son; executrixes de son tort breached duty to act for rightful heirs of musician, rather than for themselves. Code 1972, § 91-1-15(d)(ii). Johnson v. Harris (In re Estate of Johnson), 705 So. 2d 819, 1997 Miss. LEXIS 381 (Miss. 1997), cert. denied, Harris v. Johnson, 522 U.S. 1109, 118 S. Ct. 1037, 140 L. Ed. 2d 104, 1998 U.S. LEXIS 888 (U.S. 1998).

To be declared heirs, illegitimate children of testator were required to establish paternity by clear and convincing evidence. Jones v. Estate of Richardson (In re Estate of Richardson), 695 So. 2d 587, 1997 Miss. LEXIS 240 (Miss. 1997).

Chancery court was required to hold hearing regarding personal representative's petition to determine heirship of testator's reputed illegitimate children. Jones v. Estate of Richardson (In re Estate of Richardson), 695 So. 2d 587, 1997 Miss. LEXIS 240 (Miss. 1997).

Chancellor abused his discretion in failing to set aside order determining heirship of testator's reputed illegitimate children, which was entered without formal hearing on matter. Jones v. Estate of Richardson (In re Estate of Richardson), 695 So. 2d 587, 1997 Miss. LEXIS 240 (Miss. 1997).

The failure of the illegitimate children of a decedent to assert any claim in the decedent's estate until after the expiration of 90 days from the date of the first publication of notice to creditors did not bar their claim of heirship or wrongful action where the petition for letters of administration specifically named the illegitimate children as the natural children of the decedent and the administratrix failed to give them notice of the letters' issuance. Leflore v. Coleman, 521 So. 2d 863, 1988 Miss. LEXIS 170 (Miss. 1988).

A minor seeking to be declared an heir of the decedent as an illegitimate daughter and to share in the estate should have been allowed to amend her complaint to allege that the widow and former executrix knew of the existence of the minor as an illegitimate child of the decedent, but fraudulently failed to so inform the court, notwithstanding that the minor's petition was filed more than 90 days after the publication of notice to the creditors of the estate. Smith v. Estate of King, 501 So. 2d 1120, 1987 Miss. LEXIS 2287 (Miss. 1987).

Illegitimate child could inherit from their natural father, who died intestate in 1969. Holloway v. Jones, 492 So. 2d 573, 1986 Miss. LEXIS 2527 (Miss. 1986).

Illegitimate grandson is entitled to interest in estate of paternal grandmother where grandson's answer to petition filed by daughter of grandmother seeking to be adjudicated sole heir at law alleges that grandson is illegitimate son of grandmother's deceased son and where parties have stipulated that illegitimate grandson is indeed such and that grandson and daughter are only parties interested in estate. Miller v. Watson, 467 So. 2d 672, 1985 Miss. LEXIS 2022 (Miss. 1985).

Action by illegitimate to be adjudicated son of deceased and to be allowed to share in estate which is brought within 3 years of July 1, 1981, date of enactment of amendment of § 91-1-15 is timely, notwithstanding fact that suit is brought 14 years after death of deceased, so long as death occurred prior to July 1, 1981. Berry v. Berry, 463 So. 2d 1031, 1984 Miss. LEXIS 1830 (Miss. 1984), cert. denied, 474 U.S. 828, 106 S. Ct. 90, 88 L. Ed. 2d 73, 1985 U.S. LEXIS 3348 (U.S. 1985).

The Supreme Court would not answer a certified question concerning the rights of illegitimate children of deceased fathers to certain social security benefits where it was asked to assume that § 91-1-15 was unconstitutional, and the constitutionality of that statute had not been squarely presented to, and litigated by, a court of competent jurisdiction. Jones ex rel. Jones v. Harris, 460 So. 2d 120, 1984 Miss. LEXIS 2002 (Miss. 1984).

An illegitimate daughter's petition to determine heirship was not a paternity action, and therefore was not barred by § 15-1-49 when she failed to file suit within six years of reaching majority, since under § 91-1-15, the determination of heirship could not be made prior to the decedent's death, and, until then, her cause of action did not accrue. Estate of Kidd v. Kidd, 435 So. 2d 632, 1983 Miss. LEXIS 2600 (Miss. 1983).

The phrase, "children of illegitimates", as used in this section [Code 1942, § 474] applies only to legitimate children of illegitimates. Akers v. Estate of Johnson, 236 So. 2d 437, 1970 Miss. LEXIS 1493 (Miss. 1970).

Illegitimate children inherit mother's share in the estate of her intestate brother, who left no wife or children surviving him. McDaniel v. McDaniel, 123 Miss. 401, 85 So. 113, 1920 Miss. LEXIS 35 (Miss. 1920).

Illegitimate son of sister of whole-blood took intestate's personalty to exclusion of children of sister of half-blood. Davidson v. Brownlee, 114 Miss. 398, 75 So. 140, 1917 Miss. LEXIS 45 (Miss. 1917).

Word "children" in constitution and bylaws of benefit association held not to exclude illegitimate child of female member. Shelton v. Minnis, 107 Miss. 133, 65 So. 114, 1914 Miss. LEXIS 60 (Miss. 1914).

Under former provisions, this chapter made an innovation on the common law in favor of illegitimates in regard to inheritance, but it nowhere made rights in action for torts, transmissible by descent, and at common law they were not so transmissible. Illinois C. R. Co. v. Johnson, 77 Miss. 727, 28 So. 753, 1900 Miss. LEXIS 59 (Miss. 1900).

4. Inheritance through illegitimates.

Deceased child's biological father was not entitled to inherit from his daughter's estate and to receive proceeds from a wrongful death suit because to permit the father to inherit from the decedent's estate would result in a financial windfall to the father; the evidence supports a conclusion that the father refused or neglected to support the child under Miss. Code Ann. § 91-1-15(3) where the father failed to provide any financial support to the child's mother before he went to prison the month before the child was born and instead permitted the mother to support him and where, although the father received money from friends and relatives while he was in prison, he failed to direct any of those funds to the care and support of his child. Estate of McCoy v. McCoy, 988 So. 2d 929, 2008 Miss. App. LEXIS 407 (Miss. Ct. App. 2008).

Parent could inherit from an illegitimate child under Miss. Code Ann. § 91-1-15 if he had openly treated the child as his and had not refused or neglected to support the child; however, the father made no effort to be a parent to the child, suffered no loss as the result of the demise of the child, and any part of the settlement received by the father and his kindred could only have been termed a windfall and unjust enrichment. Williams v. Farmer, 876 So. 2d 300, 2004 Miss. LEXIS 760 (Miss. 2004).

Court erred in finding that an administratrix had unclean hands in the administratrix's action to disinherit the deceased's biological father; before filing the petition, the administratrix had not stated in any prior pleading or action that the father had openly treated and supported the deceased as a child, nor had the administratrix waived the provisions of Miss. Code Ann. § 91-1-15(3)(d), which would have entitled the father to inherit from the deceased. In re Estate of Richardson v. Cornes, 905 So. 2d 620, 2004 Miss. App. LEXIS 448 (Miss. Ct. App. 2004), rev'd, in part, aff'd in part, 903 So. 2d 51, 2005 Miss. LEXIS 114 (Miss. 2005).

In the absence of a clear, unequivocal, and unambiguous waiver of the requirements of Miss. Code Ann. § 91-1-15(3) by the maternal heirs of an illegitimate child, the natural father, who has not fulfilled obligations to acknowledge and support the child during the child's lifetime, is prevented from enjoying the benefits of inheritance. In re Estate of Richardson v. Cornes, 905 So. 2d 620, 2004 Miss. App. LEXIS 448 (Miss. Ct. App. 2004), rev'd, in part, aff'd in part, 903 So. 2d 51, 2005 Miss. LEXIS 114 (Miss. 2005).

The father of an illegitimate child failed to establish his right to inherit from the child where he never met the child, failed to support the child, and failed to acknowledge the child as his own during the child's lifetime, notwithstanding that he did not receive the results of a blood test that established his paternity until just four days before the child's death. In re Estate of Patterson v. Patterson, 798 So. 2d 347, 2001 Miss. LEXIS 11 (Miss. 2001).

In an action by the kindred of the natural father of an illegitimate daughter to inherit from her estate, the claimants had the burden of proving by a preponderance of the evidence that the father openly recognized the illegitimate daughter as his child and that he did not refuse or neglect to support her when she was a child. Woodall v. Johnson, 552 So. 2d 1065 (Miss. 1989).

Claim by natural father of illegitimate child, that he, the father, was entitled to the proceeds of a proposed settlement for the wrongful death of that child, was properly denied where the father had not supported the child and was therefore not the lawful heir. Alexander v. Alexander, 465 So. 2d 340, 1985 Miss. LEXIS 1967 (Miss. 1985).

Daughter of an illegitimate may sue to determine her heirship descending from the father of her illegitimate mother. In re Estate of Kimble, 447 So. 2d 1278, 1984 Miss. LEXIS 1661 (Miss. 1984).

An action brought by the daughter of decedent's illegitimate daughter to establish her heirship was timely filed, where it was brought within the three year period prescribed by § 91-1-15(3)(d)(ii) paragraph 2, which regulates the limitation period for claims accruing to any legitimate child as the result of the death of an intestate prior to July 1, 1981, and where the decedent died prior to that date. In re Estate of Kimble, 447 So. 2d 1278, 1984 Miss. LEXIS 1661 (Miss. 1984).

Where it appeared that the father of an intestate and the mothers of several groups of claimants to intestate's property were all illegitimate children of the same mother, but that the mother of one group had the same father as the intestate's father, the latter group was entitled to take the property to exclusion of the other groups of claimants, since, although children of an illegitimate, they were kindred of the whole-blood to the intestate, while the other groups, also being children of illegitimates, were kindred of the half-blood by reason of their mothers having a different father. Taylor v. Jackson, 194 Miss. 441, 12 So. 2d 144, 1943 Miss. LEXIS 62 (Miss. 1943).

The legitimate children of an illegitimate father were entitled to inherit from the half-sister of their father, who died intestate, regardless of whether such half-sister was legitimate or illegitimate, where the intestate had no kindred of the whole-blood. Malone v. Pope, 189 Miss. 46, 196 So. 319, 1940 Miss. LEXIS 109 (Miss. 1940).

RESEARCH REFERENCES

ALR.

Inheritance from illegitimate. 48 A.L.R.2d 759.

Inheritance by illegitimate from mother's legitimate children. 60 A.L.R.2d 1182.

Inheritance by illegitimate from or through mother's ancestors or collateral kindred. 97 A.L.R.2d 1101.

Inheritance by illegitimate from mother's other illegitimate children. 7 A.L.R.3d 677.

Eligibility of illegitimate child to receive family allowance out of estate of his deceased father. 12 A.L.R.3d 1140.

Discrimination on basis of illegitimacy as denial of constitutional rights. 38 A.L.R.3d 613.

Legitimation by marriage to natural father of child born during mother's marriage to another. 80 A.L.R.3d 219.

Right of illegitimate grandchildren to take under testamentary gift to "grandchildren". 17 A.L.R.4th 1292.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children § 112 et seq.

CJS.

10 C.J.S., Bastards §§ 24-28, 24-30.

Law Reviews.

1981 Mississippi Supreme Court Review: Miscellaneous. 52 Miss. L. J. 481, June, 1982.

1982 Mississippi Supreme Court Review: Civil Procedure: Judicial Decisions. 53 Miss L. J. 130, March, 1983.

1982 Mississippi Supreme Court Review: Miscellaneous. 53 Miss. L. J. 179, March, 1983.

Paternal inheritance rights of illegitimates under Mississippi law: greater than equal protection? 53 Miss. L. J. 303, June, 1983.

1989 Mississippi Supreme Court Review: Wills (Rights of Illegitimates and Heirship). 59 Miss. L. J. 909, Winter, 1989.

§ 91-1-17. Advancement to be brought into hotchpot.

When any of the children of a person dying intestate, or their descendants, shall have received from such intestate, in his lifetime, any real or personal estate by way of advancement, and shall choose to come into the partition and distribution of the estate with the other parceners and distributees, such advancement, both of real and personal estate, shall be brought into hotchpot with the whole estate, real and personal, descended. Such party bringing such advancement into hotchpot shall thereupon be entitled to his or her proper portion of the whole estate descended, both real and personal; but such advancement shall be valued according to its value at the time said distributee received it.

HISTORY:

Codes, Hutchinson's 1848, ch. 44, art. 2 (51); 1857, ch. 60, art. 113; 1871, § 1953; 1880, § 1276; 1892, § 1550; 1906, § 1656; Hemingway's 1917, § 1388; 1930, § 1409; 1942, § 475.

Cross References —

Sale of personal estate for division, see § 91-7-301 et seq.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Inasmuch as this section [Code 1942 § 475] is applicable only in the case of a person dying intestate, where decedent died testate, conveyances of property to two children did not constitute an advancement. Mills v. Mills, 279 So. 2d 917, 1973 Miss. LEXIS 1495 (Miss. 1973).

Book accounts kept by father against children during minority, without anything to show intention to charge them as advancements, will not be held advancements. Greene v. Greene, 145 Miss. 87, 110 So. 218, 1926 Miss. LEXIS 2 (Miss. 1926).

To constitute "advancement," donor must irrevocably part with title, which must be vested in donee, in lifetime of donor; where no estate which can be alienated is given donee, no advancement is made. Greene v. Greene, 145 Miss. 87, 110 So. 218, 1926 Miss. LEXIS 2 (Miss. 1926).

Land given by father to son as advancement should be valued for partition as of date of gift. Greene v. Greene, 145 Miss. 87, 110 So. 218, 1926 Miss. LEXIS 2 (Miss. 1926).

Mere gift of money to a son is not presumed an advancement, but money advanced to son to purchase real estate is presumed an advancement. Kemp v. Turman, 104 Miss. 501, 61 So. 548, 1913 Miss. LEXIS 56 (Miss. 1913).

The widow is not within the statute. Whitley v. Stephenson, 38 Miss. 113, 1859 Miss. LEXIS 100 (Miss. 1859).

The value of the property at the time of the advancement must govern in the distribution, and interest is not to be charged thereon. Jackson v. Jackson, 28 Miss. 674, 1855 Miss. LEXIS 10 (Miss. 1855).

The party bringing an advancement into hotchpot does not relinquish his interest in the particular property. The title to it was derived from the gift and cannot be affected by the distribution. Jackson v. Jackson, 28 Miss. 674, 1855 Miss. LEXIS 10 (Miss. 1855).

A child who does not claim anything by inheritance cannot be compelled to bring the property received from the father in his lifetime into hotchpot. Phillips v. McLaughlin, 26 Miss. 592, 1853 Miss. LEXIS 142 (Miss. 1853).

The advancements must have been received from the intestate himself. Callender v. McCreary, 5 Miss. 356, 1840 Miss. LEXIS 24 (Miss. 1840).

RESEARCH REFERENCES

ALR.

Presumption and burden of proof with respect to advancement. 31 A.L.R.2d 1036.

Check as evidencing advancement. 74 A.L.R.5th 491.

Am. Jur.

1A Am. Jur. Legal Forms 2d, Advancements § 10:10 et seq. (particular agreements and provisions).

35 Am. Jur. Proof of Facts 2d 357, Decedent's Gift to Heir as Advancement.

CJS.

26B C.J.S., Descent and Distribution § 114 et seq.

§ 91-1-19. Descent of exempt property.

The property, real and personal, exempted by law from sale under execution or attachment shall, on the death of the husband or wife owning it, descend to the survivor of them and the children and grandchildren of the decedent, as tenants in common, grandchildren inheriting their deceased parent's share; and if there be no children or grandchildren of the decedent, to the surviving wife or husband; and if there be no such survivor, to the children and grandchildren of the deceased owner. Where the surviving husband or wife shall own a place of residence equal in value to the homestead of the decedent, and the deceased husband or wife have no surviving children or grandchildren of the last marriage but have children or grandchildren of a former marriage, the homestead of such decedent shall not descend to the surviving husband or wife, but shall descend to the surviving children and grandchildren of the decedent by such former marriage, as other property.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 17 (2); 1857, ch. 60, art. 172; 1871, § 1956; 1880, § 1277; 1892, § 1551; 1906, § 1657; Hemingway's 1917, § 1389; 1930, § 1410; 1942, § 476; Laws, 1900, ch. 89.

Cross References —

Payment to estate as intestate property of actuarial equivalent of remaining payments on reduced retirement allowance annuity, see § 25-11-115.

Exempt property generally, see § 85-3-1 et seq. and § 89-1-29.

Homestead allotment, see § 85-3-29 et seq.

Appraiser's duty to set aside exempt property, see §§ 91-7-117, 91-7-135, 91-7-137.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. Construction and application in general.
2. Exempt property not part of estate to be administered.
3. Date for determining value of property.

1. Construction and application in general.

This statute [Code 1972, § 91-1-19] specifically controls the descent of exempt property, and those entitled thereto under the statute inherit the exempt property in fee simple free of decedent's debts; only when the decedent leaves no surviving spouse or children or grandchildren does the exempt property become liable for the decedent's debts under Code 1972, § 91-1-21. Weaver v. Blackburn, 294 So. 2d 786, 1974 Miss. LEXIS 1828 (Miss. 1974).

Undivided interest in homestead descended to decedent's wife and children. Jones v. Jones, 249 Miss. 322, 161 So. 2d 640, 1964 Miss. LEXIS 393 (Miss. 1964).

A widow, children and grandchildren are tenants in common subject to the right by the widow to undisturbed possession of the exempt homestead. Bonds v. Bonds, 226 Miss. 348, 84 So. 2d 397, 1956 Miss. LEXIS 406 (Miss. 1956).

The fact that a widow was given a right under the statute to have the undisturbed possession of the exempt homestead following the death of the husband does not have the effect of destroying the tenancy in common, which arose in the property upon the death of the husband, merely because of the fact that the right of possession of the other heirs is postponed pending the widowhood of the wife. Bonds v. Bonds, 226 Miss. 348, 84 So. 2d 397, 1956 Miss. LEXIS 406 (Miss. 1956).

Son, one of ten adult heirs of deceased father, who paid to his mother $400 which was owing to father on purchase of homestead, there being no administrator and no agent appointed by heirs authorized to receive payment, is not entitled to be credited with $250 paid to mother as allowance to widow, as widow had only a one-tenth interest in this $400, in suit in which heirs claimed balance due them on purchase price of land. Davis v. Davis, 205 Miss. 794, 39 So. 2d 486, 1949 Miss. LEXIS 465 (Miss. 1949).

This section [Code 1942, § 476] lays down general rule that upon death of a husband or wife, his or her exempt property shall descend to the survivor and to the children of the owner as tenants in common, but the section concludes with an exception thereto. Reed v. Reed, 197 Miss. 261, 19 So. 2d 745, 1944 Miss. LEXIS 294 (Miss. 1944).

A bill to establish widow's right to possession and occupancy of the homestead of her deceased husband need not negative the exception contained in this section [Code 1942, § 476]. Reed v. Reed, 197 Miss. 261, 19 So. 2d 745, 1944 Miss. LEXIS 294 (Miss. 1944).

The status of cotenancy is recognized in statutory provisions that a decedent's widow shall share in the homestead property as a tenant in common with the children, and that there shall be no partition during her widowhood, or while she continues to occupy or use it, but the usual rights thereunder are made subordinate to the widow's right of use and occupancy during her life. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

In line with the purpose of and under the statutory provisions that a decedent's widow shall share in the homestead property as a tenant in common with the children, and that there shall be no partition during her widowhood, or while she continues to occupy or use it, the immunity from partition, being personal to the widow, is not extended to her grandniece. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

The right of the widow has the attributes and incidents of a life estate, and the other heirs are vested with a future estate which takes effect in possession at the termination of the preceding estate or interest. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

Where deceased share tenant left nothing except exempt property, administration was unnecessary; hence widow and children having unsuccessfully demanded tenant's share from landlord could recover in replevin. Williams v. Sykes, 170 Miss. 88, 154 So. 267, 154 So. 727, 1934 Miss. LEXIS 100 (Miss. 1934).

Complainant in partition suit, claiming interest as tenant in common through ancestor, was not required to prove that ancestor died intestate. Smith v. Stanley, 159 Miss. 720, 132 So. 452, 1931 Miss. LEXIS 68 (Miss. 1931).

Exempt property, real or personal, left by a deceased husband descends to his widow and children as tenants in common, the grandchildren taking per stirpes the share of deceased children, but the widow has the right to occupy and use the same free from liability for rent or hire and from partition during her widowhood. Martin v. Martin, 84 Miss. 553, 36 So. 523, 1904 Miss. LEXIS 56 (Miss. 1904).

If the widow renounces the will disposing of exempt property, she is only entitled to share in the estate generally and is not entitled to the specific exempt property so disposed of. Nash v. Young, 31 Miss. 134, 1856 Miss. LEXIS 48 (Miss. 1856).

In case the exempt property be disposed of by will, the statute does not apply. Turner v. Turner, 30 Miss. 428, 1855 Miss. LEXIS 114 (Miss. 1855); Norris v. Callahan, 59 Miss. 140, 1881 Miss. LEXIS 87 (Miss. 1881); Osburn v. Sims, 62 Miss. 429, 1884 Miss. LEXIS 98 (Miss. 1884).

2. Exempt property not part of estate to be administered.

Executrix did not waive the homestead exemption by entering into a contractual relationship with the Mississippi Division of Medicaid on behalf of a decedent because the record did not support the idea that the decedent had any knowledge of the benefits a homestead exemption provided, nor that he intentionally waived his right to the benefit of that exemption since the contract did not provide any information pertaining to, or even mention, the significance of any exemption; there was no evidence of the decedent's intent to waive any of his rights because by entering into the contract, the decedent merely acknowledged Medicaid as a creditor of his estate, which estate had no property against which Medicaid could recover. State v. Stinson (In re Estate of Darby), 68 So. 3d 702, 2011 Miss. App. LEXIS 96 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 419 (Miss. 2011).

Trial court did not err in granting an executrix summary judgment and in determining that the claim of the Mississippi Division of Medicaid was not valid against a decedent's property because the decedent predeceased his children and a grandchild to whom he devised all of his property, and pursuant to the unambiguous language of Miss. Code Ann. §§ 85-3-21, 91-1-19, and 91-1-21, coupled with case law, the homestead, with its exemption, passed from the decedent to his children and grandchildren free of his debts; thus, Medicaid was not entitled to pursue a claim against the exempted property as it was not a part of the estate. State v. Stinson (In re Estate of Darby), 68 So. 3d 702, 2011 Miss. App. LEXIS 96 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 419 (Miss. 2011).

This is so whether the estate be solvent or insolvent. Mason v. O'Brien, 42 Miss. 420, 1869 Miss. LEXIS 8 (Miss. 1868); De Baum v. Hulett Undertaking Co., 169 Miss. 488, 153 So. 513, 1934 Miss. LEXIS 66 (Miss. 1934).

Under Code 1892, § 1551 [Code 1942, § 476], $1,000 of life insurance, being exempt, inures to the heirs and forms no part of the estate to be administered. Equitable Life Assurance Soc. v. Hartfield, 87 Miss. 548, 40 So. 21, 1905 Miss. LEXIS 175 (Miss. 1905).

The exempt personal property is no part of the estate to be administered, but descends directly under the statute. Whitley v. Stephenson, 38 Miss. 113, 1859 Miss. LEXIS 100 (Miss. 1859); Holliday v. Holland, 41 Miss. 528, 1867 Miss. LEXIS 25 (Miss. 1867); Wally v. Wally, 41 Miss. 657, 1868 Miss. LEXIS 16 (Miss. 1868); De Baum v. Hulett Undertaking Co., 169 Miss. 488, 153 So. 513, 1934 Miss. LEXIS 66 (Miss. 1934).

3. Date for determining value of property.

If at the death of the owner of a homestead it does not exceed the full limit of value allowed, a subsequent appreciation in value, no matter how great, does not give creditors of the decedent any right to subject to their claims the excess over the full amount allowed. Moody v. Moody, 86 Miss. 323, 38 So. 322, 1905 Miss. LEXIS 34 (Miss. 1905).

The value of the property claimed as a homestead must be as of the time of decedent's death. Parisot v. Tucker, 65 Miss. 439, 4 So. 113, 1888 Miss. LEXIS 14 (Miss. 1888).

RESEARCH REFERENCES

ALR.

Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate. 6 A.L.R.2d 515.

Effect of divorce, separation, desertion, unfaithfulness, and the like, upon right to administer upon estate of spouse. 34 A.L.R.2d 876.

Separation agreement as barring rights of surviving spouse in other's estate. 34 A.L.R.2d 1020.

Am. Jur.

40 Am. Jur. 2d, Homestead §§ 142, 143, 151 et seq.

CJS.

40 C.J.S., Homestead § 95 et seq.

§ 91-1-21. Exempt property liable for debt of decedent.

If there shall not be either a surviving wife or husband or children or grandchildren of the decedent, the exempt property shall be liable for the debts of the decedent and be disposed of in all respects as other property of such decedent.

HISTORY:

Codes, 1871, § 1956; 1880, § 1277; 1892, § 1552; 1906, § 1658; Hemingway's 1917, § 1390; 1930, § 1411; 1942, § 477; Laws, 1900, ch. 89.

Cross References —

Exempt property generally, see §§ 85-3-1 et seq., 89-1-29.

What are considered assets of estate, see § 91-7-91.

Sale of property for payment of debts, see § 91-7-183 et seq.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Executrix did not waive the homestead exemption by entering into a contractual relationship with the Mississippi Division of Medicaid on behalf of a decedent because the record did not support the idea that the decedent had any knowledge of the benefits a homestead exemption provided, nor that he intentionally waived his right to the benefit of that exemption since the contract did not provide any information pertaining to, or even mention, the significance of any exemption; there was no evidence of the decedent's intent to waive any of his rights because by entering into the contract, the decedent merely acknowledged Medicaid as a creditor of his estate, which estate had no property against which Medicaid could recover. State v. Stinson (In re Estate of Darby), 68 So. 3d 702, 2011 Miss. App. LEXIS 96 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 419 (Miss. 2011).

Trial court did not err in granting an executrix summary judgment and in determining that the claim of the Mississippi Division of Medicaid was not valid against a decedent's property because the decedent predeceased his children and a grandchild to whom he devised all of his property, and pursuant to the unambiguous language of Miss. Code Ann. §§ 85-3-21, 91-1-19, and 91-1-21, coupled with case law, the homestead, with its exemption, passed from the decedent to his children and grandchildren free of his debts; thus, Medicaid was not entitled to pursue a claim against the exempted property as it was not a part of the estate. State v. Stinson (In re Estate of Darby), 68 So. 3d 702, 2011 Miss. App. LEXIS 96 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 419 (Miss. 2011).

Where a decedent died leaving no surviving spouse, child or grandchild, the homestead exemption expired with her death and was not valid as against unpaid claims against her estate, even though the decedent left a will devising her previously exempt homestead property to her ex-husband; the specific language of § 91-1-21 does not continue a decedent's homestead exemption for anyone other than a surviving spouse, children or grandchildren, and consequently there was no exemptionist who could defeat the claim against the estate's homestead property. Memorial Hosp. v. Franzke (In re Estate of Franzke), 634 So. 2d 117, 1994 Miss. LEXIS 132 (Miss. 1994).

The general rule imposing liability for the debts of the decedent upon his exempt property in the absence of wife or children, is laid down in this section [Code 1942, § 477], but there are exceptions of limitations placed thereon in cases where the proceeds of life insurance policy, in one case, are made payable to beneficiary, and in the other, made to inure to the heirs of legatees of the decedent. Coates v. Worthy, 72 Miss. 575, 17 So. 606, 1895 Miss. LEXIS 24 (Miss. 1895).

RESEARCH REFERENCES

Am. Jur.
23 Am. Jur. 2d, Descent and Distribution § 134 et seq.

CJS.
26B C.J.S., Descent and Distribution § 134 et seq.

§ 91-1-23. Exempt property not to be partitioned in certain cases.

Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood as long as it is occupied or used by the widow, unless she consent. Likewise, where a decedent leaves a widower to whom, with others, her exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during the period of his being a widower as long as it is occupied or used by the widower, unless he consent.

HISTORY:
Codes, 1892, § 1553; 1906, § 1659; Hemingway's 1917, § 1391; 1930, § 1412; 1942, § 478; Laws, 1950, ch. 346.

Cross References —
Partition of property generally, see § 11-21-1 et seq.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. To what property applicable.
3. How title acquired immaterial.
4. —Renunciation of will.
5. Personal nature of right.
6. Effect on others' interests.
7. "Partition."
8. Obligation to give accounting.
9. Remarriage of widow/widower.
10. Use without occupancy.
11. Value of property.
12. Tax delinquency.
13. Insurance.
14. Practice and procedure.

1. In general.

Judgment creditor of husband and wife who together owned property as tenants by the entirety could levy execution and sell that portion of homestead property which exceeded value of statutory homestead exemption which had vested in wife following husband's death; this section was not applicable to debt for which surviving spouse was jointly and severally liable. In re Osborne, 120 B.R. 64, 1990 Bankr. LEXIS 2184 (Bankr. N.D. Miss. 1990).

A surviving spouse's statutory right to occupy a homestead prevails where, by will, the owner devises it to another without share to the spouse; the surviving spouse need not renounce the will of the deceased owner in order to benefit from the statutory homestead right. Rush v. Rush, 360 So. 2d 1240, 1978 Miss. LEXIS 2341 (Miss. 1978).

This section would not apply to defeat the former wife's partition action of a home to which she had been given exclusive right of possession under the decree of divorce, where neither the former wife nor former husband were deceased. Blackmon v. Blackmon, 350 So. 2d 44, 1977 Miss. LEXIS 2207 (Miss. 1977).

Exempt homestead which descended to decedent's wife and children was not subject to partition during the widowhood of the surviving wife, provided she remained a widow and qualified under the exemption statute. Jones v. Jones, 249 Miss. 322, 161 So. 2d 640, 1964 Miss. LEXIS 393 (Miss. 1964).

A husband in possession of realty which he and his wife held as cotenants, may, so long as he remains a widower, resist partition sought by one to whom the wife devised her interest. Biggs v. Roberts, 237 Miss. 406, 115 So. 2d 151, 1959 Miss. LEXIS 485 (Miss. 1959).

Where a widow of a landowner, who had died intestate leaving also a son and daughter, neither waived nor attempted to dispose of her homestead rights by a deed conveying her one third interest to her son reserving to herself a life estate in all the lands, a grantee of one half interest of the tract of land from the son, to whom the daughter had also conveyed her one third interest therein, was not entitled to have the exempt property partitioned over the widow's objection. Gresham v. Clark, 231 Miss. 206, 95 So. 2d 234, 1957 Miss. LEXIS 506 (Miss. 1957).

The property of an intestate was not subject to partition or sale for partition during the widowhood, as long as it was occupied by her, unless she consented. La Blanc v. Busby, 223 Miss. 415, 78 So. 2d 456, 1955 Miss. LEXIS 397 (Miss. 1955).

Under provision widow has the right to retain the homestead as it was during her husband's lifetime, and this is true even though he also left children surviving. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

Children cannot have partition of exempt property occupied or used by widow. Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66, 1906 Miss. LEXIS 167 (Miss. 1906).

Exempt property, real or personal, left by a deceased husband descends to his widow and children as tenants in common, the grandchildren taking per stirpes the share of the deceased children, but the widow has the right to occupy and use the same freed from liability for rent or hire and from partition during her widowhood. Martin v. Martin, 84 Miss. 553, 36 So. 523, 1904 Miss. LEXIS 56 (Miss. 1904).

2. To what property applicable.

Where property is subject to partition during the lives of cotenants-husbands, the right to partition is not enjoined by the deaths of the cotenants-husbands and the survival of their wives; however, the widows should retain their houses as improvements on the land, if possible, or, in the alternative, if it is not feasible to partition the land to allow the widows to receive their respective houses as improvements, then an accounting should be had as to such improvements. Carter v. Brewton, 396 So. 2d 617, 1981 Miss. LEXIS 2055 (Miss. 1981).

Where the husband of the defendant in a partition action had never established the property in question as his homestead, his widow had no homestead interest in the land which would prevent its partition. Mathis v. Quick, 271 So. 2d 924, 1973 Miss. LEXIS 1527 (Miss. 1973).

This section [Code 1942, § 478] applies only to the property of the decedent owned at the time of his death, and does not prevent partition of the property of a deceased cotenant. Solomon v. Solomon, 187 Miss. 22, 192 So. 10, 1939 Miss. LEXIS 86 (Miss. 1939).

3. How title acquired immaterial.

A widow or widower is entitled to full use and occupancy of homestead property during widowhood whether he or she took that interest by deed, devise, or descent. Stockett v. Stockett, 337 So. 2d 1237, 1976 Miss. LEXIS 1603 (Miss. 1976).

It is not necessary to the operation of this section [Code 1942, § 478] that title should have been acquired by inheritance. Biggs v. Roberts, 237 Miss. 406, 115 So. 2d 151, 1959 Miss. LEXIS 485 (Miss. 1959).

Widow, redeeming her interest from tax sale, had right against the other tenants to occupy property as homestead while widow, regardless of source from which cotenant's title was derived. Lackey v. Harrington, 162 Miss. 512, 139 So. 313, 1932 Miss. LEXIS 123 (Miss. 1932).

4. —Renunciation of will.

Although proper contracts not to renounce a will are enforceable even though Code 1972 § 91-5-25 provides that a husband or wife may renounce the will of another, the wife's agreement not to renounce her will constituted an unconscionable contract so as to permit the wife's renunciation of her husband's will, notwithstanding her prior agreement not to renounce, where the wife was taken by her husband directly from her job to the office of the husband's attorney and persuaded to assign the contract without prior knowledge of its existence or the opportunity to read the entire contract, and where the provision in the will, giving the wife a life estate in the parties' homestead as long as she continued to live on the property, was minimal consideration when viewed against her rights under the laws of descent and distribution including her statutory right to a life estate in the homestead under Code 1972 § 91-1-23 irrespective of her living on the property. In re Will of Johnson, 351 So. 2d 1339, 1977 Miss. LEXIS 1950 (Miss. 1977).

Upon a widow's renunciation of a testator's will devising to her a life estate in his home with remainder to a daughter, the widow became entitled to a one-third interest to the property in fee, and the daughter to the other two-thirds interest therein, subject to the right of the widow to occupy and use it during her widowhood. Milton v. Milton, 193 Miss. 563, 10 So. 2d 175, 1942 Miss. LEXIS 131 (Miss. 1942).

Widow with one child, upon renouncing, took undivided interest in the homestead, which is not subject to partition during her widowhood as long as occupied by her, without her consent. Williams v. Williams, 111 Miss. 129, 71 So. 300, 1916 Miss. LEXIS 253 (Miss. 1916).

5. Personal nature of right.

In line with the purpose of these provisions, the immunity from partition, being personal to the widow, is not extended to her grandniece. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

The right here conferred upon the widow is purely a personal one which does not pass to a grantee of her interest in the property. Middleton v. Claughton, 77 Miss. 131, 24 So. 963, 1899 Miss. LEXIS 41 (Miss. 1899).

6. Effect on others' interests.

The fact that a widow was given a right under the statute to have the undisturbed possession of the exempt homestead following the death of the husband does not have the effect of destroying the tenancy in common, which arose in the property upon the death of the husband, merely because of the fact that the right of possession of the other heirs is postponed pending the widowhood of the wife. Bonds v. Bonds, 226 Miss. 348, 84 So. 2d 397, 1956 Miss. LEXIS 406 (Miss. 1956).

A widow, children and grandchildren are tenants in common subject to the right by the widow to undisturbed possession of the exempt homestead. Bonds v. Bonds, 226 Miss. 348, 84 So. 2d 397, 1956 Miss. LEXIS 406 (Miss. 1956).

The status of cotenancy is recognized by the statute, but the usual rights thereunder are made subordinate to the widow's right of use and occupancy during her life. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

Under these provisions a widow's right has the attributes and incidents of a life estate, and the other heirs are vested with a future estate which takes effect in possession at the termination of the preceding estate or interest. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

A widow takes a child's part in the fee with the right of undisturbed possession or use of the homestead during her lifetime, and her use thereof may not be divided with the children. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

7. "Partition."

The partition prohibited by this section [Code 1942, § 478] means an actual division of title with the right of possession thereunder, not a mere record identification of the several interests therein without an assertion by the coparceners of their respective rights. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

8. Obligation to give accounting.

The rights of the widow are absolute, and she cannot be called upon to account for the use and occupancy, nor forced to purchase the rights of her cotenants. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

Children cannot have accounting, by widow, for her use of exempt property occupied or used by her. Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66, 1906 Miss. LEXIS 167 (Miss. 1906).

9. Remarriage of widow/widower.

Upon remarriage of a widow, her rights under § 91-1-23, which prevents partition of homestead property, are terminated and the entire property becomes subject to partition by any and all of the other joint owners. Cheeks v. Herrington, 523 So. 2d 1033, 1988 Miss. LEXIS 211 (Miss. 1988).

Upon remarriage of a widow, her rights under the statute are terminated and the entire property becomes subject to partition by any and all of the other joint owners. Breland v. Bryant, 402 So. 2d 838, 1981 Miss. LEXIS 2145 (Miss. 1981).

This provision ceases to operate when the widow remarries. Jefcoat v. Powell, 235 Miss. 291, 108 So. 2d 868, 1959 Miss. LEXIS 429 (Miss. 1959).

10. Use without occupancy.

Where a decedent resided on one tract of land and used this tract with another as a farm unit which consisted of less than 160 acres, the widow was entitled to claim both parcels of land as a homestead although they were not contiguous. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850, 1950 Miss. LEXIS 328 (Miss. 1950).

Neither the cases dealing only with urban property and those dealing with an urban tract and a rural tract as constituting together one homestead are applicable to a case where rural lands are involved. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850, 1950 Miss. LEXIS 328 (Miss. 1950).

Widow, being entitled to use and occupancy of homestead, was entitled to rents thereof, and would so continue during her life or widowhood unless she elected or consented otherwise. Miers v. Miers, 160 Miss. 746, 133 So. 133, 1931 Miss. LEXIS 135 (Miss. 1931).

Court could not order sale of homestead of widow more than 60 years of age who has moved from premises, but was being supported in part from products. Wright v. Coleman, 137 Miss. 699, 102 So. 774, 1925 Miss. LEXIS 21 (Miss. 1925).

Exempt property of decedent descending to the widow with others is used by her so long as its income is used for her support, whether or not she resides on it. Tiser v. McCain, 113 Miss. 776, 74 So. 660, 1917 Miss. LEXIS 152 (Miss. 1917).

11. Value of property.

The question of value has no place in the consideration of the rights of a surviving widow to use and occupancy of the homestead, her rights being absolute so long as she remains a widow; the limitation on the value of the homestead that is exempt from creditors' demands, set by § 85-3-21, is not applicable. Stockett v. Stockett, 337 So. 2d 1237, 1976 Miss. LEXIS 1603 (Miss. 1976).

The value of the homestead is not material in passing on the rights of the surviving widow, since it was never the intention of the legislature that "160 acres of land should be reduced in quantity, save in one instance, and that is where the rights of the creditors were involved." Horton v. Horton, 210 Miss. 116, 48 So. 2d 850, 1950 Miss. LEXIS 328 (Miss. 1950).

Surviving widow entitled to occupy homestead of 160 acres irrespective of value, and heirs cannot have partition thereof. Dickerson v. Leslie, 94 Miss. 627, 47 So. 659, 1909 Miss. LEXIS 319 (Miss. 1909).

Under this section [Code 1942, § 478] a surviving widow is entitled to occupy the homestead as it existed in the lifetime of the husband without reference to its value, the limit of value placed by law on exempt homesteads being solely for the benefit and protection of creditors and not affecting the rights of a surviving widow to the use and occupation of the homestead against the other heirs of the deceased exemptionist. Moody v. Moody, 86 Miss. 323, 38 So. 322, 1905 Miss. LEXIS 34 (Miss. 1905).

12. Tax delinquency.

Where a widow of intestate occupied and used intestate's tax delinquent property, she could not permit the title to mature in the state and thereafter purchase the land for her own benefit at the expense of the children and any purchase she made of the tax title was made for the joint benefit of her and the intestate's children. La Blanc v. Busby, 223 Miss. 415, 78 So. 2d 456, 1955 Miss. LEXIS 397 (Miss. 1955).

Widow, redeeming her interest from tax sale, had right against the other tenants to occupy property as homestead while widow, regardless of source from which cotenant's title was derived. Lackey v. Harrington, 162 Miss. 512, 139 So. 313, 1932 Miss. LEXIS 123 (Miss. 1932).

13. Insurance.

Proceeds of policy procured by widow on homestead property occupied by herself and children as cotenants, each having an undivided one-fifth interest therein, did not inure to the benefit of the children as cotenants merely because of alleged fiduciary relationship existing between them as such, notwithstanding insurance was not limited to widow's separate interest. Collette v. Long, 179 Miss. 650, 176 So. 528, 1937 Miss. LEXIS 60 (Miss. 1937).

14. Practice and procedure.

A bill to establish widow's right to possession and occupancy of the homestead of her deceased husband need not negative the exception contained in Code 1942, § 476. Reed v. Reed, 197 Miss. 261, 19 So. 2d 745, 1944 Miss. LEXIS 294 (Miss. 1944).

Where the defendant, a decedent's adult son, and his family were in possession of the lower floor and part of the second floor of a two-story homestead property, the widow was properly granted a peremptory writ upon the issue of liability for rent for the portion of the homestead occupied by the son, and she was entitled to have him ejected. Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429, 1942 Miss. LEXIS 77 (Miss. 1942).

Decree in partition ordering and confirming sale of homestead, to which widow objected, should be vacated and bill dismissed. Talley v. Talley, 108 Miss. 84, 66 So. 328, 1914 Miss. LEXIS 172 (Miss. 1914).

RESEARCH REFERENCES

ALR.

Homestead Right of Cotenant as Affecting Partition. 83 A.L.R.6th 605.

§ 91-1-25. Person who has killed another not to inherit from him.

If any person wilfully cause or procure the death of another in any way, he shall not inherit the property, real or personal, of such other; but the same shall descend as if the person so causing or procuring the death had predeceased the person whose death he perpetrated.

HISTORY:

Codes, 1892, § 1554; 1906, § 1660; Hemingway's 1917, § 1392; 1930, § 1413; 1942, § 479; Laws, 1992, ch. 311, § 1, eff from and after July 1, 1992.

Cross References —

Prohibition against murderer taking under will, see § 91-5-33.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction.

1. In general.

Although the chancellor cited the wrong statutory section in finding that a father had no interest in his former wife's estate, the finding was substantively correct where there was no dispute that he had murdered his former wife, and as a result, he could have no interest in the estate under Miss. Code Ann. § 91-1-25 (Rev. 2013). Young v. O'Beirne, 147 So. 3d 877, 2014 Miss. App. LEXIS 311 (Miss. Ct. App. 2014).

In an action in which a beneficiary filed suit against an insurance company alleging claims of tortious breach of contract, breach of fiduciary duty and duty of good faith and fair dealing, negligence, gross negligence, and intentional infliction of emotional distress, the insurance company was granted summary judgment where: (1) the insured executed a voluntary statement to police that her husband had stabbed her with a knife and a month after the knife wound, the insured died in her bed; (2) no reasonable juror could conclude that the insurance company acted with malice, gross negligence, or reckless disregard in wanting to review the autopsy report; and (3) the delay in receiving the autopsy report was due in part to the beneficiary's failure to inform them of his address change. Washington v. Am. Heritage Life Ins. Co., 500 F. Supp. 2d 610, 2007 U.S. Dist. LEXIS 54120 (N.D. Miss. 2007).

Neither the Mississippi slayer's statute, Miss. Code Ann. § 91-1-25, or the Mississippi Uniform Simultaneous Death Act, Miss. Code Ann. §§ 91-3-1 through 91-13-15 acted to entitle the estate of a wife who was killed by her husband in a murder-suicide to a child's share of the husband's estate; husband's son by a previous marriage was the husband's sole heir-at-law. Miller v. Miller (In re Estate of Miller), 840 So. 2d 703, 2003 Miss. LEXIS 116 (Miss. 2003).

Evidence of a guilty plea to a charge of manslaughter is not sufficient, standing alone, to enable a fact finder to conclude that one is prohibited from inheriting under §§ 91-1-25 and 91-5-33. Hood v. VanDevender, 661 So. 2d 198, 1995 Miss. LEXIS 456 (Miss. 1995).

An action alleging that funds distributed to a decedent's son under a prior decree which adjudicated the intestate distribution of the decedent's estate, were "wrongfully inherited" pursuant to § 91-1-25 because the decedent's son willfully caused the decedent's death, was barred by § 91-1-31. Johnson v. Howell, 592 So. 2d 998, 1991 Miss. LEXIS 986 (Miss. 1991).

Mississippi Code § 91-1-25 represents a legislatively-created exception. Roberts v. Grisham, 493 So. 2d 940, 1986 Miss. LEXIS 2588 (Miss. 1986).

Decedent's husband was entitled to inherit an interest in land owned by his wife, even though he had entered into a consent decree in Michigan in which he relinquished his rights as heir of his wife, where the parties did not intend the Michigan decree to cover Mississippi lands; the testimony of husband that he shot his wife accidentally was properly admitted in evidence as an exception to the dead man's statute; insofar as the shooting was not wilful, the husband was not barred from inheriting by statute. Bianchi v. Scott, 363 So. 2d 289, 1978 Miss. LEXIS 2191 (Miss. 1978).

Equitable estoppel does not and cannot authorize the exercise of a personal right which terminates with the death of a spouse, and the fact that a husband shot and killed his wife, an act which would have precluded his inheriting her estate, is no justification for permitting the deceased wife's personal representatives to renounce the husband's will, an act which by law can only be invoked personally by a surviving spouse. Jenkins v. Borodofsky, 211 So. 2d 874, 1968 Miss. LEXIS 1288 (Miss. 1968).

The statute requiring commencement of action to recover land ten years after right to do so accrues, did not apply to a suit to cancel as cloud on title claim asserted by husband who pleaded guilty to manslaughter in the death of his wife. Henry v. Toney, 217 Miss. 716, 64 So. 2d 904, 1953 Miss. LEXIS 484 (Miss. 1953).

In a suit to cancel as cloud on title claim asserted by husband by virtue of inheritance from his deceased spouse, where it was finally adjudicated that the husband had pleaded guilty to manslaughter in the death of his wife, the suit was not one for penalty or forfeiture on a penal statute required to be brought within one year from the date of offense. Henry v. Toney, 217 Miss. 716, 64 So. 2d 904, 1953 Miss. LEXIS 484 (Miss. 1953).

Under this section [Code 1942, § 479] it is not requisite that the wilful killing shall amount to murder but it is enough that it was wilful and without justification in law. Henry v. Toney, 211 Miss. 93, 50 So. 2d 921, 1951 Miss. LEXIS 335 (Miss. 1951).

In a suit to cancel husband's claim to property of wife on the ground that he had feloniously slain his wife in Ohio and thereby forfeited his right to the property under this section [Code 1942, § 479], the fact that the husband pleaded guilty to manslaughter in Ohio does not admit a wilful killing but the husband should be allowed to introduce evidence to explain the circumstances of killing. Henry v. Toney, 211 Miss. 93, 50 So. 2d 921, 1951 Miss. LEXIS 335 (Miss. 1951).

Insurance beneficiary's acts, after an assault by her husband, in running to a neighbor's home, procuring a gun and returning to shoot her husband through the window, constituted a deliberate homicide without justification in law and precluded her, as the widow beneficiary, from claiming the proceeds of a life insurance policy. Gholson v. Smith, 210 Miss. 28, 48 So. 2d 603, 1950 Miss. LEXIS 316 (Miss. 1950).

2. Construction.

Slayer's statutes such as Miss. Code Ann. § 91-1-25 are strictly construed and narrow in purpose. Miller v. Miller (In re Estate of Miller), 840 So. 2d 703, 2003 Miss. LEXIS 116 (Miss. 2003).

The Mississippi slayer's statute, Miss. Code Ann. § 91-1-25, is a statute of exclusion, not inclusion and, when applicable, it acts to exclude a slayer from participation in the victim's estate but it does not act to include the victim in the slayer's estate due to the slayer's crime. Miller v. Miller (In re Estate of Miller), 840 So. 2d 703, 2003 Miss. LEXIS 116 (Miss. 2003).

RESEARCH REFERENCES

ALR.

Felonious killing of ancestor as affecting intestate succession. 39 A.L.R.2d 477.

Killing of insured by beneficiary as affecting life insurance or its proceeds. 27 A.L.R.3d 794.

Felonious killing of one cotenant or tenant by the entireties by the other as affecting latter's right in the property. 42 A.L.R.3d 1116.

Homicide as precluding taking under will or by intestacy. 25 A.L.R.4th 787.

Am. Jur.

23 Am. Jur. 2d, Descent and Distribution § 50 et seq.

§ 91-1-27. How title to property acquired by descent may be made.

In all cases in which persons have died, or may hereafter die, wholly or partially intestate, having property, real or personal, any heir at law of such deceased person, or any one interested in any of the property as to which he shall have died intestate, may petition the chancery court of the county in which said deceased had his mansion house or principal place or residence, or in which any part of his real estate may be situated, in case he was a nonresident, setting forth the fact that said person died wholly or partially intestate, possessed of real or personal property in the State of Mississippi, the names of the heirs at law or next of kin, and praying that the person named in said petition be recognized and decreed to be the heir at law of said deceased.

HISTORY:

Codes, 1906, § 2790; Hemingway's 1917, § 310; 1930, § 359; 1942, § 1270; Laws, 1896, ch. 93.

Cross References —

Applicability of this section to inheritances by and from illegitimates, see § 91-1-15.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

A claimant's timely filing, 3 days after the decedent's death, of a sworn Petition for Letters of Administration in which he alleged that he was the son and sole surviving heir of the deceased, sufficiently complied with the provisions of §§ 91-1-15, 91-1-27 and 91-1-29 and therefore his claim of heirship was not barred by the statute of limitations of § 91-1-15(3)(c). The fact that the claimant did not precisely state that he was the "illegitimate" or "born-out-of-wedlock" son, as opposed to simply declaring himself to be "the son," was a matter of semantics which made no difference; the indication that he was the sole surviving heir was sufficiently clear. Wash v. McIntosh, 566 So. 2d 1208 (Miss. 1990).

A party may combine a suit to determine heirship with a suit to contest a will. Dees v. Estate of Moore, 562 So. 2d 109, 1990 Miss. LEXIS 257 (Miss. 1990).

Section 91-1-15(3)(c), which requires that an action seeking adjudication of paternity be filed within 90 days after the first publication of notice to creditors, does not require that notice be given within the 90-day period. An out-of-wedlock child who brought a claim for heirship after her father's death complied with the filing requirement by petitioning to be appointed administratrix and seeking to be declared the sole and only heir-at-law, where other persons, who would inherit from the decedent, had actual knowledge of the claim of heirship as evidenced by their hiring of an attorney, and, before the estate was closed, were properly allowed by the court to file their claim. The summons by publication requirement of § 91-1-29 was met, and all parties were given their day in court. This procedure sufficiently complied with the notice requirements of § 91-1-27 and § 91-1-29, and the filing requirements of § 91-1-15(3)(c). Perkins v. Thompson, 551 So. 2d 204, 1989 Miss. LEXIS 360 (Miss. 1989).

When mother of decedent's alleged illegitimate child moved to intervene in case brought under Federal Employers Liability Act, it was incumbent on her to file petition in chancery court under § 91-1-27 and proceed under § 91-1-29, and intervention should have been denied because these statutes had not been followed; where parties agreed for circuit judge to hear issue of paternity on merits, case would not be reversed because wrong court decided issue; on merits, circuit judge was correct in dismissing proposed intervention because there was no clear and convincing evidence that decedent was child's natural father. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

Provided paternity is established as required by §§ 91-1-27 and 91-1-29, "children" under Federal Employers Liability Act means illegitimate as well as legitimate children. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

Illegitimate child has right to inherit in father's wrongful death claim, but such claim must be asserted and established by clear and convincing evidence under §§ 91-1-27 and 91-1-29. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

Administrator who, in his petition for administration, represented that decedent's half-sister was the sole heir, even though he had actual knowledge that decedent had a living natural daughter, made a serious misrepresentation to the court, and, if the misrepresentation was determined to be a fraud on the court, the administrator would be removed. Campbell v. Gregory, 493 So. 2d 950 (Miss. 1986).

Although appointment of plaintiff as administrator of brother's estate may have violated Mississippi Code Annotated § 91-1-27, wrongful death action would not be dismissed where such appointment could be attacked in Chancery Court of De Soto County, Mississippi, which court appointed plaintiff as administrator. McGowan v. Riley, 628 F. Supp. 1087, 1985 U.S. Dist. LEXIS 15478 (N.D. Miss. 1985).

This section [Code 1942, § 1270] and Code 1942, § 1271 must be read as in pari materia. Shepherd v. Townsend, 249 Miss. 383, 163 So. 2d 746, 1964 Miss. LEXIS 401 (Miss. 1964).

The statute providing for the determination of the heirs of a decedent by a chancery court applies where the decedent has left a will bequeathing in part or entirely his estate to his nearest of kin according to the laws of descent and distribution. Shepherd v. Townsend, 249 Miss. 383, 163 So. 2d 746, 1964 Miss. LEXIS 401 (Miss. 1964).

Where there was no proceeding under this statute for the determination of heirs, one not a party to the administration of a decedent's estate may question its distribution even after expiration of the two years within which the statute permits the opening of an account. Shepherd v. Townsend, 249 Miss. 383, 163 So. 2d 746, 1964 Miss. LEXIS 401 (Miss. 1964).

Adopted children of decedent are not necessary parties to suit to adjudicate heirship, unless decree of adoption made adopted children lawful heirs of adopting parent. Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22, 1949 Miss. LEXIS 305 (Miss. 1949).

In a suit under this section [Code 1942, § 1270] to have themselves declared heirs, brother and sister of deceased, allegedly insane at time of marriage, could not after his death collaterally attack marriage which was merely voidable. White v. Williams, 159 Miss. 732, 132 So. 573, 1931 Miss. LEXIS 82 (Miss. 1931).

Defendant held to have complete remedy at law relative to who was heir, in death action against it by administrator. Craft v. Homochitto Lumber Co., 141 Miss. 156, 106 So. 440, 1925 Miss. LEXIS 226 (Miss. 1925).

RESEARCH REFERENCES

Am. Jur.

23 Am. Jur. 2d, Descent and Distribution § 25 et seq.

CJS.

26B C.J.S., Descent and Distribution § 10-12 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-1-29. Heirs to be cited to appear.

All the heirs at law and next of kin of said deceased who are not made parties plaintiff to the action shall be cited to appear and answer the same. And in addition thereto a summons by publication shall be made addressed to "The heirs at law of ________, Deceased," and shall be published as other publications to absent or unknown defendants, and the cause shall be proceeded with as other causes in chancery, and upon satisfactory evidence as to death of said person and as to the fact that the parties to said suit are his sole heirs at law, the court shall enter a judgment that the persons so described be recognized as the heirs at law of such a decedent, and as such be placed in possession of his estate. And said judgment shall be evidence in all the courts of law and equity in this state that the persons therein named are the sole heirs at law of the person therein described as their ancestor.

HISTORY:

Codes, 1906, § 2791; Hemingway's 1917, § 311; 1930, § 360; 1942, § 1271; Laws, 1991, ch. 573, § 127, eff from and after July 1, 1991.

Cross References —

Publication of summons for unknown heirs, see § 13-3-25.

Applicability of this section to inheritances by and from illegitimates, see § 91-1-15.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Decedent's administratrix's failure to notify decedent's illegitimate children of the administration of their father's estate resulted in tolling of the 90-day statute. In re Estate of Thomas, 883 So. 2d 1173, 2004 Miss. LEXIS 1269 (Miss. 2004).

When the individual asserting heirship claims to be an illegitimate child, the necessary parties include those blood relations of the decedent that would be the decedent's heirs at law should the illegitimate's claim of paternity fail; these persons are necessary parties even if they would be completely excluded from inheritance if the paternity claim is proven. Balsara v. Adams (In re Estate of Brewer), 755 So. 2d 1108, 1999 Miss. App. LEXIS 255 (Miss. Ct. App. 1999).

A claimant's timely filing, 3 days after the decedent's death, of a sworn Petition for Letters of Administration in which he alleged that he was the son and sole surviving heir of the deceased, sufficiently complied with the provisions of §§ 91-1-15, 91-1-27 and 91-1-29 and therefore his claim of heirship was not barred by the statute of limitations of § 91-1-15(3)(c). The fact that the claimant did not precisely state that he was the "illegitimate" or "born-out-of-wedlock" son, as opposed to simply declaring himself to be "the son," was a matter of semantics which made no difference; the indication that he was the sole surviving heir was sufficiently clear. Wash v. McIntosh, 566 So. 2d 1208 (Miss. 1990).

A party may combine a suit to determine heirship with a suit to contest a will. Dees v. Estate of Moore, 562 So. 2d 109, 1990 Miss. LEXIS 257 (Miss. 1990).

Section 91-1-15(3)(c), which requires that an action seeking adjudication of paternity be filed within 90 days after the first publication of notice to creditors, does not require that notice be given within the 90-day period. An out-of-wedlock child who brought a claim for heirship after her father's death complied with the filing requirement by petitioning to be appointed administratrix and seeking to be declared the sole and only heir-at-law, where other persons, who would inherit from the decedent, had actual knowledge of the claim of heirship as evidenced by their hiring of an attorney, and, before the estate was closed, were properly allowed by the court to file their claim, the summons by publication requirement of § 91-1-29 was met, and all parties were given their day in court. This procedure sufficiently complied with the notice requirements of § 91-1-27 and § 91-1-29, and the filing requirements of § 91-1-15(3)(c). Perkins v. Thompson, 551 So. 2d 204, 1989 Miss. LEXIS 360 (Miss. 1989).

Illegitimate child has right to inherit in father's wrongful death claim, but such claim must be asserted and established by clear and convincing evidence under §§ 91-1-27 and 91-1-29. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

Provided paternity is established as required by §§ 91-1-27 and 91-1-29, "children" under Federal Employers Liability Act means illegitimate as well as legitimate children. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

When mother of decedent's alleged illegitimate child moved to intervene in case brought under Federal Employers Liability Act, it was incumbent on her to file petition in chancery court under § 91-1-27 and proceed under § 91-1-29, and intervention should have been denied because these statutes had not been followed; where parties agreed for circuit judge to hear issue of paternity on merits, case would not be reversed because wrong court decided issue; on merits, circuit judge was correct in dismissing proposed intervention because there was no clear and convincing evidence that decedent was child's natural father. Ivy v. Illinois C. G. R. Co., 510 So. 2d 520, 1987 Miss. LEXIS 2619 (Miss. 1987).

This section [Code 1942, § 1271] must be read as in pari materia with Code 1942, § 1270. Shepherd v. Townsend, 249 Miss. 383, 163 So. 2d 746, 1964 Miss. LEXIS 401 (Miss. 1964).

RESEARCH REFERENCES

Am. Jur.
23 Am. Jur. 2d, Descent and Distribution § 41 et seq.

CJS.
26B C.J.S., Descent and Distribution § 26 et seq.

Law Reviews.
Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-1-31. Judgment as to descent of property cannot be assailed collaterally except for fraud.

A judgment so rendered as provided in Section 91-1-29 shall not be assailed collaterally, except for fraud, and shall be binding and conclusive upon all persons cited to appear from the date of its rendition, and upon all persons whomsoever from and after the expiration of two (2) years from the date on which the same was rendered, saving to minors and persons of unsound mind, the right to re-open said cause within one (1) year after attaining majority or being restored to sanity. A judgment so rendered shall thereupon be filed, recorded and indexed by the chancery clerk of the county where rendered in the general deed records of said county, just as if it were a deed of conveyance from said decedent to his heirs at law. And a certified copy of such judgment may likewise be filed, recorded and indexed in any other county where the decedent owned land at the date of his death.

HISTORY:
Codes, 1906, § 2792; Hemingway's 1917, § 312; 1930, § 361; 1942, § 1272; Laws, 1991, ch. 573, § 128, eff from and after July 1, 1991.

Cross References —
Saving of rights of infant when his real estate is sold or conveyed, see § 11-5-115.

Limitation of actions on domestic judgments generally, see §§ 15-1-43, 15-1-57.

Ratification of debt contracted during infancy, see § 15-3-11.

Proceedings pertaining to trusts and estates, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
An action alleging that funds distributed to a decedent's son under a prior decree which adjudicated the intestate distribution of the decedent's estate, were "wrongfully inherited" pursuant to § 91-1-25 because the decedent's son willfully caused the decedent's death, was barred by § 91-1-31. Johnson v. Howell, 592 So. 2d 998, 1991 Miss. LEXIS 986 (Miss. 1991).

Judgment or decree obtained by fraud is void, and may be cancelled or enjoined in a court of equity. Weems v. Vowell, 122 Miss. 342, 84 So. 249, 1920 Miss. LEXIS 438 (Miss. 1920).

RESEARCH REFERENCES

Am. Jur.
23 Am. Jur. 2d, Descent and Distribution § 65.

CJS.
26B C.J.S., Descent and Distribution §§ 154-157.

Law Reviews.
Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

CHAPTER 3.

UNIFORM SIMULTANEOUS DEATH LAW

Sec.

91-3-1. How chapter cited.
91-3-3. Construction.
91-3-5. Disposition of property in absence of evidence of survivorship.
91-3-7. Beneficiaries of another person's disposition of property.
91-3-9. Joint tenants or tenants by the entirety.
91-3-11. Insurance policies or contracts.
91-3-13. Chapter not to apply to persons dying before effective date.
91-3-15. Provision in will, etc., rendering chapter inapplicable.

§ 91-3-1. How chapter cited.

This chapter may be cited as the Uniform Simultaneous Death Law.

HISTORY:

Codes, 1942, § 479-08; Laws, 1956, ch. 214, § 8, eff from and after July 1, 1956.

Comparable Laws from other States —

Alabama: Code of Ala. §§ 43-7-1 through 47-7-8.

Alaska: Alaska Stat. § 13.12.702.

Arizona: A.R.S. § 14-2702.

Arkansas: A.C.A. §§ 28-10-201 through 28-10-212.

District of Columbia: D.C. Code §§ 19-501 through 19-509.

Georgia: O.C.G.A. §§ 53-10-1 through 53-10-6.

Guam: 15 Guam Code Ann. §§ 1301 through 1309.

Idaho: Idaho Code § 15-2-613.

Indiana: Burns Ind. Code Ann. §§ 29-2-14-1 through 29-2-14-8.

Iowa: Iowa Code §§ 633.523 through 635.529.

Kansas: K.S.A. §§ 58-708 through 58-718.

Kentucky: K.R.S. §§ 397.1001 through 397.1009.

Maine: 18 A.M.R.S. § 2-805.

Maryland: Md. Courts and Judicial Proceedings Code Ann. §§ 10-801 through 10-807.

Montana: Mont. Code Anno. § 72-2-712.

Nebraska: R.R.S. Neb. §§ 30-121 through 30-128.

Nevada: Nev. Rev. Stat. Ann. §§ 135.010 through 135.090.

New Hampshire: R.S.A. §§ 563:1 through 563:11.

New Jersey: N.J. Stat. §§ 3B:6-1 through 3B:6-7.

Ohio: O.R.C. Ann. § 2105.31 et seq.

Oklahoma: 58 Okl. St. §§ 1001 through 1008.

Oregon: O.R.S. §§ 112.570 through 112.590.

Rhode Island: R.I. Gen. Laws §§ 33-2-1 through 33-2-9.

South Carolina: S.C. Code Ann. 62-1-501 through 62-1-508.

Tennessee: Tenn. Code Ann. §§ 31-3-101 through 31-3-105.

Vermont: 14 V.S.A. §§ 621 through 627.

Virginia: Va. Code Ann. §§ 64.2-2200 through 64.2-2208.

Washington: Rev. Code Wash. § 11.05A.010 et seq.

West Virginia: W. Va. Code §§ 42-5-1 through 42-5-10.

Wyoming: Wyo. Stat. §§ 2-13-101 through 2-13-107.

RESEARCH REFERENCES

ALR.

Construction, application, and effect of Uniform Simultaneous Death Act. 39 A.L.R.3d 1332.

Am. Jur.

Am. Jur. 2d Desk Book, Doc. No. 129, jurisdictions adopting Uniform Simultaneous Death Law.

Practice References.

Bickel and Flannery, Living Trusts: Forms and Practice (Matthew Bender).

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LexisNexis® CD – Estate Planning Package (CD-Rom) (LexisNexis).

Murphy's Will Clauses: Annotations and Forms with Tax Effects (Matthew Bender).

§ 91-3-3. Construction.

This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact the Uniform Simultaneous Death Law.

HISTORY:

Codes, 1942, § 479-07; Laws, 1956, ch. 214, § 7, eff from and after July 1, 1956.

§ 91-3-5. Disposition of property in absence of evidence of survivorship.

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.

HISTORY:

Codes, 1942, § 479-01; Laws, 1956, ch. 214, § 1, eff from and after July 1, 1956.

Cross References —

Presumption of death from long continued absence, see § 13-1-23.

JUDICIAL DECISIONS

1. In general.

No presumption as to survivorship as between persons killed in a common disaster arises under the Mississippi Uniform Simultaneous Death Act, Miss. Code Ann. §§ 91-3-1 through 91-3-15, nor is there a presumption of simultaneous death; the burden of proof is on the party whose claim depends on survivorship to establish the fact. Miller v. Miller (In re Estate of Miller), 840 So. 2d 703, 2003 Miss. LEXIS 116 (Miss. 2003).

Neither the Mississippi slayer's statute, Miss. Code Ann. § 91-1-5, or the Mississippi Uniform Simultaneous Death Act, Miss. Code Ann. §§ 91-3-1 through 91-3-15 acted to entitle the estate of a wife who was killed by her husband in a murder-suicide to a child's share of the husband's estate; husband's son by a previous marriage was the husband's sole heir-at -law. Miller v. Miller (In re Estate of Miller), 840 So. 2d 703, 2003 Miss. LEXIS 116 (Miss. 2003).

RESEARCH REFERENCES

ALR.

Construction, application, and effect of Uniform Simultaneous Death Act. 39 A.L.R.3d 1332.

Am. Jur.

22A Am. Jur. 2d, Death §§ 258, 259.

Practice References.

Young, Trial Handbook for Mississippi Lawyers § 19:18.

CJS.

25A C.J.S., Death §§ 7, 16, 17.

§ 91-3-7. Beneficiaries of another person's disposition of property.

Where two (2) or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.

HISTORY:
Codes, 1942, § 479-02; Laws, 1956, ch. 214, § 2, eff from and after July 1, 1956.

§ 91-3-9. Joint tenants or tenants by the entirety.

Where there is no sufficient evidence that two (2) joint tenants have died otherwise than simultaneously the property so held shall be distributed one half (½) as if one had survived and one half (½) as if the other had survived. If there are more than two (2) joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

HISTORY:
Codes, 1942, § 479-03; Laws, 1956, ch. 214, § 3, eff from and after July 1, 1956.

§ 91-3-11. Insurance policies or contracts.

Where the insured and the beneficiary in a policy of life or accident insurance have died and there is insufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

HISTORY:
Codes, 1942, § 479-04; Laws, 1956, ch. 214, § 4, eff from and after July 1, 1956.

§ 91-3-13. Chapter not to apply to persons dying before effective date.

This chapter shall not apply to the distribution of the property of a person who has died before July 1, 1956.

HISTORY:
Codes, 1942, § 479-05; Laws, 1956, ch. 214, § 5, eff from and after July 1, 1956.

§ 91-3-15. Provision in will, etc., rendering chapter inapplicable.

This chapter shall not apply in the case of wills, living trusts, deeds, contracts of insurance or other contracts wherein provision has been made for distribution of property different from the provisions of this chapter.

HISTORY:
Codes, 1942, § 479-06; Laws, 1956, ch. 214, § 6, eff from and after July 1, 1956.

RESEARCH REFERENCES

ALR.

Wills: construction of provision as to which of two or more parties shall be deemed the survivor in case of death simultaneously, in a common disaster, or within a specified period of time. 40 A.L.R.3d 359.

CHAPTER 5.

WILLS AND TESTAMENTS

Sec.
91-5-1. Who may execute; signature; attestation.
91-5-3. Revocations.
91-5-5. Children born after making of the will.
91-5-7. Bequests not to lapse in certain cases.
91-5-9. Devise to witness void.
91-5-11. Devise or bequest to trustee.
91-5-13. Creditor competent witness to will.
91-5-15. Nuncupative wills.
91-5-17. Parties in interest to nuncupative will to be cited.
91-5-19. Noncupative will not to be proven after six months unless reduced to writing.
91-5-21. Members of armed forces and mariners at sea excepted.
91-5-23. Provision for husband or wife to be in bar.
91-5-25. Right of spouse to renounce will; form of renunciation; right to intestate share.
91-5-27. Effect of no provision for husband or wife.
91-5-29. Effect of wife or husband having separate estate.
91-5-31. Repealed.
91-5-33. Person who kills another not to take under his will.
91-5-35. Will devising real property admitted to probate as muniment of title only; rights of interested parties unaffected.

§ 91-5-1. Who may execute; signature; attestation.

Every person eighteen (18) years of age or older, being of sound and disposing mind, shall have power, by last will and testament, or codicil in writing, to devise all the estate, right, title and interest in possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, of, in, or to lands, tenements, hereditaments, or annuities, or rents charged upon or issuing out of them, or goods and chattels, and personal estate of any description whatever, provided such last will and testament, or codicil, be signed by the testator or testatrix, or by some other person in his or her presence and by his or her express direction. Moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two (2) or more credible witnesses in the presence of the testator or testatrix.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (14); 1857, ch. 60, art. 34; 1871, § 2388; 1880, § 1262; 1892, § 4488; 1906, § 5078; Hemingway's 1917, § 3366; 1930, § 3550; 1942, § 657; Laws, 1970, ch. 324, § 1; Laws, 1973, ch. 314, § 1, eff from and after passage (approved March 14, 1973).

Cross References —

Definition of term "will," see § 1-3-59.

Recording of wills, see § 9-5-137.

Descent and distribution generally, see § 91-1-1 et seq.

Proof of wills by handwriting, see § 91-7-7.

Release of powers of appointment, see § 91-15-1 et seq.

Criminal offense of alteration, destruction, or secretion of wills, see § 97-9-77.

Criminal offense of forgery of record of will, see § 97-21-45.

Criminal offense of forgery or counterfeiting of will, see § 97-21-63.

Applicability of Mississippi Rules of Civil Procedure to proceedings which are subject to the provisions of Title 91, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. What interests are devisable.
3. Establishment of lost or destroyed will.
4. Reformation or revocation.
5. Construction of wills.
6. —Lapsed or void devises; property not devised by will.
7. Effect of mistake.
8. Testamentary capacity.
9. —Determination; generally.
10. —Sufficiency.
11. —Undue influence.
12. Execution, in general.
13. —Codicil.
14. Signature or subscription.
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16. —Validity; particular circumstances.
17. —Presence of witnesses.
18. Particular instruments as valid testamentary instruments.
19. Holographic wills.
20. —Date requirement.
21. —Reference to extrinsic documents.
22. —Construction.
23. —Particular instruments as valid holographic wills.
24. Probate; requirement, generally.
25. —Practice and procedure.
26. —Evidence.
27. — —Admissibility.
28. —Burden of proof.

1. In general.

Denial by a chancery court of the payment of attorney fees in a will contest was proper because testators did not have the authority in Mississippi to require unsuccessful will contestants to pay attorney fees for their adversaries, as there was no statutory law permitting it. Parker v. Benoist, 160 So. 3d 198, 2015 Miss. LEXIS 113 (Miss. 2015).

Competent person may dispose of property by will in any manner not prohibited by law. Parker v. Broadus, 128 Miss. 699, 91 So. 394, 1922 Miss. LEXIS 152 (Miss. 1922).

Right to devolve property by will and rights thereunder are statutory. Woodville v. Pizzati, 119 Miss. 442, 81 So. 127, 1919 Miss. LEXIS 22 (Miss. 1919).

Statute upon wills and testaments authorizes every person sui juris to devise all his estate, real or personal, of any description whatever, and such a will unless broken by heirs or renounced by the widow governs the entire disposition of his estate. McGaughey v. Eades, 78 Miss. 853, 29 So. 516, 1901 Miss. LEXIS 132 (Miss. 1901).

2. What interests are devisable.

A testator cannot, by will, dispose of property which he or she placed, during his or her lifetime, in a validly created joint tenancy account with rights of survivorship. A subsequent will does not destroy the joint tenancy and does not terminate that tenancy and divest the corpus of it into the estate of the testator. In re Will & Estate of Strange, 548 So. 2d 1323, 1989 Miss. LEXIS 431 (Miss. 1989).

A person of sound and disposing mind whose property has been placed under conservatorship may execute a valid will and may do so without the knowledge of the conservator or the permission of the court. Lee v. Lee, 337 So. 2d 713, 1976 Miss. LEXIS 1588 (Miss. 1976).

This statute authorizes devises of all interests in real estate, whether present or future. Hemphill v. Mississippi State Highway Com., 245 Miss. 33, 145 So. 2d 455, 1962 Miss. LEXIS 529 (Miss. 1962).

A testator has the right to devise or bequeath all of the property which he may have, not only at the time the will is executed, but any that he may thereafter acquire and own at the time of his death. Milton v. Milton, 193 Miss. 563, 10 So. 2d 175, 1942 Miss. LEXIS 131 (Miss. 1942).

A will does not operate as substitution of legatees as beneficiaries in testator's life policy payable to his executors, administrators or assigns. Magee v. Bank of Hattiesburg & Trust Co., 134 Miss. 126, 98 So. 541, 1923 Miss. LEXIS 243 (Miss. 1923).

Under this section [Code 1942, § 657] one may devise land acquired after the will. McRae v. Lowery, 80 Miss. 47, 31 So. 538, 1902 Miss. LEXIS 225 (Miss. 1902).

3. Establishment of lost or destroyed will.

The evidence was sufficient to rebut the presumption that a testator revoked a will which was known to have been made and was kept in a locked drawer of the testator's desk, but which was not found upon his death, where the testator had a close and affectionate relationship with his daughter who was the sole beneficiary under the will, he talked to people about his will and told them that he was leaving his entire estate to his daughter, there was nothing in the record suggesting that he had changed his mind, the desk in which the will was kept was subject to entry by others, and there was evidence that someone had entered the house and the desk area after the testator died and emptied the contents of filing cabinet drawers. Matter of Berry v. Smith, 584 So. 2d 400 (Miss. 1991).

The trial court properly set aside a jury verdict finding that the decedent's lost or destroyed will had been properly executed where there was neither direct nor secondary evidence that the alleged lost or destroyed will was ever signed, witnessed, and executed according to law. Gaston v. Gaston, 358 So. 2d 376, 1978 Miss. LEXIS 2527 (Miss. 1978).

Although there was no direct proof that the testatrix had destroyed the will, proof showing that the will was in her possession when last seen and that it could not be found after her death, together with other evidence, sustained the chancellor's finding that complainant's proof was insufficient to establish the existence of the alleged lost or destroyed will at the time of testatrix's death, or to overcome the presumption that the will had been destroyed by the testatrix during her lifetime with the intention of revoking it. James v. Barber, 244 Miss. 234, 142 So. 2d 21, 1962 Miss. LEXIS 443 (Miss. 1962).

Failure to locate an instrument apparently alleged to have revoked a lost will of which an admittedly true copy was produced, coupled with evidence that the devisee named had for years devoted himself to fulfillment of an oral agreement with the testator, sustained establishment of the lost will. Denson v. Denson, 203 Miss. 146, 33 So. 2d 311, 1948 Miss. LEXIS 242 (Miss. 1948).

To establish destroyed will, interested parties must establish date thereof, attesting witnesses, and whether wholly or partly written and subscribed in testator's genuine handwriting. Didlake v. Ellis, 158 Miss. 816, 131 So. 267, 1930 Miss. LEXIS 112 (Miss. 1930).

Personal property not disposed of by will is distributed under statute of descent and distribution. Eaton v. Broaderick, 101 Miss. 26, 57 So. 298, 1911 Miss. LEXIS 95 (Miss. 1910).

4. Reformation or revocation.

Any instrument expressly revoking a will must meet the requirements of Mississippi Code § 91-5-1. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

The mental capacity required to revoke a will is the same as that required to make one. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Courts cannot add to or take from a will or make a new will for the parties. Williams v. Gooch, 208 Miss. 223, 44 So. 2d 57, 1950 Miss. LEXIS 241 (Miss. 1950).

Courts will not by construction add to the terms of the will. Jones v. Carey, 122 Miss. 244, 84 So. 186, 1920 Miss. LEXIS 432 (Miss. 1920).

Courts can no more supply defects in the execution of a will or codicil than they can add to or subtract from its words. Johnson v. Delome Land & Planting Co., 77 Miss. 15, 26 So. 360, 1899 Miss. LEXIS 55 (Miss. 1899).

No court can decree the reformation and correction of a will. Schlottman v. Hoffman, 73 Miss. 188, 18 So. 893, 1895 Miss. LEXIS 105 (Miss. 1895).

5. Construction of wills.

Where the residuary clause of a will devised the remainder of a trust to named persons, "my heirs at law, including", following which all the testator's heirs were named with the exception of his two older children by his first wife, and the will was carefully drawn, with gifts made to the testator's heirs at law in other parts of the will without naming them individually, it was evident that the testator intended under the residuary clause to make a gift to certain named individuals, rather than to a class. Eubanks v. Lucius, 257 So. 2d 215, 1972 Miss. LEXIS 1451 (Miss. 1972).

A will is to be construed so as to avoid intestacy if that can be reasonably done considering the language employed in the instrument and the circumstances confronting the testator at the time of execution. Martin v. Eslick, 229 Miss. 234, 90 So. 2d 635, 1956 Miss. LEXIS 604 (Miss. 1956).

Where, at the time a testator made his will, he owned property designated in the will as the "home place," which he afterwards disposed of, and acquired other property which answered the same description, and owned it at his death, the will must be applied thereto, unless something therein indicates that the testator does not so intend. Milton v. Milton, 193 Miss. 563, 10 So. 2d 175, 1942 Miss. LEXIS 131 (Miss. 1942).

The term "reversion" is not used in a restricted sense, but includes the right of reversion which would mature into an estate upon the happening of an uncertain future contingency the same as upon the happening of an event which at the time of the execution of a conveyance is certain to occur in the future. Ricks v. Merchants Nat'l Bank & Trust Co., 191 Miss. 323, 2 So. 2d 344, 1941 Miss. LEXIS 128 (Miss. 1941).

A possibility of reverter owned by a testatrix at the time of her death passed to her residuary devisee, and did not descend according to the laws of descent and distribution. Ricks v. Merchants Nat'l Bank & Trust Co., 191 Miss. 323, 2 So. 2d 344, 1941 Miss. LEXIS 128 (Miss. 1941).

A will does not operate as substitution of legatees as beneficiaries in testator's life policy payable to his executors, administrators or assigns. Magee v. Bank of Hattiesburg & Trust Co., 134 Miss. 126, 98 So. 541, 1923 Miss. LEXIS 243 (Miss. 1923).

This section [Code 1942, § 657] is not qualified by Code 1942, § 700, defining the word "written." Sheehan v. Kearney, 82 Miss. 688, 21 So. 41, 1903 Miss. LEXIS 99 (Miss. 1896).

6. —Lapsed or void devises; property not devised by will.

Under this section [Code 1942, § 657] and Code 1942, § 831, a residuary devise or bequest carries everything the testator has attempted but failed to dispose of, unless a contrary intention appears from the will. Oliphant v. Skelton, 230 Miss. 518, 93 So. 2d 181, 1957 Miss. LEXIS 392 (Miss. 1957).

Where a testatrix devised to her two daughters a life interest in certain real estate with the remainder over to their descendants, bequeathed one dollar each to her other children, and devised to the same two daughters the rest of her estate, both real and personal, the two daughters, having no children, took a fee to the realty. Oliphant v. Skelton, 230 Miss. 518, 93 So. 2d 181, 1957 Miss. LEXIS 392 (Miss. 1957).

Remainder goes to heirs, where devise thereof is void. Wheat v. Lacals, 139 Miss. 300, 104 So. 73, 1925 Miss. LEXIS 130 (Miss. 1925).

Devise lapsed because of death of devisee descends as undisposed of property. Marx v. Hale, 131 Miss. 290, 95 So. 441, 1922 Miss. LEXIS 289 (Miss. 1923).

7. Effect of mistake.

A mistaken belief of an extrinsic fact, even though it causes a testator to make a will differently than he otherwise would had he known the truth, is insufficient to avoid a will. In re Estate of Vick, 557 So. 2d 760, 1989 Miss. LEXIS 434 (Miss. 1989).

8. Testamentary capacity.

Trial court did not err in granting beneficiaries summary judgment in a will contest because they established a prima facie case that the will was valid and that the testator possessed testamentary capacity, and the son failed to rebut the prima facie case with any summary-judgment evidence that there was a genuine issue for trial; the will was admitted to probate, and the beneficiaries attached affidavits of individuals that testified as to the testator's mental capacity. Froemel v. Estate of Froemel, — So. 3d —, 2018 Miss. App. LEXIS 230 (Miss. Ct. App. May 8, 2018).

The mental capacity required to revoke a will is the same as that required to make one. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Capacity relates to time of execution; temporary insanity not presumed to continue until execution of will. Scally v. Wardlaw, 123 Miss. 857, 86 So. 625, 1920 Miss. LEXIS 89 (Miss. 1920).

Sound and disposing mind of testator is essential. Gathings v. Howard, 122 Miss. 355, 84 So. 240, 1920 Miss. LEXIS 439 (Miss. 1920).

One of testamentary capacity may execute will from any motive. Moore v. Parks, 122 Miss. 301, 84 So. 230, 1920 Miss. LEXIS 437 (Miss. 1920).

Where on an issue devisavit vel non the question is whether the testator was sane or insane the contestants are not required to prove his sanity beyond all reasonable doubt. King v. Rowan, 82 Miss. 1, 34 So. 325, 1903 Miss. LEXIS 158 (Miss. 1903).

9. —Determination; generally.

The granting of an instruction in a will contest which advised the jury that it could not return a verdict for the proponent if it found that the testatrix was in any way influenced, or guided, or directed, about, or in, or concerning the signing, publication, or the securing of attestation of the will by any person whomsoever, was reversible error, since it is undue influence that vitiates a will; a testator has the right to be directed and assisted in the preparation of his will, and may have any aid or direction which he desires. Estate of Briscoe v. Briscoe, 255 So. 2d 313, 1971 Miss. LEXIS 1284 (Miss. 1971).

In determining whether the chancellor should have granted a peremptory instruction on the question of testamentary capacity the court must assume as true all the facts which contestant's evidence fairly tends to establish, together with all reasonable inferences to be deduced therefrom. Lowrey v. Wilkinson, 222 Miss. 201, 75 So. 2d 643, 1954 Miss. LEXIS 640 (Miss. 1954).

In a proceeding devisavit vel non involving a will which was challenged on the ground of lack of testamentary capacity and of undue influence, the submission to jury of both issues was in error where the evidence as to undue influence was insufficient. Thames v. Thames, 233 Miss. 24, 100 So. 2d 868, 1958 Miss. LEXIS 352 (Miss. 1958).

In will contest on ground of lack of testamentary capacity and existence of undue influence, it should be assumed that general verdict of jury against validity of will was on ground of want of testamentary capacity which was amply supported by evidence, where proof was insufficient to sustain verdict on ground of undue influence. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

In will contest on ground of lack of testamentary capacity and existence of undue influence, judgment on general verdict against validity of will returned under instruction as to burden of proponents to establish both testamentary capacity and lack of undue influence by preponderance of evidence will not be reversed because of refusal to grant peremptory instruction on question of undue influence where there is sufficient evidence on question of want of testamentary capacity to warrant jury's finding. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

In will contest on ground of lack of testamentary capacity and existence of undue influence, general verdict of jury on issue of whether or not proponents have shown by preponderance of evidence both testamentary capacity and lack of undue influence at time of execution of will should be sustained if proponents fail to prove either or both of these necessary requirements. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

It is the general rule that the nature and extent of testator's estate may be shown on issue of testamentary capacity and undue influence. Norman v. Norman, 196 Miss. 597, 18 So. 2d 130, 1944 Miss. LEXIS 239 (Miss. 1944).

Unnatural or unreasonable provisions not sufficient to show incapacity, but may be considered with other evidence. Scally v. Wardlaw, 123 Miss. 857, 86 So. 625, 1920 Miss. LEXIS 89 (Miss. 1920).

Occasional fits of anger not connected with the will do not show incapacity. Moore v. Parks, 122 Miss. 301, 84 So. 230, 1920 Miss. LEXIS 437 (Miss. 1920).

10. —Sufficiency.

Children failed to come forward with evidence to overcome the prima facie case of their father's testamentary capacity; the father's physical weakness did not preclude him from making a will, and a bare and unexplained assertion that his mental state was "terrible" did not raise a jury issue as to his mental capacity. The father's agreement that he was no longer up to the task of campaigning for elected office did not amount to an admission or even evidence that he lacked the mental capacity to sign a will, and all testimony relevant to his mental capacity on March 2, 2009, indicated that he had sufficient capacity to execute both a general power of attorney and a will. Callington v. Gardner (In re Estate of Gardner), 228 So. 3d 921, 2017 Miss. App. LEXIS 95 (Miss. Ct. App.), cert. denied, 232 So. 3d 785, 2017 Miss. App. LEXIS 360 (Miss. Ct. App. 2017).

Son showed a prima facie case of the son's deceased mother's testamentary capacity because (1) the son's subscribing witness's testimony to such capacity had more weight than contrary testimony of daughters who were not present at the will's execution, and (2) further testimony on the mother's condition rebutted the contrary testimony. Terry v. Phelps (In re Estate of Phelps), 180 So. 3d 835, 2015 Miss. App. LEXIS 642 (Miss. Ct. App. 2015).

Trial court properly granted a directed verdict and a peremptory instruction in favor of will proponents on the issue of whether the testator of a will had testamentary capacity to make a will at the time it was executed as the attesting witnesses indicated that the testator had capacity at the moment of the will's execution despite claims by the will contestants that the testator was lethargic, jaundiced, on medication, and hallucinating on days prior to signing the will. Noblin v. Burgess, 54 So. 3d 282, 2010 Miss. App. LEXIS 287 (Miss. Ct. App. 2010), cert. denied, 53 So. 3d 760, 2011 Miss. LEXIS 109 (Miss. 2011).

Trial court erred by giving the issue of the decedent's testamentary capacity to the jury where there was no indication that the decedent lacked testamentary capacity; on the contrary, she left her estate to the natural objects of her bounty, the decedent was capable of determining the property disposition that she wished, and she was cognizant of the nature of her actions. McClendon v. McClendon (In re Estate of Pigg), 877 So. 2d 406, 2003 Miss. App. LEXIS 851 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 875 (Miss. 2004).

A court did not err in finding that a testator had the necessary mental capacity to make a valid will where the proponent of the will made a prima facie case of testamentary capacity by placing into evidence the will of the decedent, the affidavits of subscribing witnesses, and the judgment admitting the will to probate, and the only evidence offered by the contestant was the testimony of an adverse witness whose testimony did not indicate that the testator lacked testamentary capacity. In re Will of Wasson, 562 So. 2d 74, 1990 Miss. LEXIS 249 (Miss. 1990).

The evidence in a will contest action brought by the testator's son was insufficient to establish testamentary incapacity where 2 witnesses stated that the testator had made statements of hostility toward his son and cursed him, neither witness could identify the reason for this attitude and expressed the belief that the son tried untiringly to please his father and obey him, and one witness testified to the testator's drinking alcoholic beverages, "some" every day. In re Last Will & Testament of Dickey, 542 So. 2d 903, 1989 Miss. LEXIS 194 (Miss. 1989).

Chancellor's finding that the testatrix lacked mental capacity to make a will was supported by a number of witnesses who had testified as to the testatrix's mental and physical condition on the day before the day after the alleged execution of the will, and it further appeared that for the three days involved the testatrix's condition was continuous. Kelker v. Jordan, 228 Miss. 847, 89 So. 2d 858, 1956 Miss. LEXIS 573 (Miss. 1956).

On issue of testamentary capacity, it is for serious consideration of jury as to whether or not it is either natural or rational that testatrix should devise to sister and nephew half interest in home occupied by husband, when testatrix has ample personal assets to provide for them to extent greater than value of undivided interest devised in residence. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

It is neither unnatural nor evidence of abnormality that testatrix in her will should favor widowed sister, who was not in as good financial circumstances as other members of family and also her nephew who had lived in her home for many years. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

It cannot be said that an eccentric old man was not in one of his admitted periods of calm and discretion at the time he executed a will when at that time he made intelligent and solicitous inquiry as to the contents and import of the will. Ward v. Ward, 203 Miss. 32, 33 So. 2d 294, 1948 Miss. LEXIS 227 (Miss. 1948).

Testator's disposition of his property to certain nephews and nieces to the exclusion of other nephews and nieces and an incompetent brother, was natural and just and did not, of itself, show lack of testamentary capacity or undue influence, where beneficiaries resided near testator, worked with and assisted him in the operation of his farm, and cared for testator during illness. Norman v. Norman, 196 Miss. 597, 18 So. 2d 130, 1944 Miss. LEXIS 239 (Miss. 1944).

Chancellor's finding of testamentary capacity reversed where will showed such capacity lacking and will made in contemplation of suicide. Johnson v. Stansell, 94 Miss. 923, 48 So. 619, 1909 Miss. LEXIS 356 (Miss. 1909).

11. —Undue influence.

In a will contest amongst siblings, the proponent and beneficiary was unable to overcome the presumption of undue influence because, inter alia, the beneficiary was substantially involved in the procurement of the will and paid the costs of the will's execution, and the testator, who was the siblings' mother, was not aware of her total assets and their worth, was totally dependent on the beneficiary to handle her finances, and did not seek advice from a person disconnected to the beneficiary. Thomas v. Thomas, 122 So. 3d 111, 2013 Miss. App. LEXIS 512 (Miss. Ct. App. 2013).

Finding that the decedent had the requisite mental capacity when he executed his power of attorney was appropriate because the presumption of any undue influence was rebutted; although the decedent's friend was aware of the decedent's deteriorating health, the friend, along with his family, acted unselfishly to lend his support to the decedent. Further, the record indicated that the decedent was aware of his assets and he controlled his own finances. Mitchell v. Poynor (In re Estate of Hall), 32 So. 3d 506, 2009 Miss. App. LEXIS 331 (Miss. Ct. App. 2009), cert. denied, 31 So. 3d 1217, 2010 Miss. LEXIS 187 (Miss. 2010).

Where appellants' sole evidence that a will was procured by appellee's undue influence over his father was testimony from appellee's ex-wife, who had no first-hand knowledge and testified only as to conversations she allegedly had with appellee, and her testimony was fully refuted by appellee, appellants failed to meet their burden to show undue influence. Hensley v. Harris, 870 So. 2d 1227, 2003 Miss. App. LEXIS 791 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 419 (Miss. 2004).

A daughter failed to overcome the presumption of undue influence arising from her father's execution of a will devising all of his property to her where the father had previously executed a will devising the property to all of his children, the father developed a dislike of all of his children except the daughter within two years after the daughter moved in with the father to care for him after he suffered a stroke, the daughter did nothing to discourage the unwarranted ill will which her father developed towards her brothers and sisters, she took control of the father's financial affairs and initiated the preparation of the second will by contacting a lawyer of her selection, she stayed in the waiting room of the lawyer's office while the will was being executed, she paid the lawyer at the father's request by writing a check from the father's account, and the execution of the will was kept secret by the father and the daughter, though all matters concerning the father had previously been discussed by all the children and all of them had participated in making decisions which concerned his well being and financial affairs. In re Estate of Woodall, 593 So. 2d 471, 1992 Miss. LEXIS 2 (Miss. 1992).

The test for rebutting a presumption of undue influence has been modified and no longer requires the independent advice of a competent person, but instead requires a showing of the grantor's "independent consent and action." Marsalis v. Lehmann, 566 So. 2d 217, 1990 Miss. LEXIS 532 (Miss. 1990).

One of the many ways of effecting undue influence upon a testator is by misrepresentation of fact; the misrepresentation may be made with the deliberate intent to deceive, knowing full well that it is false, as well as recklessly made without regard to its truth or falsity. In order to set aside a will resulting solely from the misrepresentation of a beneficiary, it must first be established that the representation was not true and actually influenced the testator to make a will he or she would not otherwise have made, that but for the misrepresentation by the beneficiary, the will would have been entirely different. In re Estate of Vick, 557 So. 2d 760, 1989 Miss. LEXIS 434 (Miss. 1989).

There was sufficient evidence of undue influence exercised upon a testatrix, in the absence of which she would not have executed the will she made which left an undivided ½ interest in property owned by the testatrix and her husband to their daughters, where one of the testatrix's daughters made persistent efforts to get the testatrix to secure for her some interest in the property, the daughter constantly badgered the testatrix when she was well advanced in years and in failing health, the daughter played a material part in convincing the testatrix that her husband had devised all his real property to their sons, and the testatrix's only reason for executing the will was her conviction that her husband was devising all his property to the sons and it was her desire to treat all the children equally. In re Estate of Vick, 557 So. 2d 760, 1989 Miss. LEXIS 434 (Miss. 1989).

An attorney did not overcome the presumption of undue influence over an elderly couple with whom he had entered into an oral arrangement under which couple made the attorney a signatory of their bank account with the authority to write checks for their needs in the event they became incapacitated and with the attorney being entitled to the balance of the account upon the couples' death where the attorney failed to advise the couple to secure independent advice and counsel, even though the arrangement was accomplished without any intent on the part of the attorney to commit any wrongful act. Lowrey v. Last Will & Testament of Smith, 543 So. 2d 1155, 1989 Miss. LEXIS 185 (Miss. 1989).

Although testatrix' will was prepared by an independent attorney personally employed by her for that purpose, evidence established that the will under which her regular attorney was the principal beneficiary had been procured by the exercise of undue influence upon testatrix by him. Holland v. Traylor, 227 So. 2d 829 (Miss. 1969).

In the absence of proof of an actual attempt to deceive the testator, his mistaken belief that the principal devisee was his son would have been insufficient to show undue influence. Provenza v. Provenza, 201 Miss. 836, 29 So. 2d 669, 1947 Miss. LEXIS 453 (Miss. 1947).

Jury may consider disposition of property, confidential relations, and mental and physical conditions of testator in determining undue influence; jury are sole judges as to undue influence. Isom v. Canedy, 128 Miss. 64, 88 So. 485, 1921 Miss. LEXIS 293 (Miss. 1921).

Undue influence may be made out by circumstantial evidence. Jamison v. Jamison, 96 Miss. 288, 51 So. 130, 1909 Miss. LEXIS 56 (Miss. 1909).

12. Execution, in general.

Chancery court properly granted summary judgment to a testator's siblings in their contest to the testator's will because the ninth page of the will naming a friend of the testator as the sole beneficiary of her estate failed to meet the statutory requirements of a valid codicil or holographic will where it constituted a separate document from the first eight pages of the will (it was typed in a different font style and size than the rest of the will and contained its own separate signature line), the will failed to incorporate it by reference, and there was no evidence that the testator signed the ninth page in the presence of two credible witnesses or that she published or acknowledged it as her will in the presence of witnesses. Murakami v. Young (In re Will of Massingale), 199 So. 3d 710, 2016 Miss. App. LEXIS 539 (Miss. Ct. App. 2016).

Although a testator did not affix her initials in the margins of the first two pages of her four-page will, the will was validly executed because there was evidence the testator actually signed the will in the presence of two attesting witnesses. Thomas v. Thomas, 122 So. 3d 111, 2013 Miss. App. LEXIS 512 (Miss. Ct. App. 2013).

The chancery court correctly denied probate to a document offered as the will of a decedent, where the document was neither wholly written and subscribed by the testator nor attested by two or more credible witnesses in the presence of the testator as required by § 91-5-1, but was entirely typewritten, signed by the decedent, and had a certificate of a notary public that it had been "sworn to and subscribed before me" followed by the signature and seal of the notary. The history of will contests in Mississippi supports the view that the requirements that there be two attesting witnesses to a will and, moreover, that it be attested by them in the presence of the testator, and that such attestation be evidenced by the affixation of their signatures to document, are indispensable safeguards of the integrity of testimentary documents. Batchelor v. Powers, 348 So. 2d 776, 1977 Miss. LEXIS 2108 (Miss. 1977).

Where a testator in his will clearly expressed a desire that his estate be held together, and it was evident that his intent could be followed only by execution of the trust recommended by the testator in his will, the form of the trust attached to the will was mandatory, and it was proper that the trust was admitted to probate and established, notwithstanding that the testator's words in the will attaching a draft of his plans for the trust, and recommending it as a guide, were merely precatory. Farmer v. Broadhead, 230 So. 2d 779, 1970 Miss. LEXIS 1561 (Miss. 1970).

As a general rule of law, courts tend to sustain a testamentary document as having been legally executed if it is possible to do so consistent with statutory requirements. Lyle v. Shannon, 228 So. 2d 594 (Miss. 1969).

Ordinarily, substantial compliance with statutory formalities in the execution of a will is sufficient in the absence of a suggestion of fraud, deception, undue influence or mental incapacity. Lyle v. Shannon, 228 So. 2d 594 (Miss. 1969).

It is the requisite to a valid will that it be executed as prescribed by statute. Boyles Coffee Co. v. Anderson, 218 So. 2d 843, 1969 Miss. LEXIS 1621 (Miss. 1969).

No matter how earnestly one may desire and intend to make a will, a paper, although fully intended by the maker to be a will, is ineffective and invalid unless its execution meets statutory requirements. Boyles Coffee Co. v. Anderson, 218 So. 2d 843, 1969 Miss. LEXIS 1621 (Miss. 1969).

The purpose of statutes prescribing formalities for the execution of wills is not to restrict the power of testator to dispose of his property, but it is to guard against mistakes, impositions, undue influences, fraud, deception, etc., which would divert the property of the testator from those intended by him or her to inherit same. Boyles Coffee Co. v. Anderson, 218 So. 2d 843, 1969 Miss. LEXIS 1621 (Miss. 1969).

Although the intention of the testator is paramount in the construction of wills, the search for the testator's intention does not begin until there is a will executed in accordance with the requirements of this section [Code 1942, § 657]. In re Estate of King, 203 So. 2d 581, 1967 Miss. LEXIS 1383 (Miss. 1967).

An instrument executed by a husband and wife which purported to be their last will and testament but which was not witnessed by two subscribing witnesses and was neither wholly in the handwriting of each, nor wholly in the handwriting of either, was invalid under the provisions of this section [Code 1942, § 657]. Seab v. Seab, 203 So. 2d 478, 1967 Miss. LEXIS 1373 (Miss. 1967).

A will was not executed within the requirements of this section [Code 1942, § 657] where it appeared that after the witnesses, who were in a different room, had signed the instrument and the testatrix's name had been signed thereto, it was then carried into the room of the testatrix who merely touched the pen. Kelker v. Jordan, 228 Miss. 847, 89 So. 2d 858, 1956 Miss. LEXIS 573 (Miss. 1956).

Methods of executing will, and who may execute one, are defined by statute. Didlake v. Ellis, 158 Miss. 816, 131 So. 267, 1930 Miss. LEXIS 112 (Miss. 1930).

Publication and attestation of will may be by construction. Green v. Pearson, 145 Miss. 23, 110 So. 862, 1927 Miss. LEXIS 130 (Miss. 1927).

The writing of a will by a witness, at the request of the deceased, and embodying therein the disposition the deceased desired to make of his property, and the signing of the will by the deceased, was a sufficient declaration by the latter that the paper he had signed was his last will and testament, it being unnecessary for him to so declare in appropriate words. Green v. Pearson, 145 Miss. 23, 110 So. 862, 1927 Miss. LEXIS 130 (Miss. 1927).

Duly attested will need not be dated. Lee v. Stewart, 139 Miss. 287, 104 So. 89, 1925 Miss. LEXIS 139 (Miss. 1925).

Where there was a good faith effort to execute will, no technical construction should be allowed to defeat its purpose. Better v. Hirsch, 115 Miss. 614, 76 So. 555, 1917 Miss. LEXIS 239 (Miss. 1917).

If it appears from the face of a writing testamentary in its character that a contemplated voyage and the dangers incident thereto were merely the occasion of its execution, and that the testator's death while on the voyage was not made a condition upon which its validity depended, it will be operative and may be probated after his return and subsequent death. In re Redhead's Estate, 83 Miss. 141, 35 So. 761 (Miss. 1904).

13. —Codicil.

Failure to execute codicil as required of will rendered it invalid but did not affect the will. Hawkins v. Duberry, 101 Miss. 17, 57 So. 919, 1911 Miss. LEXIS 140 (Miss. 1912).

14. Signature or subscription.

The Chancellor made no error in submitting the issue to the jury of whether there was compliance with § 91-5-1, where contestants of a will specifically charged that the signature to the will was not the testator's, where proponents, in their answer, denied all such allegations, where all witnesses for the proponents and all evidence offered on their behalf indicated that the testator had signed the will without assistance, and where the proponents changed their testimony only after overwhelming evidence was offered by the contestants that, at the very least, the testator, who was 88 years old at the time the will was executed, was assisted in making her signature. Webster v. Kennebrew, 443 So. 2d 850, 1983 Miss. LEXIS 3056 (Miss. 1983).

A certificate of deposit payable to a decedent "P.O.D. (two named persons)" failed as a testamentary disposition by the decedent, since, among other things, it was neither in the handwriting of the decedent, nor signed by him, and did not otherwise conform to § 91-5-1. Rand v. Moore, 414 So. 2d 885, 32 U.C.C. Rep. Serv. (CBC) 1539, 1981 Miss. LEXIS 2466 (Miss. 1981).

A will was not executed within the requirements of this section [Code 1942, § 657] where it appeared that after the witnesses, who were in a different room, had signed the instrument, and the testatrix's name had been signed thereto, it was then carried into the room of the testatrix who merely touched the pen. Kelker v. Jordan, 228 Miss. 847, 89 So. 2d 858, 1956 Miss. LEXIS 573 (Miss. 1956).

This section [Code 1942, § 657] does not require the testator to sign in the presence of the witnesses. Phifer v. McCarter, 222 Miss. 415, 76 So. 2d 258, 1954 Miss. LEXIS 659 (Miss. 1954).

Any signature or mark signed by the testator, or by another in his presence and at his express direction, to the will, as and for his completed signature, and acknowledged and adopted by him as such at the time, in the presence of subscribing witnesses, is a sufficient signing. Wallace v. Harrison, 218 Miss. 153, 65 So. 2d 456, 1953 Miss. LEXIS 525 (Miss. 1953).

In a will contest, that the testatrix's name, which appeared beside her mark, was written there at her request, did not establish the invalidity of the will. Wallace v. Harrison, 218 Miss. 153, 65 So. 2d 456, 1953 Miss. LEXIS 525 (Miss. 1953).

The words "sign" and "subscribe" in this section [Code 1942, § 657] are not synonymous but are used in different senses. Baker v. Baker's Estate, 199 Miss. 388, 24 So. 2d 841, 1946 Miss. LEXIS 208 (Miss. 1946).

The section [Code 1942, § 657] is not qualified by Code 1942, § 700. A testator, though able to write, is not required to write his name to his will, but he may sign by mark. Sheehan v. Kearney, 82 Miss. 688, 21 So. 41, 1903 Miss. LEXIS 99 (Miss. 1896).

Where the testator consents to have his hand guided by another in signing his will, it is sufficient. Watson v. Pipes, 32 Miss. 451, 1856 Miss. LEXIS 227 (Miss. 1856).

15. Attestation.

Judgment which rejected the probate of the decedent's alleged last will and testament was affirmed because the witnesses each asserted that he had not witnessed a will, but a power of attorney; Miss. Code Ann. § 91-5-1 required attesting witnesses to a will know the purpose of their attestation. In re Estate of Griffith, 30 So. 3d 1190, 2010 Miss. LEXIS 159 (Miss. 2010).

The chancery court correctly denied probate to a document offered as the will of a decedent, where the document was neither wholly written and subscribed by the testator nor attested by two or more credible witnesses in the presence of the testator as required by § 91-5-1, but was entirely typewritten, signed by the decedent, and had a certificate of a notary public that it had been "sworn to and subscribed before me" followed by the signature and seal of the notary. The history of will contests in Mississippi supports the view that the requirements that there be to attesting witnesses to a will and, moreover, that it be attested by them in the presence of the testator, and that such attestation be evidence by the affixation of their signatures to document, are indispensable safeguards of the integrity of testamentary documents. Batchelor v. Powers, 348 So. 2d 776, 1977 Miss. LEXIS 2108 (Miss. 1977).

Although this section [Code 1942, § 657] states that a will, not wholly written and subscribed by the testator, must be attested by two or more creditable witnesses, the section means that witnesses must be competent rather than credible. Wallace v. Harrison, 218 Miss. 153, 65 So. 2d 456, 1953 Miss. LEXIS 525 (Miss. 1953).

One of the purposes of having witnesses of the will is to determine the capacity of the testator to make the will. Cowart v. Cowart, 211 Miss. 459, 51 So. 2d 775, 1951 Miss. LEXIS 376 (Miss. 1951).

The publication and attestation of a will may be by construction. One may speak by his actions as well as by word of mouth. Green v. Pearson, 145 Miss. 23, 110 So. 862, 1927 Miss. LEXIS 130 (Miss. 1927).

Will signed by one attesting witness before signature by testatrix held valid. Gordon v. Parker, 139 Miss. 334, 104 So. 77, 1925 Miss. LEXIS 132 (Miss. 1925).

Witness must be satisfied with maker's testamentary capacity. Smith v. Young, 134 Miss. 738, 99 So. 370, 1924 Miss. LEXIS 303 (Miss. 1924).

It was the purpose of the statute in requiring two witnesses to attest the will to have more than the mere signatures of two persons to the will. Maxwell v. Lake, 127 Miss. 107, 88 So. 326, 1921 Miss. LEXIS 193 (Miss. 1921).

It was the duty of the attesting witnesses, under the statute, to observe and see that the will was executed by the testator, and that he had capacity to execute the will. Maxwell v. Lake, 127 Miss. 107, 88 So. 326, 1921 Miss. LEXIS 193 (Miss. 1921).

"Attested" is broader than "subscribed." Maxwell v. Lake, 127 Miss. 107, 88 So. 326, 1921 Miss. LEXIS 193 (Miss. 1921).

Word "credible" is synonymous with "competent." Swanzy v. Kolb, 94 Miss. 10, 46 So. 549, 1908 Miss. LEXIS 2 (Miss. 1908).

16. —Validity; particular circumstances.

Chancellor erred in upholding a lease assignment that purported to convey the lessor's rights to the assignee upon the lessor's death because while the lease agreement acted as a testamentary document, it did not constitute a valid will and failed to validly assign the lessor's rights to the assignee where there was no indication that the lessor was of "sound and disposing mind," that the document represented a will, or that the lessees met any of the statutory requirements of attesting witnesses. Estate of Greer v. Ball, 218 So. 3d 1196, 2016 Miss. App. LEXIS 259 (Miss. Ct. App. 2016), aff'd, 218 So. 3d 1136, 2017 Miss. LEXIS 219 (Miss. 2017).

Chancery court properly determined that a decedent's will was invalid because the will was only signed by the decedent and a notary; therefore, the will lacked the proper attestation and as a result the decedent died intestate. Lockhart (In re Estate of Thomas) v. Wilson, 962 So. 2d 141, 2007 Miss. App. LEXIS 500 (Miss. Ct. App. 2007).

In a will contest, it was error for the trial court to permit the jury to take into consideration the suspension of a license to practice law for mental aberration of the attesting witness, which occurred a little over 4 years subsequent to the execution of the last will and testament, since that matter of itself would not determine the competence of the witness, and competence, not credibility, is the test. Estate of Briscoe v. Briscoe, 255 So. 2d 313, 1971 Miss. LEXIS 1284 (Miss. 1971).

Although under Code 1942, § 498 the testimony of only one living witness is sufficient to establish a will's proper execution, proof of two signatures of witnesses is required to prove due execution where the witnesses to a will are deceased. Estate of Willis v. Willis, 207 So. 2d 348, 1968 Miss. LEXIS 1609 (Miss. 1968).

The affidavits of two subscribing witnesses to a will were sufficient for the probate thereof in common form. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

Will was sufficiently attested where one of two witnesses took testator's acknowledgment instead of signing as a witness. Bolton v. Bolton, 107 Miss. 84, 64 So. 967, 1914 Miss. LEXIS 53 (Miss. 1914).

Will was sufficiently attested where one witness signed on separate sheet of paper which was folded together with will. Bolton v. Bolton, 107 Miss. 84, 64 So. 967, 1914 Miss. LEXIS 53 (Miss. 1914).

Devise to witness is void, but witness is competent to establish residue of will. Swanzy v. Kolb, 94 Miss. 10, 46 So. 549, 1908 Miss. LEXIS 2 (Miss. 1908).

17. —Presence of witnesses.

Where one of the witnesses to a will, a non-lawyer, helped prepare the will, had known the testator for more than 25 years, was fully aware of the testator's motives for disinheriting all but one of his children, and could testify as to the testator's capacity for executing the will, and the second witness testified that the testator seemed fully capable of executing the will, it was properly held valid; that the will was prepared by a non-lawyer did not invalidate it. Hensley v. Harris, 870 So. 2d 1227, 2003 Miss. App. LEXIS 791 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 419 (Miss. 2004).

The attestation of a will that occurred outside the testator's physical presence was invalid, notwithstanding that the attesting witness was the draftsman of the will and that his long time familiarity with the testator and his handwriting provided him with the assurances that the document was indeed the will of the testator. McDevitt v. McDevitt (In re Estate of McDevitt), 755 So. 2d 1125, 1999 Miss. App. LEXIS 273 (Miss. Ct. App. 1999).

A purported will did not meet the statutory requirements of an attested instrument where the document, which was entirely handwritten, only contained decedent's purported signature in the opening paragraph, where none of the three witnesses to the document saw, read, or heard the entire document, where no page of the document except the last was signed by a witness, and where no evidence showed that any witness had observed decedent affix her signature on the document or had heard her acknowledge that she had at any time signed it. Jay v. Thrash, 380 So. 2d 1273 (Miss. 1980).

A telephone conversation between the testator and one of the witnesses to the will, in which the witness first asked the testator whether he had signed the will and received an affirmative reply prior to the witness' attestation, did not constitute the necessary "presence" of the witness to the signing for purposes of validating the will; the purpose of signing in the presence of the testator is to allow the testator to know that the witnesses are attesting the testator's will and not another document, that the witnesses will know the same, that imposition or fraud is thus prevented by precluding the substitution of another will in place of that signed by the testator, and that the witnesses will be reasonably satisfied that the testator is of sound and disposing mind and capable of making a will. In re Will of Jefferson, 349 So. 2d 1032, 1977 Miss. LEXIS 2174 (Miss. 1977).

A will was not executed within the requirements of this section [Code 1942, § 657] where it appeared that after the witnesses, who were in a different room, had signed the instrument, and the testatrix's name had been signed thereto, it was then carried into the room of the testatrix who merely touched the pen. Kelker v. Jordan, 228 Miss. 847, 89 So. 2d 858, 1956 Miss. LEXIS 573 (Miss. 1956).

Where the testator signed his will at the end and exhibited it to two witnesses telling them it was his will and requesting them to sign, and one of the witnesses read the will in the presence of the testator and the other witness after which both witnesses attached their signatures in testator's presence, the will was valid. Phifer v. McCarter, 222 Miss. 415, 76 So. 2d 258, 1954 Miss. LEXIS 659 (Miss. 1954).

The necessity of two witnesses in the making of a will has no application to proof of a promise to make a will. Boggan v. Scruggs, 200 Miss. 747, 29 So. 2d 86, 1947 Miss. LEXIS 358 (Miss. 1947), overruled, Talbert v. Ellzey, 203 Miss. 612, 35 So. 2d 628, 1948 Miss. LEXIS 313 (Miss. 1948).

Subscribing witnesses to wills are not required to sign in the presence of each other. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

Subscribing witnesses to wills are not required to see the testator sign the will, but is enough if testator produces the will, declares it to be his will, and states that signature appended thereto is his and that he wrote it. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

Evidence of subscribing witness that testatrix told him that instrument was her will, that she had signed it and wanted him to sign it as a witness, and that he did so in her presence, and testimony of other witness who did not sign in presence of other subscribing witness and was not present when other witness signed, that testatrix told him instrument was her will and requested him to sign it as a witness, was sufficient to authorize admission of will to probate in solemn form. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

A request to sign a will as a witness, made in the presence of the testator by one intrusted with the preparation of the will, is equivalent to a request by the testator, and it is sufficient that enough is said and done in the presence and with the knowledge of the testator to make the witnesses understand that he desires them to know that the paper is his will, and that they are to be the witnesses thereto. Green v. Pearson, 145 Miss. 23, 110 So. 862, 1927 Miss. LEXIS 130 (Miss. 1927).

Where a testator did not sign his will in the presence of one of the witnesses, did not declare his signature, did not identify the paper or signature, and did not declare it to be his will, it was improper to instruct the jury that the will as duly and legally executed. Maxwell v. Lake, 127 Miss. 107, 88 So. 326, 1921 Miss. LEXIS 193 (Miss. 1921).

Will duly attested by two witnesses is valid although third witness signed when other two were not present. Gore v. Ligon, 105 Miss. 652, 63 So. 188, 1913 Miss. LEXIS 245 (Miss. 1913).

Attestation held sufficient where testator directed another to sign his name for him to the will and then sign it as witness, and afterwards exhibited it to two other persons stating it was his will and having them sign as witnesses. Miller v. Miller, 96 Miss. 526, 51 So. 210, 1910 Miss. LEXIS 164 (Miss. 1910).

18. Particular instruments as valid testamentary instruments.

Will was properly found to be invalid because, while stating an intent to distribute the testator's property, the will did not designate a beneficiary. Swilley v. Estate of LeBlanc (In re Estate of Regan), 179 So. 3d 1155, 2015 Miss. App. LEXIS 179 (Miss. Ct. App.), cert. denied, 179 So. 3d 1137, 2015 Miss. LEXIS 577 (Miss. 2015).

The words on a certificate of deposit "payable on death" were testamentary in character and constituted an attempt to make a negotiable instrument a will, thus requiring compliance with this section. In re Collier, 381 So. 2d 1338, 1980 Miss. LEXIS 1933 (Miss. 1980).

An instrument executed in the manner required by the statute with the express intent of vesting the testator's property upon his death constitutes a valid testamentary disposition, no matter what name the testator may give it. Peebles v. Rodgers, 211 Miss. 8, 50 So. 2d 632, 1951 Miss. LEXIS 326 (Miss. 1951).

Provision in an instrument which intends to convey all the lands the grantor owns but the grantor to live on and control the land during his life time and on his death the instrument to take effect and the title to vest in the grantee, was testamentary in character. Peebles v. Rodgers, 211 Miss. 8, 50 So. 2d 632, 1951 Miss. LEXIS 326 (Miss. 1951).

A letter clearly indicating that its writer had her death in mind when writing it, and intended by it to make the gifts set forth therein effective when that event should occur, constituted all that is necessary to a will. In re Mey's Estate, 200 Miss. 548, 28 So. 2d 125, 1946 Miss. LEXIS 321 (Miss. 1946).

An instrument in the form of a deed which provided that the grantors were to retain possession, control and occupancy of the lands during their lifetime and then vest in the purported grantee, "but not until the death of both grantors herein, does the title pass," was testamentary in character since it did not meet the requirement of a deed that it must convey some estate effective upon delivery. Coulter v. Carter, 200 Miss. 135, 26 So. 2d 344, 1946 Miss. LEXIS 274 (Miss. 1946).

Test to determine whether instrument is will or deed set forth; instrument will operate according to legal effect regardless of denomination given by maker. Knight v. Knight, 133 Miss. 74, 97 So. 481, 1923 Miss. LEXIS 112 (Miss. 1923).

Letter not containing dispositive word is not a will, in absence of evidence that it was intended to be testamentary. Sullivan v. Jones, 130 Miss. 101, 93 So. 353, 1922 Miss. LEXIS 177 (Miss. 1922).

Letter stating writer held property to protect interest of addressee, that he would later give her a deed to it, and that it was to go to her at his death, held declaration of trust and not a will. Morgan v. Hayward, 115 Miss. 354, 76 So. 262, 1917 Miss. LEXIS 206 (Miss. 1917).

Instrument in form of deed to take effect only after grantor's death, held testamentary and not a deed. Simpson v. McGee, 112 Miss. 344, 73 So. 55, 1916 Miss. LEXIS 117 (Miss. 1916).

Letter of testatrix stating disposition to be made of her property unless she made another and more formal will, fully written and subscribed by her, was properly admitted to probate. Hewes v. Hewes, 110 Miss. 826, 71 So. 4, 1916 Miss. LEXIS 211 (Miss. 1916).

An instrument, executed by plaintiffs' father and mother, providing that in consideration of five dollars and parental love and affection, the parents sold and granted to plaintiffs, as joint owners, certain lands in fee simple, with a reservation of possession and control in the grantors so long as they should live, was not a will, but a deed, with the reservation of a life estate to the grantors. Myers v. Viverett, 110 Miss. 334, 70 So. 449, 1915 Miss. LEXIS 45 (Miss. 1915).

Instrument executed by decedent expressing her wish as to devolution of her property in case her husband survived her was not subject to probate as her will on her surviving her husband. Du Sauzay v. Du Sauzay, 105 Miss. 839, 63 So. 273, 1913 Miss. LEXIS 268 (Miss. 1913).

Letter written by decedent to brother stating how he wished his property disposed of is a valid will, if he did not deliver it but kept it and treated it as his will. Prather v. Prather, 97 Miss. 311, 52 So. 449, 1910 Miss. LEXIS 232 (Miss. 1910).

Parol agreement by two sisters that survivor should have certain personal property is not testamentary. Marshall v. Stratton, 96 Miss. 465, 51 So. 132, 1910 Miss. LEXIS 161 (Miss. 1910).

19. Holographic wills.

A purported holographic will did not comport with the execution requirements of § 91-5-1 and was therefore invalid, where the will was a one-page document with writing on the front and back, the testator's name appeared in the first line of the will but did not appear again, and the will was not signed at the end. Amyotte v. Hollingsworth, 585 So. 2d 731 (Miss. 1991).

There is no legal requirement that signature "subscribing" holographic will must be placed on the same sheet of paper as the dispositive provisions of the will, so long as the signature is at the conclusion of the will; and the part of the will containing the signature may be mechanically attached to the other part of the will so that it may be identified as a part thereof. Lyle v. Shannon, 228 So. 2d 594 (Miss. 1969).

The intent of one to make a will, insofar as probate of a holographic will is concerned, is immaterial; for the question is whether the will actually is executed in accordance with the statute of the state. Boyles Coffee Co. v. Anderson, 218 So. 2d 843, 1969 Miss. LEXIS 1621 (Miss. 1969).

With respect to holographic wills, this section [Code 1942, § 657] has been construed to mean that such a will must be signed at the end of a document, testamentary in character, which shows on its face that the testamentary purpose therein expressed is completed, that nothing which follows the signature may be considered, and if the writing does not meet the requirements of this section the intent of the writer is immaterial. In re Estate of King, 203 So. 2d 581, 1967 Miss. LEXIS 1383 (Miss. 1967).

Holographic wills must be subscribed by testator, or another for him, and nothing can be effective which appears after and beneath such signature. In re George's Estate, 208 Miss. 734, 45 So. 2d 571, 1950 Miss. LEXIS 292 (Miss. 1950).

Unsigned postscript cannot be treated as part of dispositive provisions of letter offered as holographic will. In re George's Estate, 208 Miss. 734, 45 So. 2d 571, 1950 Miss. LEXIS 292 (Miss. 1950).

Letter constituting valid holographic will must be of testamentary character, wholly written, dated, and signed by testator. Sullivan v. Jones, 130 Miss. 101, 93 So. 353, 1922 Miss. LEXIS 177 (Miss. 1922).

Holographic will must be both written and subscribed by testator. Better v. Hirsch, 115 Miss. 614, 76 So. 555, 1917 Miss. LEXIS 239 (Miss. 1917).

A letter testatmentary in its character wholly written, dated and signed by the testator is a valid holographic will although it contains a request that the person to whom it was addressed should keep its contents private. Buffington v. Thomas, 84 Miss. 157, 36 So. 1039, 1904 Miss. LEXIS 84 (Miss. 1904).

20. —Date requirement.

An otherwise valid holographic will is not invalid for lack of a date, there being nothing in the statute which requires that a holographic will be dated. Vaughn v. General Cable Corp., 248 So. 2d 798, 1971 Miss. LEXIS 1489 (Miss. 1971).

21. —Reference to extrinsic documents.

Extrinsic document, by reference made part of will wholly written by testator, must also be so written, otherwise the whole will would not be in the handwriting of testator. Hewes v. Hewes, 110 Miss. 826, 71 So. 4, 1916 Miss. LEXIS 211 (Miss. 1916).

22. —Construction.

In giving legal effect to an instrument prepared by a lay person, the court should endeavor to ascertain what the words contained in it meant to the author, not simply what they could connote to a lawyer. Thus, where a holographic will provided that if the testator preceded his wife in death "all of my earthly possessions be received by her," the use of the ordinary words "possessions" and "receive," with no further qualification or restriction, indicated that the testator intended for his wife to receive and own everything he possessed and owned. In re Estate of Dedeaux, 584 So. 2d 419, 1991 Miss. LEXIS 462 (Miss. 1991).

In a will contest, requiring construction of a holographic will, in view of evidence that the testatrix' use and enjoyment of land was not restricted and that there was no fence defining a "yard" in which a dwelling house and out buildings were located, and the testatrix had been accustomed to referring to the entire place by the term "home", her bequest of one-half the value of the "home" was not a bequest of one-half the value of the house and "yard" but of one-half the value of the entire 58.4 acres of land on which the house was situated. Carlisle v. Estate of Carlisle, 252 So. 2d 894, 1971 Miss. LEXIS 1208 (Miss. 1971).

In construing a will, consideration must be given to all the provisions of the instrument and every part thereof taken together, rather than to any particular clause, sentence or form of words, and this is particularly true with respect to a holographic will since the words and terms are those of the testator who is also the writer and the will is not therefore as subject to mistake through misunderstanding as might be the case where the instrument is drawn by one other than the testator. Carlisle v. Estate of Carlisle, 252 So. 2d 894, 1971 Miss. LEXIS 1208 (Miss. 1971).

Fact that wife's holographic will referred to a request of her husband was no more than an explanation as to her reason for devising the property as she did, and was not an expression of the testamentary intent of the husband. Carlisle v. Carlisle, 233 So. 2d 803, 1970 Miss. LEXIS 1680 (Miss. 1970).

A holographic will written and subscribed by the decedent which, after making certain specific bequests concluded with the statement, "I will finish this later," was properly admitted to probate, for the testamentary purpose as far as expressed in the will was complete. Maines v. Davis, 227 So. 2d 844, 1969 Miss. LEXIS 1372 (Miss. 1969).

The intent of one to make a will, insofar as probate of a holographic will is concerned, is immaterial; for the question is whether the will actually is executed in accordance with the statute of the state. Boyles Coffee Co. v. Anderson, 218 So. 2d 843, 1969 Miss. LEXIS 1621 (Miss. 1969).

23. —Particular instruments as valid holographic wills.

A page of a scratch pad on which appeared, in the decedent's handwriting: "Madge Do what should be done and complete my work. I will all to you." , followed by the decedent's signature and the abbreviation for Thursday, constituted a valid holographic will, though undated. Vaughn v. General Cable Corp., 248 So. 2d 798, 1971 Miss. LEXIS 1489 (Miss. 1971).

A holographic will written and subscribed by the decedent which, after making certain specific bequests concluded with the statement, "I will finish this later," was properly admitted to probate, for the testamentary purpose as far as expressed in the will was complete. Maines v. Davis, 227 So. 2d 844, 1969 Miss. LEXIS 1372 (Miss. 1969).

Letter written wholly in sender's handwriting expressing desire to give addressee interest in plantation and saying, "I want you to begin fixing things that you may get the rent for 1947," and expressing intent to enter upon negotiations for purchase of four lots, is not testamentary or dispositive, but merely expresses desire with purpose to later effectuate it, and cannot be probated as holographic will of writer. In re George's Estate, 208 Miss. 734, 45 So. 2d 571, 1950 Miss. LEXIS 292 (Miss. 1950).

A simple statement written by the signer that she gives everything she owns without bond to her sister named, which writing is kept in the signer's possession until the time of her death, is effective as a holographic will, even though the day of the month when executed is not specified by the signer who could not possibly have attained her majority during the particular month of the year shown by the writing. Estes v. Estes, 200 Miss. 541, 27 So. 2d 854, 1946 Miss. LEXIS 320 (Miss. 1946).

Instrument entirely in handwriting of deceased, with caption consisting of the name of deceased followed by the words "writing this," where no signature, date or other writing appeared underneath the last paragraph of the instrument, was inadmissible to probate as a holographic will, since the instrument was not subscribed to within the meaning of this section [Code 1942, § 657]. Words appearing at top and as caption were mere words of description and identification of the person writing the instrument and did not constitute a signature in execution of the instrument. Baker v. Baker's Estate, 199 Miss. 388, 24 So. 2d 841, 1946 Miss. LEXIS 208 (Miss. 1946).

A letter testatmentary in its character wholly written, dated and signed by the testator is a valid holographic will although it contains a request that the person to whom it was addressed should keep its contents private. Buffington v. Thomas, 84 Miss. 157, 36 So. 1039, 1904 Miss. LEXIS 84 (Miss. 1904).

An holographic will complete and perfect in itself is not invalidated because the words "my will", a mere caption, were written above it on the same sheet of paper by the hand of another than the testator. Baker v. Brown, 83 Miss. 793, 36 So. 539, 1903 Miss. LEXIS 97 (Miss. 1904).

24. Probate; requirement, generally.

Will ineffectual as instrument of title until probated. Virginia Trust Co. v. Buford, 123 Miss. 572, 86 So. 356, 1920 Miss. LEXIS 60 (Miss. 1920).

25. —Practice and procedure.

In will contest where more than one ground is asserted challenging validity of will, court should require jury to return special verdict as authorized by Mississippi Rule of Civil Procedure 49 to enable reviewing court to determine true verdict of jury and render opinion in accord. Street Medical Found. v. Watts, 475 So. 2d 819 (Miss. 1985).

Giving of jury instruction addressing issue of which nonprofit corporation is proper beneficiary under will is reversible error where primary issue presented is testatmentary capacity of testatrix, particularly where instruction is peremptory in obligating jury to find for contestant on uncontradicted facts. Matter of Street Medical Found. v. Watts, 475 So. 2d 819 (Miss. 1985).

The trial court in an action contesting a will properly refused jury instructions offered by the will proponents, where one was a "boiler plate" instruction purporting to set forth the law on who might make a will, which contained mere abstract principles of law, did not apply to the specific facts of the case, and was erroneous in that it failed to take into account § 91-5-1, and where the other instruction correctly recited the law but did not apply to the specific facts of the case. Estate of Lawler v. Weston, 451 So. 2d 739, 1984 Miss. LEXIS 1757 (Miss. 1984).

Where contestants attempt to show subsequent will was valid, instruction that if contested will was not believed by jury to be the true and last will beyond a reasonable doubt, it should be held invalid, is erroneous. Williams v. Morehead, 116 Miss. 653, 77 So. 658, 1917 Miss. LEXIS 354 (Miss. 1917).

26. —Evidence.

A person contesting a will should be allowed to examine the subscribing witnesses to the will as to all matters relevant to the will's execution and to inquire into surrounding facts and circumstances so that the court may determine if the will was properly signed and attested, if attestation be required, and if the testator was mentally competent and free of undue influence. Chapman v. Chapman, 264 So. 2d 395, 1972 Miss. LEXIS 1357 (Miss. 1972).

Presumption against intestacy is only a presumption which must yield to facts, and cannot be applied to change or write new will so as to dispose of property under a will which makes no such disposition. Williams v. Gooch, 208 Miss. 223, 44 So. 2d 57, 1950 Miss. LEXIS 241 (Miss. 1950).

In proceeding by residuary legatee to recover his share of estate, introduction in evidence of proceedings before chancery clerk in vacation admitting will to probate in common form makes out prima facie case of validity of will. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195, 1949 Miss. LEXIS 382 (Miss. 1949).

Lay witnesses are competent to testify on issue of capacity of testator to make will on date of its alleged execution where they first give facts upon which their opinions are based. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

Notwithstanding transcript, in view of entire testimony, witness held not to have said will was typewritten. Watkins v. Watkins, 142 Miss. 210, 106 So. 753, 1926 Miss. LEXIS 49 (Miss. 1926).

Testimony of subscribing witness best evidence of execution. Smith v. Young, 134 Miss. 738, 99 So. 370, 1924 Miss. LEXIS 303 (Miss. 1924).

Undue influence may be made out by circumstantial evidence. Jamison v. Jamison, 96 Miss. 288, 51 So. 130, 1909 Miss. LEXIS 56 (Miss. 1909).

27. — —Admissibility.

Where testatrix, who had a daughter named Rosalind Gwin Hutton Johnson and a granddaughter named Rosalind Gwin Hutton, devised land to "Rosalind Gwin Hutton," the will was ambiguous as to the identity of the devisee, and evidence extrinsic to the will was admissible to identify the intended devisee. Hutton v. Hutton, 233 Miss. 458, 102 So. 2d 424, 1958 Miss. LEXIS 404 (Miss. 1958).

In contest proceeding arising out of offer of letter for probate as holographic will of writer, later unsigned will prepared at writer's suggestion, letter with reference to unsigned will, circumstances surrounding preparation of documents, their contents, and action of parties with reference thereto are competent evidence upon question of whether writer intended letter as will and so considered it, and whether, in legal effect, it was will. In re George's Estate, 208 Miss. 734, 45 So. 2d 571, 1950 Miss. LEXIS 292 (Miss. 1950).

In will contest, admission in evidence of opinions of lay witnesses as to mental incapacity of testatrix to make will on date of its alleged execution followed by statement by witnesses of facts or incidents in connection with their acquaintance, association and experience with testatrix on which opinion is based is not reversible error in absence of objection interposed by proponents to expression of these opinions by witnesses for contestants on ground that they had not previously stated facts upon which their opinions were given, objection on ground that profferred testimony involved opinion of lay witness being insufficient. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

Parol evidence to effect that deceased stated that she had made her will was inadmissible on question whether alleged holographic will was intended to be and in fact was "subscribed" within the meaning of this section [Code 1942, § 657], even though parol evidence generally is competent to show whether an instrument was intended to be of testamentary character where its meaning in that behalf is not clearly shown on the face thereof, since there was no issue as to whether the instrument was testamentary in character. Baker v. Baker's Estate, 199 Miss. 388, 24 So. 2d 841, 1946 Miss. LEXIS 208 (Miss. 1946).

Evidence as to how testator acquired certain personal property about 23 years prior to making of his will is inadmissible, as too remote, on issue of testamentary capacity, especially where it is not shown that any of this property was in existence at time of testator's death. Norman v. Norman, 196 Miss. 597, 18 So. 2d 130, 1944 Miss. LEXIS 239 (Miss. 1944).

Error by trial court in excluding evidence as to timber cruise on testator's lands, in suit contesting will on grounds of undue influence and lack of testamentary capacity, did not constitute reversible error in view of other evidence admitted showing value and extent of testator's estate. Norman v. Norman, 196 Miss. 597, 18 So. 2d 130, 1944 Miss. LEXIS 239 (Miss. 1944).

Exclusion of evidence of attorney drawing will held harmless in will contest where proponents granted peremptory instruction. Isom v. Canedy, 128 Miss. 64, 88 So. 485, 1921 Miss. LEXIS 293 (Miss. 1921).

Opinion evidence that testatrix was under influence of a legatee is inadmissible. Scally v. Wardlaw, 123 Miss. 857, 86 So. 625, 1920 Miss. LEXIS 89 (Miss. 1920).

Declarations of sole beneficiary of a will shortly after testatrix's death held incompetent in will contest on ground of forgery, he being a witness in his own behalf and testifying he wrote the will. Liles v. May, 105 Miss. 807, 63 So. 217, 1913 Miss. LEXIS 252 (Miss. 1913).

Whether writing was intended as will may be shown by parol. Prather v. Prather, 97 Miss. 311, 52 So. 449, 1910 Miss. LEXIS 232 (Miss. 1910).

Declarations of testator that he would make no will held incompetent. Miller v. Miller, 96 Miss. 526, 51 So. 210, 1910 Miss. LEXIS 164 (Miss. 1910).

28. —Burden of proof.

In will contest on ground of lack of testamentary capacity and existence of undue influence, there is but a single issue-will or no will, and burden is on proponent throughout. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

Burden of proof on proponents of will as to capacity and undue influence, but they make out prima facie case by introduction of record of probate in common form. Gathings v. Howard, 122 Miss. 355, 84 So. 240, 1920 Miss. LEXIS 439 (Miss. 1920).

Proponents of will have burden of giving reasonable explanation of unnatural character of will. Jamison v. Jamison, 96 Miss. 288, 51 So. 130, 1909 Miss. LEXIS 56 (Miss. 1909).

Where on an issue devisavit vel non the question is whether the testator was sane or insane the contestants are not required to prove his sanity beyond all reasonable doubt. King v. Rowan, 82 Miss. 1, 34 So. 325, 1903 Miss. LEXIS 158 (Miss. 1903).

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Incorporation in will of extrinsic document not in existence at date of will. 3 A.L.R.2d 682.

Remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services. 7 A.L.R.2d 1166.

Power and capacity of bank to take devise or bequest. 8 A.L.R.2d 454.

Right of an administrator with the will annexed, or trustee other than the person named in the will as such, to execute power of sale conferred by will. 9 A.L.R.2d 1324.

Taking per stripes or per capita under will. 13 A.L.R.2d 1023.

Devisability of possibility of reverter, or of right of re-entry for breach of condition subsequent. 16 A.L.R.2d 1246.

Enlarged interest acquired by testator after execution of will as passing by devise or bequest. 18 A.L.R.2d 519.

Nature of remainders created by will giving life estate to spouse of testator, with remainder to be divided equally between testator's heirs and spouse's heirs. 19 A.L.R.2d 371.

Place of signature of holographic wills. 19 A.L.R.2d 926.

Codicil as validating will or codicil which was invalid or inoperative at time of its purported execution. 21 A.L.R.2d 821.

Effect of testator's attempted physical alteration of will after execution. 24 A.L.R.2d 514.

Effectiveness of nuncupative will where essential witness thereto is beneficiary. 28 A.L.R.2d 796.

Term "next of kin" used in will, as referring to those who would take in cases of intestacy under distribution statutes, or to nearest blood relatives of designated person or persons. 32 A.L.R.2d 296.

Validity and effect of promise not to make a will. 32 A.L.R.2d 370.

What passes under term "possessions" in will. 33 A.L.R.2d 550.

Codicil as reviving revoked will or codicil. 33 A.L.R.2d 922.

Interlineations and changes appearing on face of will. 34 A.L.R.2d 619.

Validity and effect of provision in will regulating or controlling beneficiary's residence. 35 A.L.R.2d 387.

Validity of will written on disconnected sheets. 38 A.L.R.2d 477.

Letter as a will or codicil. 40 A.L.R.2d 698.

"Attestation" or "witnessing" of will, required by statute, as including witnesses' subscription. 45 A.L.R.2d 1365.

What passes under term "personal estate" in will. 53 A.L.R.2d 1059.

Failure of attesting witness to write or state place of residence as affecting will. 55 A.L.R.2d 1053.

Sufficiency of publication of will. 60 A.L.R.2d 124.

Competency of named executor as subscribing witness to will. 74 A.L.R.2d 283.

Sufficiency, as to form, of signature to holographic will. 75 A.L.R.2d 895.

Effect of guardianship of adult on testamentary capacity. 89 A.L.R.2d 1120.

Requirement that holographic will be entirely in handwriting of testator as affected by appearance printed of matter or handwriting of another. 89 A.L.R.2d 1198.

Validity of will as affected by fact that witnesses signed before testator. 91 A.L.R.2d 737.

Validity of a will signed by testator with the assistance of another. 98 A.L.R.2d 824.

Validity of will signed by testator's mark, stamp, or symbol, or partial or abbreviated signature. 98 A.L.R.2d 841.

Sufficiency of testator's acknowledgment of signature from his conduct and the surrounding circumstances. 7 A.L.R.3d 317.

Wills: Testator's illiteracy or lack of knowledge of language in which will is written as affecting its validity. 37 A.L.R.3d 889.

Effect of residuary clause to pass property acquired by testator's estate after his death. 39 A.L.R.3d 1390.

Wills: when is will signed at "end" or "foot" as required by statute. 44 A.L.R.3d 701.

Change in stock or corporate structure, or split, or substitution of stock of corporation, as affecting bequest of stock. 46 A.L.R.3d 7.

Effect upon testamentary nature of document of expression therein of intention to make more formal will, further disposition of property, or the like. 46 A.L.R.3d 938.

Restrictions on transfer of corporate stock as applicable to testamentary dispositions thereof. 61 A.L.R.3d 1090.

Construction of reference in will to statute where pertinent provisions of statute are subsequently changed by amendment or repeal. 63 A.L.R.3d 603.

Partial invalidity of will: may parts of will be upheld notwithstanding failure of other parts for lack of testamentary mental capacity or undue influence. 64 A.L.R.3d 261.

Effect of doubtful construction of will devising property upon marketability of title. 65 A.L.R.3d 450.

Ademption of legacy of business or interest therein. 65 A.L.R.3d 541.

Measure of damages for breach of contract to will property. 65 A.L.R.3d 632.

Wills: separate gifts to same person in same or substantially same amounts, made in separate wills or codicils, as cumulative or substitutionary. 65 A.L.R.3d 1325.

Necessity that attesting witness realize instrument was intended as will. 71 A.L.R.3d 877.

Existence of illicit or unlawful relation between testator and beneficiary as evidence of undue influence. 76 A.L.R.3d 743.

Disposition of insurance proceeds of personal property specifically bequeathed or devised. 82 A.L.R.3d 1261.

Wills: Effect of gift to be disposed of "as already agreed" upon or the like. 85 A.L.R.3d 1181.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will. 86 A.L.R.3d 980.

Wills: condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith. 89 A.L.R.3d 984.

Effect of testamentary gift to child conditioned upon specified arrangements for parental control. 11 A.L.R.4th 940.

Validity of testamentary exercise of power of appointment by donee sane when will was executed but insane thereafter. 19 A.L.R.4th 1002.

Liability in damages for interference with expected inheritance or gift. 22 A.L.R.4th 1229.

Word "child" or "children" in will as including grandchild or grandchildren. 30 A.L.R.4th 319.

Requirement that holographic will, or its material provisions, be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting. 37 A.L.R.4th 528.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 A.L.R.4th 561.

Testamentary direction to devisee to pay stated sum of money to third party as creating charge or condition or as imposing personal liability on devisee for nonpayment. 54 A.L.R.4th 1098.

Proper execution of self-proving affidavit as validating or otherwise curing defect in execution of will itself. 1 A.L.R.5th 965.

Alzheimer's disease as affecting testamentary capacity. 47 A.L.R.5th 523.

Am. Jur.

79 Am. Jur. 2d, Wills § 47 et seq.

20A Am. Jur. Legal Forms 2d, Wills § 266:1 et seq.

9 Am. Jur. Trials, Will Contests § 15 et seq.

1 Am. Jur. Proof of Facts 2d, Mistake in the Inducement of Wills, § 5 et seq. (proof of mistake in the inducement).

2 Am. Jur. Proof of Facts 2d, Mistake in Naming or Designating Beneficiary in Will, § 6 et seq. (proof of testator's mistake in designating beneficiary in will).

6 Am. Jur. Proof of Facts 2d, Intentional Omission of Child from Will, § 8 et seq. (proof of intentional omission of child from will).

18 Am. Jur. Proof of Facts 2d 1, Mentally Disordered Testator's Execution of Will During Lucid Interval.

36 Am. Jur. Proof of Facts 2d 109, Undue Influence in Execution of Will.

40 Am. Jur. Proof of Facts 2d 339, Lack of Testamentary Capacity by Reason of Insane Delusion.

17 Am. Jur. Proof of Facts 3d 219, Alzheimer's and Multi-Infarct Dementia – Incapacity to Execute Will.

19 Am. Jur. Proof of Facts 3d 335, AIDS Dementia – Incapacity to Execute Will.

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§ 91-5-3. Revocations.

A devise so made, or any clause thereof, shall not be revocable but by the testator or testatrix destroying, canceling, or obliterating the same, or causing it to be done in his or her presence, or by subsequent will, codicil, or declaration, in writing, made and executed. Every last will and testament made when the testator or testatrix had no child living, wherein any child he or she might have is not provided for or not mentioned, if at the time of his or her death he or she have a child, or if the testator leave his wife enceinte of a child who shall be born, shall have no effect during the life of any such after-born child and shall be void unless the child die without having been married, or without leaving issue capable of inheriting, and before he or she shall have attained twenty-one years. The estate, both real and personal, so devised shall descend to such child in the same manner as if the testator or testatrix had died intestate, subject, nevertheless, to the bequests made in the last will and testament in case of the death of such child before marriage, or without issue capable of inheriting, and under the age of twenty-one years. When a testator shall leave children born and his wife enceinte, the posthumous child or children, if unprovided for by settlement and neither provided for nor disinherited, but only pretermitted, by the last will and testament, shall succeed to the same portion of the father's estate as such child or children would have been entitled to if the father had died intestate, towards raising which portion the devisees and legatees shall contribute proportionably out of the parts devised and bequeathed to them by the same will and testament.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (15); 1857, ch. 60, art. 35; 1871, § 2389; 1880, § 1263; 1892, § 4489; 1906, § 5079; Hemingway's 1917, § 3367; 1930, § 3551; 1942, § 658.

Cross References —

Limitation upon death without issue, see § 89-1-13.

Descent and distribution generally, see § 91-1-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Requirements — mental capacity.
3. —Intent to revoke.
4. By instrument of revocation.
5. By subsequent will.
6. By codicil.
7. By destruction or obliteration.
8. —Presumptive animo revocandi.
9. —Destruction of one of multiple copies.
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11. Implied revocation; generally.
12. —Subsequent inconsistent instrument.
13. Joint wills.
14. Pleading and practice.
15. Evidence — sufficiency.
16. —Parol.
17. Equity; promise not to revoke.

1. In general.

Chancellor, on remand, had to determine whether the decedent's 2001 will was validly made and executed; if the chancellor found that the 2001 will was validly made and executed, the chancellor had to re-admit the 2001 will to probate; however, if the 2001 will was not valid, then the decedent's 1973 will had to be re-admitted to probate. Woodfield v. Woodfield (In re Estate of Woodfield), 968 So. 2d 421, 2007 Miss. LEXIS 606 (Miss. 2007).

Generally, revocation of a will can be accomplished only by physical destruction of the will or by subsequent will, codicil, or declaration, in writing, made and executed. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Mississippi Code § 91-5-3 provides the only means by which a will may be expressly revoked. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Revocation of a will is a matter of intent, except in those instances in which it occurs by operation of law from a change in circumstances subsequent to the execution of the will. McCormack v. Warren, 228 Miss. 617, 89 So. 2d 702, 1956 Miss. LEXIS 555 (Miss. 1956).

Statute pertaining to revocations of wills applies only to express revocation, and has no application to an implied revocation. Holcomb v. Holcomb, 173 Miss. 192, 159 So. 564, 1935 Miss. LEXIS 194 (Miss. 1935).

This section [Code 1942, § 658] provides sole method for expressly revoking will. Minor v. Russell, 126 Miss. 228, 88 So. 633, 1921 Miss. LEXIS 29 (Miss. 1921).

2. Requirements — mental capacity.

The execution of a will in 1982, at a time when testatrix lacked testamentary capacity, did not revoke a 1980 will. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

The mental capacity required to revoke a will is the same as that required to make one. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Same degree of mentality is necessary for revocation as for making. Watkins v. Watkins, 142 Miss. 210, 106 So. 753, 1926 Miss. LEXIS 49 (Miss. 1926).

Burden of showing lack of capacity to revoke on party seeking to establish lost will. Watkins v. Watkins, 142 Miss. 210, 106 So. 753, 1926 Miss. LEXIS 49 (Miss. 1926).

3. —Intent to revoke.

In Mississippi, revocation of a duly executed will is governed by a statute, and in order to affect the revocation of a will, it is essential that it be shown in some competent manner that the testator or someone for him performed one or more of the acts specified in the statute of "destroying, cancelling, or obliterating" the will and that he did so with the intention of revoking the will. Griffith v. Movie Star of Collins, Inc., 233 So. 2d 760, 1970 Miss. LEXIS 1664 (Miss. 1970).

The intent to revoke a will is essential to the revocation by act of the testator. McCormack v. Warren, 228 Miss. 617, 89 So. 2d 702, 1956 Miss. LEXIS 555 (Miss. 1956).

In order for an act to have the effect of revoking a will the intention to revoke must clearly and unequivocally appear, so that a will is not revoked by any act of spoliation or destruction not deliberately done animo revocandi, and even where the statutory methods for revoking a will are followed by the testator, his act is ineffectual unless his intent thereby to revoke or alter the will appears. McCormack v. Warren, 228 Miss. 617, 89 So. 2d 702, 1956 Miss. LEXIS 555 (Miss. 1956).

4. By instrument of revocation.

Any instrument expressly revoking a will must meet the requirements of Mississippi Code § 91-5-1. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

In a proceeding to annul probate of will and codicil and for decree that decedent died intestate, the question whether the instrument of revocation had been executed in compliance with the requirements of the statute was a question of fact to be determined according to the proof. Kennard v. Evans, 218 Miss. 176, 65 So. 2d 285, 1953 Miss. LEXIS 528 (Miss. 1953).

Where instrument intended to revoke a codicil, which disposed of all the property of testatrix, was not signed in the presence of one of the subscribing witnesses and the witness was not informed that the instrument was a revocation of the codicil and that signature appended to the instrument was that of the testatrix, and the witness learned only from other witness that testatrix had signed the instrument, the revoking instrument was not duly executed and attested. Kennard v. Evans, 218 Miss. 176, 65 So. 2d 285, 1953 Miss. LEXIS 528 (Miss. 1953).

5. By subsequent will.

Will unambiguously stated that the testator's wife was to inherit a life estate in a home, and the will further revoked all prior wills and testaments, and the antenuptial-agreement provision leaving the testator's daughter the home was a devise, or testament, that the testator intended to revoke by the subsequent will; since the antenuptial-agreement provision was revoked by the will, the provision was void and gave the daughter no claim of ownership to the home, and the will's gift of the home to the wife controlled. Dixon v. Jones (In re Will of Jones), 138 So. 3d 205, 2014 Miss. App. LEXIS 230 (Miss. Ct. App. 2014).

The execution of a will in 1982, at a time when testatrix lacked testamentary capacity, did not revoke a 1980 will. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

A validly executed will with inconsistent provisions, but no express revocation clause, revokes an earlier will. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

In a probate contest the court properly admitted testimony concerning a 1979 will, where such testimony was probative as to whether there was a statement of revocation of a 1961 will or whether there were inconsistent devises under the two wills. Deposit Guaranty Nat'l Bank v. Cotten, 420 So. 2d 242, 1982 Miss. LEXIS 2203 (Miss. 1982).

Revocation of a will by a subsequent instrument requires the document to be in writing, made and executed; execution in this context means signing. Therefore, a properly executed will that revoked a prior holographic will was not itself revoked by the testator's re-dating of the holographic will without re-signing that will. Ramsey v. Robinson, 346 So. 2d 379, 1977 Miss. LEXIS 2528 (Miss. 1977).

A surviving wife could by a valid, subsequent will revoke her part of a joint will earlier executed with her husband. Lane v. Woodland Hills Baptist Church, 285 So. 2d 901, 1973 Miss. LEXIS 1313 (Miss. 1973).

Provision that testatrix's daughter and her son should not inherit any of the testatrix's property until five years after the death of the daughter's husband was revoked by implication by two subsequent testamentary instruments, one of which devised to the daughter certain Louisiana property without provision for the postponement of the enjoyment thereof, the other of which directed the management by trustees of the interest of the daughter and her son, also without making any provision for the postponement of the enjoyment thereof. Martin v. Eslick, 229 Miss. 234, 90 So. 2d 635, 1956 Miss. LEXIS 604 (Miss. 1956).

Where a testator made a second will which had no revoking provisions but which was inconsistent with the first will and where the sole devisee and legatee was a witness to the will and therefore ineligible to take under it, the property passed as if the deceased had died intestate. Estate of Crawford v. Crawford, 225 Miss. 208, 82 So. 2d 823, 1955 Miss. LEXIS 574 (Miss. 1955).

Revocation may be worked by inconsistent provisions of subsequent will. Wheat v. Lacals, 139 Miss. 300, 104 So. 73, 1925 Miss. LEXIS 130 (Miss. 1925).

6. By codicil.

The rule that a codicil does not work a revocation except to the precise extent that it either expressly or by necessary implication modifies the former provisions in a will was applied to a separate paper in the testator's handwriting, signed and dated after the will, found in the same envelope as the will and referring to "my formal will." Klein v. Gaines, 203 Miss. 871, 34 So. 2d 488, 1948 Miss. LEXIS 332 (Miss. 1948).

Statute pertaining to revocations of wills held not to prevent implied revocation through codicil directing sum loaned legatee by testator to be repaid or deducted from his legacy. Holcomb v. Holcomb, 173 Miss. 192, 159 So. 564, 1935 Miss. LEXIS 194 (Miss. 1935).

Codicil to will not subscribed and attested is invalid, but does not affect validity of will. Hawkins v. Duberry, 101 Miss. 17, 57 So. 919, 1911 Miss. LEXIS 140 (Miss. 1912).

7. By destruction or obliteration.

A total or partial revocation of a will by either cancellation or obliteration is authorized by this section. In re Will of Palmer, 359 So. 2d 752, 1978 Miss. LEXIS 2267 (Miss. 1978).

In Mississippi, revocation of a duly executed will is governed by a statute, and in order to affect the revocation of a will, it is essential that it be shown in some competent manner that the testator or someone for him performed one or more of the acts specified in the statute of "destroying, cancelling, or obliterating" the will and that he did so with the intention of revoking the will. Griffith v. Movie Star of Collins, Inc., 233 So. 2d 760, 1970 Miss. LEXIS 1664 (Miss. 1970).

8. —Presumptive animo revocandi.

Will presumed destroyed animo revocandi, where traced to testator and not found after death. Watkins v. Watkins, 142 Miss. 210, 106 So. 753, 1926 Miss. LEXIS 49 (Miss. 1926).

Presumption of destruction animo revocandi is overcome by showing existence after permanent incapacity. Watkins v. Watkins, 142 Miss. 210, 106 So. 753, 1926 Miss. LEXIS 49 (Miss. 1926).

9. —Destruction of one of multiple copies.

Where a will has been executed in duplicate, the destruction by testator of that copy which he retains in his possession, with intent to revoke the will, creates a presumption that the testator intends thereby to revoke the will. Phinizee v. Alexander, 210 Miss. 196, 49 So. 2d 250, 1950 Miss. LEXIS 337 (Miss. 1950).

Where there are two copies of a will, both in possession of deceased, the presumption of law would be that by the preservation of one duplicate entire the testator did not intend a revocation of these particular devises, otherwise he would have mutilated both duplicates. Phinizee v. Alexander, 210 Miss. 196, 49 So. 2d 250, 1950 Miss. LEXIS 337 (Miss. 1950).

10. —Marginal notation.

Where credible extraneous evidence to the contrary is available, marginal notations made by a testator subsequent to the execution of his will need not necessarily constitute a revocation thereof. Wiley v. Wiley, 184 So. 2d 854, 1966 Miss. LEXIS 1483 (Miss. 1966).

11. Implied revocation; generally.

Mississippi Supreme Court declined to adopt a rule of revocation of a will by divorce and to adopt a rule that a pre-divorce will was automatically or expressly revoked by a divorce accompanied by a property settlement agreement with provisions inconsistent with the terms of the pre-divorce will; on the other hand, it did acknowledge that there may be an implied revocation of a pre-divorce will in cases where there is a divorce accompanied by a property settlement agreement with provisions inconsistent with the terms of the pre-divorce will, but any document submitted by a contestant as a subsequent declaration pursuant to Miss. Code Ann. § 91-5-3 must reveal by "clear and unequivocal" evidence the testator's intention to revoke the prior will by looking to the facts and circumstances of the particular case, the terms of the will itself, the divorce decree and the property settlement, and the conduct of the parties. Hinders v. Hinders, 828 So. 2d 1235, 2002 Miss. LEXIS 312 (Miss. 2002).

Mississippi recognizes the doctrine of revocation of wills by statute, and also, in proper cases where the facts give rise to an implied revocation, by operation of law. Rasco v. Estate of Rasco, 501 So. 2d 421, 1987 Miss. LEXIS 2274 (Miss. 1987).

The doctrine of implied revocation is carefully limited to execution of conflicting deeds or other instruments; statements of the testator that he intends to revoke the will are not enough; and, generally, such statements are inadmissible if offered to show an implied revocation. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Mississippi recognizes that a will may be impliedly revoked. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Revocation of a will is a matter of intent, except in those instances in which it occurs by operation of law from a change in circumstances subsequent to the execution of the will. McCormack v. Warren, 228 Miss. 617, 89 So. 2d 702, 1956 Miss. LEXIS 555 (Miss. 1956).

Revocation of a will is a matter of intent except where it occurs by operation of law from a change in circumstances subsequent to the execution of the will. McCormack v. Warren, 228 Miss. 617, 89 So. 2d 702, 1956 Miss. LEXIS 555 (Miss. 1956).

The doctrine of implied revocation has been carefully limited in Mississippi to the execution of conflicting deeds and other instruments. In re Stoball's Will, 211 Miss. 15, 50 So. 2d 635, 1951 Miss. LEXIS 327 (Miss. 1951).

This section [Code 1942, § 658] has no application to implied revocations by operation of law, but has reference alone to express revocations which are sought to be shown in the manner stated in the statute. Hilton v. Johnson, 194 Miss. 671, 12 So. 2d 524, 1943 Miss. LEXIS 77 (Miss. 1943).

Statute pertaining to revocations of wills applies only to express revocation, and has no application to an implied revocation. Holcomb v. Holcomb, 173 Miss. 192, 159 So. 564, 1935 Miss. LEXIS 194 (Miss. 1935).

Forcefully preventing testator from changing will held not such a change in conditions or circumstances as to amount to a revocation by implication. Minor v. Russell, 126 Miss. 228, 88 So. 633, 1921 Miss. LEXIS 29 (Miss. 1921).

Doctrine of implied revocation is always recognized in Mississippi. Caine v. Barnwell, 120 Miss. 209, 82 So. 65, 1919 Miss. LEXIS 79 (Miss. 1919).

This section [Code 1942, § 658] does not prevent implied revocation. Hoy v. Hoy, 93 Miss. 732, 48 So. 903, 1908 Miss. LEXIS 169 (Miss. 1908).

12. —Subsequent inconsistent instrument.

Decedent's will was revoked by implication because the chancellor determined that the express terms of the will and the provisions of the property-settlement agreement were inconsistent; by the express terms of the property-settlement agreement, the ex-wife forfeited her interest in the Tennessee farmland; the property-settlement agreement satisfied the requirements of this statute as a subsequent declaration to the will that revoked the decedent's predivorce will and divested the ex-wife of any interest in the farmland; and the chancellor correctly found that the parties intended to settle any and all property rights against each other and that the decedent acted by implication and intent to void the previous bequests. Chaney v. Chaney (In re Estate of Chaney), 235 So. 3d 120, 2017 Miss. App. LEXIS 278 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 45 (Miss. 2018).

A divorce accompanied by property settlement did not revoke, by implication, a previously executed will where the parties continued to live together, the divorce decree or property settlement contained no proof of intent to revoke the prior testamentary instrument, and there was no showing that the property settlement was anything more than a formality to comply with the requirements of a divorce for irreconcilable differences. Rasco v. Estate of Rasco, 501 So. 2d 421, 1987 Miss. LEXIS 2274 (Miss. 1987).

Under the provisions of Code 1942, § 658 a divorce accompanied by a property settlement made by the husband to his former wife will not serve as a revocation of a prior will providing property rights or legacies for the divorced spouse, absent proof that the testator intended that the settlement should operate as a fulfillment of support rights or as an ademption of a prior-created legacy and release by the divorced spouse of all rights in the deceased's estate. McKnight v. McKnight, 267 So. 2d 315, 1972 Miss. LEXIS 1417 (Miss. 1972).

Execution of deed to property conveying it to devisee named in prior executed will covering same property operates as pro tanto revocation of will, but only to extent of property deeded and revokes will in no other particular. Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908, 1949 Miss. LEXIS 439 (Miss. 1949).

13. Joint wills.

A surviving wife could by a valid, subsequent will revoke her part of a joint will earlier executed with her husband. Lane v. Woodland Hills Baptist Church, 285 So. 2d 901, 1973 Miss. LEXIS 1313 (Miss. 1973).

14. Pleading and practice.

Burden of showing lack of capacity to revoke on party seeking to establish lost will. Watkins v. Watkins, 142 Miss. 210, 106 So. 753, 1926 Miss. LEXIS 49 (Miss. 1926).

15. Evidence — sufficiency.

The evidence was sufficient to rebut the presumption that a testator revoked a will which was known to have been made and was kept in a locked drawer of the testator's desk, but which was not found upon his death, where the testator had a close and affectionate relationship with his daughter who was the sole beneficiary under the will, he talked to people about his will and told them that he was leaving his entire estate to his daughter, there was nothing in the record suggesting that he had changed his mind, the desk in which the will was kept was subject to entry by others, and there was evidence that someone had entered the house and the desk area after the testator died and emptied the contents of filing cabinet drawers. Berry v. Smith, 584 So. 2d 400 (Miss. 1991).

Where a testator's will was found in a lock box at his bank, to which box only he had access, and where the testator's signature, but not the signatures of the witnesses, had been cut off of the bottom of the first two pages of the will apparently with scissors, but the third page with the signature of the testator and those of the witnesses, and with an attestation certificate also signed by the witnesses, was unmarred and intact, and in all other respects the will was in its original condition, the will had not been revoked. Griffith v. Movie Star of Collins, Inc., 233 So. 2d 760, 1970 Miss. LEXIS 1664 (Miss. 1970).

Although there was no direct proof that the testatrix had destroyed the will, proof that the will was in her possession when last seen and that it could not be found after her death, together with other evidence, supported finding that complainant's proof was insufficient to establish the existence of the alleged lost or destroyed will at the time of testatrix's death, or to overcome the presumption that the will had been destroyed by the testatrix during her lifetime with the intention of revoking it. James v. Barber, 244 Miss. 234, 142 So. 2d 21, 1962 Miss. LEXIS 443 (Miss. 1962).

Although a will which had last been seen in testatrix' possession was not found after her death, evidence established that the testatrix did not revoke her will and rebutted the presumption as to revocation arising due to the fact that the will could not be found upon her death, especially since it appeared that the devisees under the will were blood relatives of the testatrix, and that one, who desired to defeat the will, had access to the place where it was kept. Adams v. Davis, 233 Miss. 228, 102 So. 2d 190, 1958 Miss. LEXIS 377 (Miss. 1958).

Under evidence that testatrix might have desired to revoke her will but later changed her mind, the chancellor did not err in holding that there had been no revocation where both copies of the instrument were found in her possession at the time of death, and even though the original or ribbon copy of the instrument, which was found in the envelope with other of the testatrix' papers, was torn from the bottom upwards by five separate tears which extended to points opposite or above the testatrix' signature, it was shown that no part of the instrument was torn off, and the signature of the testatrix and subscribing witnesses were plainly legible, there were no interlineations, erasures or cancellations on the instrument, and the carbon copy thereof was not torn. McCormack v. Warren, 228 Miss. 617, 89 So. 2d 702, 1956 Miss. LEXIS 555 (Miss. 1956).

Will presumed destroyed animo revocandi, where traced to testator and not found after death. Watkins v. Watkins, 142 Miss. 210, 106 So. 753, 1926 Miss. LEXIS 49 (Miss. 1926).

16. —Parol.

Parol testimony designed to show an implied revocation is not admissible. In re Stoball's Will, 211 Miss. 15, 50 So. 2d 635, 1951 Miss. LEXIS 327 (Miss. 1951).

The statute by its very language excludes parol testimony to change a will in any respect. Hilton v. Johnson, 194 Miss. 671, 12 So. 2d 524, 1943 Miss. LEXIS 77 (Miss. 1943).

In a widow's contest of her husband's will, leaving all his property to his brothers and sisters, parol testimony of several witnesses, offered by the widow, that the husband had stated that he wanted her to have all of his property, was properly excluded as not establishing a revocation in the manner provided by this section [Code 1942, § 658]. Hilton v. Johnson, 194 Miss. 671, 12 So. 2d 524, 1943 Miss. LEXIS 77 (Miss. 1943).

17. Equity; promise not to revoke.

A breach of a contract not to revoke a will is just that a breach of contract. It is not grounds for contesting the will pertaining to the contract. Remedies, if any, of promissor's heirs lie on the contract or perhaps upon constructive trust theory. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

A contract not to revoke a will may become irrevocable, as long as the promisee performs in accordance with the contract. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

A proper rescission of a contract not to revoke a will does not revoke the will to which the contract pertains. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Where testator executes a will in compliance with an oral agreement with the devisee that the latter will render unique and necessary personal services to testator involving a substantial change in the status and manner of living of the promisee, and such services have been performed, so that a revocation of the will amounts to fraud upon the devisee rendering it impossible or impracticable to restore devisee to prior situation, equity will hold such will to be irrevocable and the rights thereunder may be established. Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730, 1946 Miss. LEXIS 202 (Miss. 1946).

RESEARCH REFERENCES

ALR.

Remarriage of woman after death of or divorce from former husband as revoking will executed during former marriage. 9 A.L.R.2d 510.

Conflict of laws respecting revocation of will. 9 A.L.R.2d 1412.

Destruction or cancelation of one copy of will executed in duplicate, as revocation of other copy. 17 A.L.R.2d 805.

Divorce or annulment as affecting will previously executed by husband or wife. 18 A.L.R.2d 697.

What constitutes fraud within statute relating to proof of will "fraudulently" destroyed during testator's lifetime. 23 A.L.R.2d 382.

Effect of testator's attempted physical alteration of will after execution. 24 A.L.R.2d 514.

Adoption of child as revoking will. 24 A.L.R.2d 1085.

Wills: revocation as affected by invalidity of some or all of dispositive provisions of later will. 28 A.L.R.2d 526.

Validity of oral promise or agreement not to revoke will. 29 A.L.R.2d 1229.

Codicil as reviving revoked will or codicil. 33 A.L.R.2d 922.

Implied revocation of will by later will or codicil. 59 A.L.R.2d 11.

Statutory revocation of will by subsequent birth or adoption of child. 97 A.L.R.2d 1044.

Revocation of will as affecting codicil and vice versa. 7 A.L.R.3d 1143.

Statute excluding testimony of one person because of death of another as applied to testimony in respect of lost or destroyed instrument. 18 A.L.R.3d 606.

Revocation of will by nontestamentary writing. 22 A.L.R.3d 1346.

Revocation of witnessed will by holographic will or codicil, where statute requires revocation by instrument of equal formality as will. 49 A.L.R.3d 1223.

Testator's failure to make new will, following loss of original will by fire, theft, or similar casualty, as constituting revocation of original will. 61 A.L.R.3d 958.

Divorce or annulment as affecting will previously executed by husband or wife. 71 A.L.R.3d 1297.

Revival, under doctrine of dependant relative revocation, of charitable bequest in will expressly revoked in later will containing same charitable bequest. 75 A.L.R.3d 877.

Disposition of insurance proceeds of personal property specifically bequeathed or devised. 82 A.L.R.3d 1261.

Marriage of testator or birth of testator's child as revoking will previously made in exercise of power of appointment. 92 A.L.R.3d 1244.

Validity of statutes or rules providing that marriage or remarriage of woman operates as revocation of will previously executed by her. 99 A.L.R.3d 1020.

Liability in damages for interference with expected inheritance or gift. 22 A.L.R.4th 1229.

Revocation of prior will by revocation clause in lost will or other lost instrument. 31 A.L.R.4th 306.

Sufficiency of evidence of nonrevocation of lost will not shown to have been inaccessible to testator – modern cases. 70 A.L.R.4th 323.

Pretermitted heir statutes: what constitutes sufficient testamentary reference to, or evidence of contemplation of, heir to render statute inapplicable. 83 A.L.R.4th 779.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, or trustee of mentally or physically incompetent testator. 84 A.L.R.4th 462.

Sufficiency of evidence of nonrevocation of lost will where codicil survives. 84 A.L.R.4th 531.

Action for tortious interference with bequest as precluded by will contest remedy. 18 A.L.R.5th 211.

Alzheimer's disease as affecting testamentary capacity. 47 A.L.R.5th 523.

Am. Jur.

79 Am. Jur. 2d, Wills § 454 et seq.

20B Am. Jur. Legal Forms 2d, Wills § 266:118 et seq., 266:288 et seq. (revocation, generally).

CJS.

95 C.J.S., Wills § 407 et seq.

§ 91-5-5. Children born after making of the will.

If a testator or testatrix, having a child or children born at the time of making and publishing his or her last will and testament, shall, at his or her death, leave a child or children born after the making and publishing such last will and testament, the child or children so after-born, if unprovided for by settlement and neither provided for nor disinherited, but only pretermitted, by the last will and testament, shall succeed to the same portion of the father's or mother's estate as such child or children would have been entitled to if the father or mother had died intestate, towards raising which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by the same will and testament, in the same manner as is provided in the case of posthumous children.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (16); 1857, ch. 60, art. 36; 1871, § 2390; 1880, § 1264; 1892, § 4490; 1906, § 5080; Hemingway's 1917, § 3368; 1930, § 3352; 1942, § 659.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Rights of after-born children.

1. In general.

In interpreting a will, as affected by this section [Code 1942, § 659], and in an effort to determine the intent of the testatrix, the court should take into consideration all of the terms and provisions of the will and the circumstances surrounding the testatrix at the time at which she executed the will. Guion v. Guion, 232 Miss. 647, 100 So. 2d 351, 1958 Miss. LEXIS 313 (Miss. 1958).

Intent is to be determined by the words of the will and by circumstances surrounding the testator, including the events and circumstances happening after the execution of the will and before the death of the testator. Guion v. Guion, 232 Miss. 647, 100 So. 2d 351, 1958 Miss. LEXIS 313 (Miss. 1958).

In a case involving an adopted child born before the execution of a will, the court need not reach the question whether this section [Code 1942, § 659] was intended to apply to adopted children born after the execution of a will since the legislature intended pretermitted children provisions to apply only to children born after the will was made. Lee v. Foley, 224 Miss. 684, 80 So. 2d 765, 1955 Miss. LEXIS 531 (Miss. 1955).

2. Rights of after-born children.

Where a mother had two living children at the time she executed her will, the fact that she devised and bequeathed all of her property to her husband manifested an intent to disinherit her children as a class, so that a child born after the execution of the will had no inheritable rights in the mother's estate. Guion v. Guion, 232 Miss. 647, 100 So. 2d 351, 1958 Miss. LEXIS 313 (Miss. 1958).

A general devise of a remainder or reversionary interest to the heirs of the testator or to his children does not comprehend a posthumous child, so as to prevent it from claiming under the statute as a child pretermitted by the will, in the absence of anything to show that the child was in the mind of the testator. Mahaffey v. First Nat'l Bank, 231 Miss. 798, 97 So. 2d 756, 1957 Miss. LEXIS 567 (Miss. 1957).

Provisions of testator's will, directing that the residue of testator's estate should be distributed into four parts, with one part each going to his wife and then living children, and devising a life estate in certain property to testator's sister and brother-in-law, with reversion to the heirs of testator's body, did not manifest an intent to deprive two children born after the execution of the will, one posthumously, of the status of pretermitted children. Mahaffey v. First Nat'l Bank, 231 Miss. 798, 97 So. 2d 756, 1957 Miss. LEXIS 567 (Miss. 1957).

Child born within 10 months after testator's death, or after time devisees must be living to take under will, takes under will; "in esse." Scott v. Turner, 137 Miss. 636, 102 So. 467, 1925 Miss. LEXIS 6 (Miss. 1925).

After-born children held to inherit interest in decedent's estate; devises and legacies held subject to proportionate contribution to make up shares of after-born children. Clark v. Clark, 126 Miss. 455, 89 So. 4, 1921 Miss. LEXIS 51 (Miss. 1921).

After-born children not provided for in will held vested with absolute title to property as if parent had died intestate. Clark v. Clark, 126 Miss. 455, 89 So. 4, 1921 Miss. LEXIS 51 (Miss. 1921).

Child born during testator's life, after making of will and not mentioned therein, there being other living children, became vested with absolute title to share in estate. Watkins v. Watkins, 88 Miss. 148, 40 So. 1001, 1906 Miss. LEXIS 150 (Miss. 1906).

RESEARCH REFERENCES

ALR.

Adoption of child as revoking will. 24 A.L.R.2d 1085.

Marriage of testator or birth of testator's child as revoking will previously made in exercise of power of appointment. 92 A.L.R.3d 1244.

Conflict of laws as to pretermission of heirs. 99 A.L.R.3d 724.

Pretermitted heir statutes: what constitutes sufficient testamentary reference to, or evidence of contemplation of, heir to render statute inapplicable. 83 A.L.R.4th 779.

Legal status of posthumously conceived child of decedent. 17 A.L.R.6th 593.

Am. Jur.

79 Am. Jur. 2d, Wills § 541 et seq.

20B Am. Jur. Legal Forms 2d, Wills, § 266:112 (provision of codicil as to bequest to child born or adopted after execution of will).

6 Am. Jur. Proof of Facts 2d, Intentional Omission of Child from Will, § 8 et seq. (proof of intentional omission of child from will).

CJS.

95 C.J.S., Wills § 440.

§ 91-5-7. Bequests not to lapse in certain cases.

Whenever any estate of any kind shall or may be devised or bequeathed by the last will and testament of any testator or testatrix to any person being a child or descendant of such testator or testatrix, and such devisee or legatee shall, during the lifetime of such testator or testatrix, die testate or intestate, leaving a child or children, or one or more descendants of a child or children, who shall survive such testator or testatrix, in that case, such devise or legacy to such person so situated as above mentioned, and dying in the lifetime of the testator or testatrix, shall not lapse, but the estate so devised or bequeathed shall vest in such child or children, descendant or descendants, of such devisee or legatee in the same manner as if a legatee or devisee had survived the testator or testatrix and had died intestate.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (17); 1857, ch. 60, art. 37; 1871, § 2391; 1880, § 1265; 1892, § 4491; 1906, § 5081; Hemingway's 1917, § 3369; 1930, § 3553; 1942, § 660.

JUDICIAL DECISIONS

1. In general.

Where the residuary clause of the decedent's will gave an undivided one-half interest of the remainder of his estate to his wife, and secondly, an undivided one-half interest, per stirpes, to his children (by an earlier marriage), and where the wife predeceased the husband by one week, the chancery court properly rejected the stepchildren's argument that either spouse intended for all six children (the decedent's children and the stepchildren), to divide their estate equally, no matter which parent died first; because the writing was clear and spoke for itself, parol evidence was not admissible to alter the terms of the document, and the anti-lapse statute, Miss Code Ann. § 91-5-7, was clearly applicable, such that the failed devise to the wife passed to the decedent's natural children. Marlar v. Castillo-Ruiz (In re Will of Roland), 920 So. 2d 539, 2006 Miss. App. LEXIS 85 (Miss. Ct. App. 2006).

Rule as to lapsed devises is applicable primarily to instances where devisee named in will predeceased testatrix. Mississippi State Univ. Found. v. Clark (In re Estate of Homburg), 697 So. 2d 1154, 1997 Miss. LEXIS 317 (Miss. 1997).

Testamentary gift to life income beneficiary of testamentary trust lapsed when beneficiary predeceased testatrix; however, gift over to remaindermen did not lapse, as remaindermen were capable of taking at time of death of testatrix. Mississippi State Univ. Found. v. Clark (In re Estate of Homburg), 697 So. 2d 1154, 1997 Miss. LEXIS 317 (Miss. 1997).

In a proceeding seeking interpretation of a residuary clause of a will in which the testator left his residual estate to his daughter and to his brothers and sisters, share and share alike, several of whom predeceased the testator, the chancellor properly held that the lapsed portions of the testator's estate descended by the laws of intestate succession to his daughter, his heir-at-law. Moffett v. Howard, 392 So. 2d 509, 1981 Miss. LEXIS 1903 (Miss. 1981).

Where a son died intestate prior to the death of the testatrix and left a son and daughter as his surviving heirs, such surviving heirs succeeded to the share of their father in the estate. Martin v. Eslick, 229 Miss. 234, 90 So. 2d 635, 1956 Miss. LEXIS 604 (Miss. 1956).

The rule as to lapsed devises is applicable primarily to instances where the devisee named in the will had died prior to the death of the testator. Hays v. Cole, 221 Miss. 459, 73 So. 2d 258, 1954 Miss. LEXIS 551 (Miss. 1954).

Under devise of residue of estate under will to the fiancee, two uncles and a cousin of testator, the share of one of the devisees who predeceased the testator goes to testator's heirs at law, and is not saved by this section [Code 1942, § 660]. Clark v. Case, 207 Miss. 163, 42 So. 2d 109, 1949 Miss. LEXIS 326 (Miss. 1949).

This section [Code 1942, § 660] does not apply to bequests to those who are not descendants of the testator, and a legacy to a niece who predeceased the testator lapsed so that her son did not inherit through her. Kullman v. Dreyfus' Estate, 201 Miss. 887, 30 So. 2d 81, 1947 Miss. LEXIS 460 (Miss. 1947).

Leasehold interest in school land in state owned by testatrix of other state is governed by Mississippi law; legacy lapses on death of legatee without children though statute of domicile of testatrix provides contrary. Neblett v. Neblett, 112 Miss. 550, 73 So. 575, 1916 Miss. LEXIS 145 (Miss. 1916).

RESEARCH REFERENCES

ALR.

Wills: antilapse statute as applicable to devise or bequest in terms of distributive share, under law, in estate of testator. 3 A.L.R.2d 1419.

Benefit of direction in deed or will for payments by grantee or devisee to third person as surviving latter's death, and passing as part of his estate. 6 A.L.R.2d 363.

Devise or bequest to designated individual "or his estate," "or his children," "or his representatives," or the like (other than "or his heirs"), as subject to lapse in event of individual's death before that of testator. 11 A.L.R.2d 1387.

Rights of party to void marriage in respect of transfers or gifts to other in mistaken belief marriage was valid. 14 A.L.R.2d 918.

Who is "child," "issue," "descendant," "relation," "heir," etc., within antilapse statute describing the person taking through or from the legatee or devisee. 19 A.L.R.2d 1159.

Devolution of lapsed portion of residuary estate. 36 A.L.R.2d 1117.

Applicability of anti-lapse statutes to class gifts. 56 A.L.R.2d 948.

Testator's intention as defeating operation of antilapse statute. 63 A.L.R.2d 1172.

Who are within terms "relation," "descendant," "child," "brother," "sister," etc., describing legatee or devisee, in statute providing against lapse upon death of legatee or devisee before testator. 63 A.L.R.2d 1195.

Ademption of bequest of proceeds of property. 45 A.L.R.3d 10.

Anti-lapse statute as applicable to interest of beneficiary under inter vivos trust who predeceases life-tenant settlor. 47 A.L.R.3d 358.

Am. Jur.

80 Am. Jur. 2d, Wills §§ 1416, 1417 et seq.

20B Am. Jur. Legal Forms 2d, Wills § 266:644 et seq. (lapse; gifts over).

CJS.

97 C.J.S., Wills, §§ 2085-2087 et seq.

§ 91-5-9. Devise to witness void.

If any person be a subscribing witness to a will wherein any devise or bequest is made to him and the will cannot otherwise be proven, such devise or bequest shall be void, and the witness shall be competent as to the residue of the will as if a devise or bequest had not been made to him, and he may be compelled to testify. If such witness would have been entitled to any share of the testator's estate in case the will were not established, then so much of such share shall be saved to the witness as shall not exceed the value of the devise or bequest made to him in the will.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (27); 1857, ch. 60, art. 45; 1871, § 1101; 1880, § 1973; 1892, § 1826; 1906, § 2001; Hemingway's 1917, § 1666; 1930, § 3554; 1942, § 661.

JUDICIAL DECISIONS

1. In general.

Where a devisee or legatee to the will is also a witness, the devise or bequest to him is void but the witness is competent as to the residue of the will, so the will is valid except as to the annulled legacy or devise. Estate of Crawford v. Crawford, 225 Miss. 208, 82 So. 2d 823, 1955 Miss. LEXIS 574 (Miss. 1955).

Devise to witness is void, but witness is competent to establish residue of the will. Swanzy v. Kolb, 94 Miss. 10, 46 So. 549, 1908 Miss. LEXIS 2 (Miss. 1908); Estate of Crawford v. Crawford, 225 Miss. 208, 82 So. 2d 823, 1955 Miss. LEXIS 574 (Miss. 1955).

Where a husband qualified as executor under the will of his wife, proved the will as a subscribing witness, and administered the estate, he is estopped to claim title to land belonging to him and devised by the will to a third party. In this case this section [Code 1942, § 661] was not invoked, and the husband took the bequests and devises under the will. West v. West, 131 Miss. 880, 95 So. 739, 1923 Miss. LEXIS 223 (Miss. 1923).

Words "otherwise to be proved" in this section [Code 1942, § 661] refer to execution and not proof of contents of will. Swanzy v. Kolb, 94 Miss. 10, 46 So. 549, 1908 Miss. LEXIS 2 (Miss. 1908).

RESEARCH REFERENCES

ALR.

Amount or value of testamentary gift as affecting application of statute invalidating will attested by beneficially interested witness or limiting benefit to such witness. 73 A.L.R.2d 1230.

Exception or proviso in statute invalidating testamentary gift to subscribing witness, saving the share witness would take in absence of will. 95 A.L.R.2d 1256.

Am. Jur.

79 Am. Jur. 2d, Wills §§ 263 et seq., 275, 276 et seq.

CJS.

95 C.J.S., Wills §§ 86-92, 262-276.

§ 91-5-11. Devise or bequest to trustee.

(1) A devise or bequest in a will duly executed pursuant to the provisions of Section 91-5-1 of Mississippi Code of 1972 may be made to the trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will. Such devise or bequest shall not be invalid because the trust is amendable or revocable, or both, by the settlor or any other person or persons; nor because the trust instrument or any amendment thereto was not executed in the manner required for wills; nor

because the trust was amended after execution of the will. Unless the will provides otherwise, such devise or bequest shall operate to dispose of the property under the terms and provisions of the instrument creating the trust, including any amendments or modifications in writing made at any time before or after the making of the will and before the death of the testator, and the property shall not be deemed held under a testamentary trust. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest.

(2) The provisions of this section shall apply to all devises or bequests made in any will duly executed according to said section of any testator dying after May 6, 1958, whether the will is executed before or after that date.

(3) The term "will" in this section shall include and refer to the term "codicil".

HISTORY:
Codes, 1942, § 661.5; Laws, 1958, ch. 240, §§ 1-3, eff. upon passage (approved May 6, 1958).

Cross References —
Definition of term "will," see § 1-3-59.

Comparable Laws from other States —
Georgia Code Annotated, §§ 53-12-70 through 53-12-74.
Tennessee Code Annotated, § 32-3-106.
Texas Probate Code Annotated, § 58a.

RESEARCH REFERENCES

ALR.
Effect of impossibility of performance of condition precedent to testamentary gift. 40 A.L.R.4th 193.

§ 91-5-13. Creditor competent witness to will.

Any creditor shall be a competent subscribing witness to a last will and testament; but any special provision in favor of such creditor in the will, either by admitting the debt or by providing for its payment or by giving it a preference, shall be void, and such claim shall stand as though the provision had not been made.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (44); 1857, ch. 60, art. 46; 1871, § 1102; 1880, § 1974; 1892, § 1827; 1906, § 2002; Hemingway's 1917, § 1667; 1930, § 3555; 1942, § 662.

§ 91-5-15. Nuncupative wills.

A nuncupative will shall not be established unless it be made in the time of the last sickness of the deceased at his or her habitation or where he or she hath resided for ten days next preceding the time of his or her death, except when such person is taken sick from home and die before his or her return to such habitation, nor where the value bequeathed exceeds One Hundred Dollars ($100.00) unless it be proved by two witnesses that the testator or testatrix called on some person present to take notice or bear testimony that such is his or her will, or words to that effect.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (18); 1857, ch. 60, art. 38; 1871, § 2392; 1880, § 1266; 1892, § 4492; 1906, § 5082; Hemingway's 1917, § 3370; 1930, § 3556; 1942, § 663.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Devise of lands.
3. Foreign nuncupative wills.
4. Not found.

1. In general.

Biological father entitled to inherit from illegitimate child is entitled to share in recovery in wrongful death action. Burdette v. Crump, 472 So. 2d 959, 1985 Miss. LEXIS 2142 (Miss. 1985).

"Last sickness," as used in statute permitting nuncupative wills under certain conditions, means that at time of making will testator is in extremis, at least so near death that he did not have reasonable time and opportunity to make written will. Schmitz v. Summers, 179 Miss. 260, 174 So. 569, 1937 Miss. LEXIS 20 (Miss. 1937).

Where testator made nuncupative will while sick with illness of which he died, but neither testator nor his physician considered his condition mortally serious, will was invalid under statute requiring nuncupative wills to be made "in the time of last sickness." Schmitz v. Summers, 179 Miss. 260, 174 So. 569, 1937 Miss. LEXIS 20 (Miss. 1937).

Nuncupative will is testamentary declaration, not in writing, made before sufficient number of witnesses when testator is in extremis. Lee v. Barrow, 156 Miss. 711, 126 So. 648, 1930 Miss. LEXIS 211 (Miss. 1930).

Nuncupative will requires intent of testator that declaration then made constitute his will without being embodied in written instrument. Lee v. Barrow, 156 Miss. 711, 126 So. 648, 1930 Miss. LEXIS 211 (Miss. 1930).

Instrument dictated in form of letter to executor was simply defectively executed written will and not subject to probate as nuncupative will. Lee v. Barrow, 156 Miss. 711, 126 So. 648, 1930 Miss. LEXIS 211 (Miss. 1930).

The witnesses are not required to prove the presence of each other. Burch v. Stovall, 27 Miss. 725, 1854 Miss. LEXIS 118 (Miss. 1854).

2. Devise of lands.

Lands do not pass under a nuncupative will. Sadler v. Sadler, 60 Miss. 251, 1882 Miss. LEXIS 42 (Miss. 1882).

3. Foreign nuncupative wills.

The removal and change of citizenship from Louisiana to this state of a person who has executed a nuncupative will in that state according to its laws does not revoke the will. Pratt v. Hargraves, 77 Miss. 892, 28 So. 722, 1900 Miss. LEXIS 52 (Miss. 1900).

4. Not found.

Where a joint owner of a certificate of deposit (CD) still retained an ownership interest when the CD was reissued with new owners right at the time of her death, there was no violation of Miss. Code Ann. § 91-5-15 since there was no testamentary devise. DeJean v. DeJean, 982 So. 2d 443, 2007 Miss. App. LEXIS 730 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

RESEARCH REFERENCES

ALR.

What amounts to "last sickness" or the like within requirement that nuncupative will be made during last sickness. 8 A.L.R.3d 952.

Am. Jur.

79 Am. Jur. 2d, Wills § 625 et seq.

20 Am. Jur. Legal Forms 2d, Wills, § 266:92 (nuncupative will: affidavit by witness who reduced testamentary words to writing).

CJS.

95 C.J.S., Wills § 340 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-5-17. Parties in interest to nuncupative will to be cited.

The probate of any nuncupative will shall not be taken, or letters testamentary granted thereon, until after the expiration of fourteen days from the time of the decease of the testator or testatrix, nor until the widow, if any, and next of kin, if resident in this state, have been summoned to contest the same if they think proper.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (18); 1857, ch. 60, art. 40; 1871, § 2394; 1880, § 1268; 1892, § 4494; 1906, § 5084; Hemingway's 1917, § 3372; 1930, § 3557; 1942, § 664.

RESEARCH REFERENCES

Law Reviews.
Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-5-19. Nuncupative will not to be proven after six months unless reduced to writing.

After six months have elapsed from the time of speaking the alleged testamentary words, testimony shall not be received to probate a nuncupative will unless the words, or the substance thereof, shall have been reduced to writing within six days after speaking the same.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (18); 1857, ch. 60, art. 39; 1871, § 2393; 1880, § 1267; 1892, § 4493; 1906, § 5083; Hemingway's 1917, § 3371; 1930, § 3558; 1942, § 665.

JUDICIAL DECISIONS

1. In general.
The word "prove," (Code 1871, § 2393) had reference to probate; but, if probated within six months, testimony to establish the will on an issue devisavit vel non would not be rejected. George v. Greer, 53 Miss. 495, 1876 Miss. LEXIS 101 (Miss. 1876).

RESEARCH REFERENCES

Law Reviews.
Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-5-21. Members of armed forces and mariners at sea excepted.

Any person of sound mind eighteen years of age or older and being in the armed forces of the United States of America, in active service at home or abroad or being a mariner at sea, may devise, dispose of, and bequeath his goods and chattels or property, real and personal, anything in this chapter to the contrary notwithstanding.

Any will executed prior to July 23, 1968, which conforms to the requirements of this section shall be valid; provided, however, that the testator of said will must be alive at said date.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (21); 1857, ch. 60, art. 41; 1871, § 2395; 1880, § 1269; 1892, § 4495; 1906, § 5085; Heming-

way's 1917, § 3373; 1930, § 3559; 1942, § 666; Laws, 1968, ch. 307, §§ 1, 2, eff from and after passage (approved July 23, 1968).

RESEARCH REFERENCES

Am. Jur.
79 Am. Jur. 2d, Wills § 632 et seq.

CJS.
95 C.J.S., Wills §§ 351-353.

§ 91-5-23. Provision for husband or wife to be in bar.

Any provision by the will of the husband or wife for the other shall be construed to be in bar of any share of the real or personal estate of the testator, unless it be otherwise expressed in the will.

HISTORY:
Codes, 1880, § 1174; 1892, § 4498; 1906, § 5088; Hemingway's 1917, § 3376; 1930, § 3560; 1942, § 667.

Cross References —
Descent of property between husband and wife, see § 91-1-7.

JUDICIAL DECISIONS

1. In general.

Widow of testator dying without children inherits all undisposed of property, including lapsed devises; widow of testator dying without children not precluded from inheriting undisposed property because she takes life estate under the will. Marx v. Hale, 131 Miss. 290, 95 So. 441, 1922 Miss. LEXIS 289 (Miss. 1923).

Where the widow gets nothing by the will or where the devise to her is unsatisfactory and she renounces the will she takes a child's part, but where she takes a legacy under the will, and the will is expressly made in lieu of the allowance of one year's provisions and all exemptions, she may not without renouncing the will take the legacy and the year's provisions and other exemptions. McGaughey v. Eades, 78 Miss. 853, 29 So. 516, 1901 Miss. LEXIS 132 (Miss. 1901).

The remedy of the husband or wife who is dissatisfied with the provision made for him or her in the will of the other is to renounce such provision and claim a distributive share of the estate, whether it includes the homestead or other property, as provided by Code 1942, § 668; or if no such provision is made in the will, to claim such distributive share under Code 1942, §§ 667, 669, without renunciation. Kelly v. Alred, 65 Miss. 495, 4 So. 551, 1888 Miss. LEXIS 30 (Miss. 1888).

RESEARCH REFERENCES

ALR.

Priority of surviving spouse who accepts provision of will in lieu of dower or other marital rights over other legatees and devisees and creditors. 2 A.L.R.2d 607.

Spouse's right to take under other spouse's will as affected by antenuptial or postnuptial agreement or property settlement. 53 A.L.R.2d 475.

Surviving spouse's right to marital share as affected by valid contract to convey by will. 85 A.L.R.4th 418.

Validity of Postnuptial Agreements in Contemplation of Spouse's Death. 87 A.L.R.6th 495.

§ 91-5-25. Right of spouse to renounce will; form of renunciation; right to intestate share.

When a husband makes his last will and testament and does not make satisfactory provision therein for his wife, she may, at any time within ninety (90) days after the probate of the will, file in the office where probated a renunciation to the following effect, viz.: "I, A B, the widow of C D, hereby renounce the provision made for me by the will of my deceased husband, and elect to take in lieu thereof my legal share of his estate." Thereupon she shall be entitled to such part of his estate, real and personal, as she would have been entitled to if he had died intestate, except that, even if the husband left no child nor descendant of such, the widow, upon renouncing, shall be entitled to only one-half (½) of the real and personal estate of her deceased husband. The husband may renounce the will of his deceased wife under the same circumstances, in the same time and manner, and with the same effect upon his right to share in her estate as herein provided for the widow.

HISTORY:

Codes, 1871, § 1282; 1880, § 1172; 1892, § 4496; 1906, § 5086; Hemingway's 1917, § 3374; 1930, § 3561; 1942, § 668; Laws, 1975, ch. 373, § 1, eff from and after January 1, 1976.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction.
3. Who may take or renounce.
4. —Common law spouse.
5. Time within which to renounce.
6. Right as personal.
7. Renunciation for person non compos mentis.
8. Effect on right to contest will.
9. Effect on executorship.
10. Testator having foreign domicil.
11. Contract to make or renounce will.
12. Valuation, calculation.
13. Effect on trusts, insurance proceeds.
14. Effect on debts.
15. Application in particular cases.
16. Effect, tax deductions.

1. In general.

Where a husband can properly renounce his wife's will, and there are no children, he is entitled to one half of the estate of his deceased wife; however, the right of a husband to renounce is qualified by Code 1942, § 670, which expressly applies to husband renouncing the will of his wife. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828, 1957 Miss. LEXIS 409 (Miss. 1957).

The effect of renunciation is to make the deceased spouse an intestate as to one-half of the willed property, leaving the will to stand as to the other half, so that the deductions provided in Code 1942, § 670, on account of the separate estate of the surviving spouse are to be taken out of the half of the total estate to which the surviving spouse is limited by this section. [Code 1942, § 668]. Davis v. Miller, 202 Miss. 880, 32 So. 2d 871, 1947 Miss. LEXIS 351 (Miss. 1947).

2. Construction.

Code 1942, §§ 470 and 668, must be construed together. Callicott & Norfleet v. Callicott, 90 Miss. 221, 43 So. 616, 1907 Miss. LEXIS 83 (Miss. 1907).

A failure to renounce within the statutory time amounts to an election to take under the will. Collins v. Melton, 40 Miss. 242, 1866 Miss. LEXIS 67 (Miss. 1866).

3. Who may take or renounce.

A wife justified in living separate and apart from her husband at the time of his death, there being no children, was entitled to renounce his will and take one-half of his estate, less the value of her own separate property. Stringer v. Arrington, 202 Miss. 798, 32 So. 2d 879, 1947 Miss. LEXIS 342 (Miss. 1947).

4. —Common law spouse.

In a proceeding to renounce will and to obtain a year's support from the estate on ground that plaintiff had been testator's common law wife, the will which did not refer to the plaintiff as wife, but left her an annuity as long as she was unmarried, could be taken into consideration. Martin v. Martin's Estate, 217 Miss. 173, 63 So. 2d 827, 1953 Miss. LEXIS 421 (Miss. 1953).

In a proceeding to renounce will and to obtain a year's support from the estate on ground that plaintiff had been testator's common law wife, income returns for years during which plaintiff claimed to have been testator's common law wife in which plaintiff reported herself as single person constituted competent evidence since they were declarations against interest. Martin v. Martin's Estate, 217 Miss. 173, 63 So. 2d 827, 1953 Miss. LEXIS 421 (Miss. 1953).

In a proceeding to renounce will and to obtain a year's support from the estate on ground that plaintiff had been testator's common law wife, income tax reports for a period which plaintiff claimed to be common law wife, filed by the plaintiff as a single person did not constitute a waiver of plaintiff's disqualification as witness under the Deadman's Statute. Martin v. Martin's Estate, 217 Miss. 173, 63 So. 2d 827, 1953 Miss. LEXIS 421 (Miss. 1953).

5. Time within which to renounce.

Substantial evidence supported the chancery court's judgment awarding a wife a one-third interest in a decedent's estate because the wife filed a renunciation of the provision made for her in the will and her intention to elect her spousal share within the time period established by the statute, and the chancery court found that the wife complied with the statute. Chester v. Labasse (in re Estate of Labasse), — So. 3d — (Miss. 2017)

Widow may renounce at any time within 6 months after probate; widow and not court determines what is "satisfactory provision." Simpson v. Simpson, 120 Miss. 197, 82 So. 3, 1919 Miss. LEXIS 77 (Miss. 1919).

Spouse's right to renounce will under statute was personal and abated at her demise; therefore, such right may not be undertaken by personal representative after death of spouse, even where death occurs prior to expiration of statutory period for election. Shattuck v. Estate of Tyson, 508 So. 2d 1077, 1987 Miss. LEXIS 2556 (Miss. 1987).

A widow's renunciation of her husband's will, which renunciation was made before the will was admitted to probate, was nevertheless effective and valid, despite the provision in § 91-5-25 stating that renunciation may be made at any time within 90 days after the probate of the will. Gettis v. McAllister, 411 So. 2d 770, 1982 Miss. LEXIS 1917 (Miss. 1982).

6. Right as personal.

Spouse's right to renounce will under statute was personal and abated at her demise; therefore, such right may not be undertaken by personal representative after death of spouse, even where death occurs prior to expiration of statutory period for election. Shattuck v. Estate of Tyson, 508 So. 2d 1077, 1987 Miss. LEXIS 2556 (Miss. 1987).

Where a wife in her will failed to make any provision for her surviving husband, and the husband's property was not equal to his lawful portion of the wife's estate, the right of the husband to renounce the will and to take his legal share of the wife's estate vested as a matter of law and became part of his estate upon his death, exercisable by the executor of the husband's estate, even though before his death, 3 weeks following his wife's death, the husband did not renounce the wife's will or take any affirmative action with reference thereto. McBride v. Haynes, 247 So. 2d 129, 1971 Miss. LEXIS 1436 (Miss. 1971).

The personal representative of a deceased spouse does not have the right to renounce the will of a predeceased spouse under this section [Code 1942, § 668], for the privilege is one which must be invoked personally by the surviving spouse during her lifetime. Jenkins v. Borodofsky, 211 So. 2d 874, 1968 Miss. LEXIS 1288 (Miss. 1968).

Equitable estoppel does not and cannot authorize the exercise of a personal right which terminates with the death of a spouse, and the fact that a husband shot and killed his wife, an act which would have precluded his inheriting her estate, is no justification for permitting the deceased wife's personal representatives to renounce the husband's will, an act which by law can only be invoked personally by a surviving spouse. Jenkins v. Borodofsky, 211 So. 2d 874, 1968 Miss. LEXIS 1288 (Miss. 1968).

The right to renounce a will conferred by this statute upon a surviving spouse may not be exercised by his or her administrator. Estate of Mullins v. Estate of Mullins, 239 Miss. 751, 125 So. 2d 93, 1960 Miss. LEXIS 350 (Miss. 1960).

7. Renunciation for person non compos mentis.

Where a widow has been mentally incompetent continuously from the death of the testator and has no guardian acting in her behalf during the statutory period for renunciation, its lapse is no bar to a subsequent election in her behalf by the court, or guardian acting under supervision and approval of the court; for the general rule is that where an election is required by statute to be made within a certain period of time, the incompetency of the person entitled to elect is considered as warranting an extension of the statutory period. Wolcott v. Wolcott, 184 So. 2d 381, 1966 Miss. LEXIS 1459 (Miss. 1966).

The general savings statute in favor of those under disabilities insofar as limitations of actions are concerned does not apply to the statute giving a widow the right to renounce her husband's will under certain circumstances. Wolcott v. Wolcott, 184 So. 2d 381, 1966 Miss. LEXIS 1459 (Miss. 1966).

The right to renounce a will conferred by this statute upon a surviving spouse may be exercised by a guardian in case of such spouse's incompetency. Estate of Mullins v. Estate of Mullins, 239 Miss. 751, 125 So. 2d 93, 1960 Miss. LEXIS 350 (Miss. 1960).

Guardian, with approval of chancery court, may renounce for widow non compos mentis. Hardy v. Richards, 98 Miss. 625, 54 So. 76, 1910 Miss. LEXIS 101 (Miss. 1910).

8. Effect on right to contest will.

Renouncement by a widow of her husband's will does not constitute an abandonment of her action to contest the will, since renouncement does not affect the validity of the will but merely affects the amount of property which the parties receive, and, therefore, renouncement does not constitute an estoppel to contest the will. Edwards v. Edwards, 193 Miss. 889, 11 So. 2d 450, 1943 Miss. LEXIS 16 (Miss. 1943).

Where a widow contesting the will of her husband renounced within the time prescribed, there was no inconsistency between such renunciation and the will contest so as to preclude her appeal from an adverse decision in the will contest, since both by the renunciation and the contest, if successful, she takes by inheritance; and renunciation is not an abandonment of the contest since renouncement does not affect the validity of the will but merely affects the amount of property which the parties receive. Edwards v. Edwards, 193 Miss. 889, 11 So. 2d 450, 1943 Miss. LEXIS 16 (Miss. 1943).

Renunciation by a widow of her husband's will within the time prescribed and pending an appeal from a judgment against her in a contest of the will, did not preclude her from prosecuting her appeal in the will contest irrespective of any inconsistency between renunciation and the prosecution of the appeal. Edwards v. Edwards, 193 Miss. 889, 11 So. 2d 450, 1943 Miss. LEXIS 16 (Miss. 1943).

9. Effect on executorship.

Husband must renounce wife's will and refuse qualification as executor if he would keep on property devised thereunder. West v. West, 131 Miss. 880, 95 So. 739, 1923 Miss. LEXIS 223 (Miss. 1923).

10. Testator having foreign domicil.

Husband may renounce wife's will and take child's share, although domicil of testatrix in foreign state. Bolton v. Barnett, 131 Miss. 802, 95 So. 721, 1923 Miss. LEXIS 220 (Miss. 1923).

Right of husband to renounce will of wife and take child's part governed by law of state, and not by law of wife's domicil; husband renouncing will of wife, who also leaves children, may take child's part in both real and personal property. Bolton v. Barnett, 131 Miss. 802, 95 So. 721, 1923 Miss. LEXIS 220 (Miss. 1923).

11. Contract to make or renounce will.

Although proper contracts not to renounce a will are enforceable even though Code 1972 § 91-5-25 provides that a husband or wife may renounce the will of another, the wife's agreement not to renounce her will constituted an unconscionable contract so as to permit the wife's renunciation of her husband's will, notwithstanding her prior agreement not to renounce, where the wife was taken by her husband directly from her job to the office of the husband's attorney and persuaded to assign the contract without prior knowledge of its existence or the opportunity to read the entire contract, and where the provision in the will, giving the wife a life estate in the parties' homestead as long as she continued to live on the property, was minimal consideration when viewed against her rights under the laws of descent and distribution including her statutory right to a life estate in the homestead under Code 1972 § 91-1-23 irrespective of her living on the property. In re Will of Johnson, 351 So. 2d 1339, 1977 Miss. LEXIS 1950 (Miss. 1977).

Release of a right to renounce wife's will by the husband constituted sufficient consideration for a contract by the wife to will to the husband or his issue one third of her estate, so that the wife could not, by revoking the will executed pursuant to the contract, defeat the rights of the predeceased husband's issue. In re Estate of Sadler, 232 Miss. 349, 98 So. 2d 863, 1957 Miss. LEXIS 482 (Miss. 1957).

Husband's will giving property to one who provided for him pursuant to contract was an obligation of the contract, not an abrogation of the contract which would enable widow to renounce will. Price v. Craig, 164 Miss. 42, 143 So. 694, 1932 Miss. LEXIS 218 (Miss. 1932).

12. Valuation, calculation.

The value of real property in Louisiana would not be included in the value of an estate for the purpose of determining the lawful portion of the surviving husband of the testatrix, when he renounced the will in Mississippi, by the testatrix' real and personal estate in Mississippi. Banks v. Junk, 264 So. 2d 387, 1972 Miss. LEXIS 1356 (Miss. 1972).

In a proceeding to determine whether surviving husband's separate estate was equal in value to one half portion of his deceased wife's estate, the chancellor properly found that the husband had not conveyed his one half interest in certain Louisiana property to his children prior to wife's death, but had given the property to his children by an act of donation after the event; thus, the value of the husband's one half interest in the Louisiana property, less one half of the outstanding mortgage loan, should have been included in the valuation of his separate estate along with the value of his personal property, and he was precluded by Code 1942, § 670, from renouncing his wife's will, which made no provision for him, since his property at the time of her death was more than equal in value to what would have been his lawful portion of her estate. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828, 1957 Miss. LEXIS 409 (Miss. 1957).

Where testatrix had willed an estate of the value of $90,000, and surviving husband had a separate estate worth $30,000, upon renunciation the surviving husband was entitled only to have the value of his separate estate deducted from one-half of the value of testatrix's estate, leaving the sum of $15,000 as a deficiency to be made up for the surviving husband. Davis v. Miller, 202 Miss. 880, 32 So. 2d 871, 1947 Miss. LEXIS 351 (Miss. 1947).

13. Effect on trusts, insurance proceeds.

Where will gave widow one-half interest in testator's entire estate except proceeds of an insurance policy, which were directed to be used to pay certain legacies and to set up a trust for testator's adopted son, widow on renunciation was entitled to one-half the personal estate to the extent of impairing the trust if net personal estate was insufficient. Campbell v. Cason, 206 Miss. 420, 40 So. 2d 258, 1949 Miss. LEXIS 271 (Miss. 1949).

Where a widow renounced will leaving her one-half of testator's entire estate except proceeds of insurance policy which were to be used to pay bills of testator's aged father not to exceed $500 and to provide small monthly payments for such father's living expenses, with residue to be used in trust for adopted son, and personal estate of testator was substantial, award to widow would not be postponed pending ascertainment of liabilities with respect to insurance proceeds, since such contingent liabilities were inconsequential in comparison with the net personal estate of the testator. Campbell v. Cason, 206 Miss. 420, 40 So. 2d 258, 1949 Miss. LEXIS 271 (Miss. 1949).

Where widow renounced will, leaving her undivided one-half interest in the entire estate excluding proceeds of an insurance policy, and contained a similar provision for testator's adopted son together with a trust in favor of such son with respect to the insurance proceeds, the son took under the will and not as an heir. Campbell v. Cason, 206 Miss. 420, 40 So. 2d 258, 1949 Miss. LEXIS 271 (Miss. 1949).

14. Effect on debts.

Widow accepting devise made subject to payment of debts must pay them though she might have renounced. Rainey v. Rainey, 124 Miss. 780, 87 So. 128, 1920 Miss. LEXIS 550 (Miss. 1921).

The estate does not on the widow's election to take against the will become intestate as to the widow's share so as to incumber that share primarily with the debts of the estate, but she is entitled to the same proportion of the estate which she would have taken had her husband died intestate, after the payment of the debts from the whole estate. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

15. Application in particular cases.

Chancery court was not manifestly wrong in granting a widow a child's share of her late husband's estate after finding that she had not abandoned her marriage because there was no legal change of marital status; the changer court found that the widow did not willfully leave or have the intention of permanently separating from the marital relationship. Estes v. Estes, 226 So. 3d 583, 2017 Miss. LEXIS 223 (Miss. 2017).

The right of a widow to renounce her husband's will could not be exercised by the co-conservators of her estate where no evidence was presented to the court demonstrating that the widow was non compos mentis, and court approval for the co-conservators to file on her behalf was neither requested nor given. Greer v. State, 755 So. 2d 511, 1999 Miss. App. LEXIS 434 (Miss. Ct. App. 1999).

A trial court erred in considering a widow's homestead right as part of her separate estate for purposes of determining and reducing the value of her statutory share of the net assets of the estate resulting from her election against her husband's will since her homestead right was not property owned by her at the time of her husband's death, but accrued to her as the result of her husband's death and the renunciation of his will. Holloway v. Holloway (In re Estate of Holloway), 631 So. 2d 127, 1993 Miss. LEXIS 603 (Miss. 1993).

Widow who had entered into a property settlement agreement with husband may not elect to take against his will unless her estate is less than one half of her deceased husband's estate. Will of Best v. Brewer, 236 Miss. 359, 111 So. 2d 262, 1959 Miss. LEXIS 325 (Miss. 1959).

Under Code 1942, § 668, together with Code 1942, § 670, the widow is entitled to one-half of testator's net estate, where he died leaving widow and adopted son as only heirs of law. Campbell v. Cason, 206 Miss. 420, 40 So. 2d 258, 1949 Miss. LEXIS 271 (Miss. 1949).

Upon a widow's renunciation of a testator's will devising to her a life estate in his home with remainder to a daughter, the widow became entitled to a one-third interest to the property in fee, and the daughter to the other two-thirds interest therein, subject to the right of the widow to occupy and use it during her widowhood. Milton v. Milton, 193 Miss. 563, 10 So. 2d 175, 1942 Miss. LEXIS 131 (Miss. 1942).

Where a testator directed that monthly payments of $200 be made to his wife so long as she remained his widow, and that, "in the event of the death or remarriage of my wife, and $200 monthly payments shall cease, then" the sum of $75 per month should be paid to a daughter and to a stepdaughter, the use of the words "and

$200 monthly payments shall cease" between the words "wife" and "then" demonstrated that he meant that the payment to the daughters should begin on the cessation for any reason of the monthly payments bequeathed to the widow, and, upon renunciation of the will by the widow, the bequests of monthly payments to the daughters became at once effective, regardless of the fact that the widow was still living and had not remarried. Milton v. Milton, 193 Miss. 563, 10 So. 2d 175, 1942 Miss. LEXIS 131 (Miss. 1942).

Provision that on renunciation husband shall be entitled to one-half of wife's estate does not limit his rights as heir to property not devised. Cain v. Barnwell, 124 Miss. 860, 87 So. 484, 1921 Miss. LEXIS 190 (Miss. 1921).

Widow with one child upon renouncing took child's part. Williams v. Williams, 111 Miss. 129, 71 So. 300, 1916 Miss. LEXIS 253 (Miss. 1916).

Upon renunciation one-half of land not going to widow descended as intestate property, and did not go to residuary legatees. Gordan v. Perry, 98 Miss. 893, 54 So. 445, 1910 Miss. LEXIS 139 (Miss. 1910).

Upon renouncing will widow became tenant in common with residuary legatees and devisees, and with them entitled to sue for partition. Laughlin v. O'Reily, 92 Miss. 121, 45 So. 193, 1907 Miss. LEXIS 11 (Miss. 1907).

Where 3 of 6 children of testator received advancements extinguishing their rights in estate, widow by renouncing became entitled to one-fourth interest. Callicott & Norfleet v. Callicott, 90 Miss. 221, 43 So. 616, 1907 Miss. LEXIS 83 (Miss. 1907).

The estate does not on the widow's election to take against the will become intestate as to the widow's share so as to incumber that share primarily with the debts of the estate, but she is entitled to the same proportion of the estate which she would have taken had her husband died intestate, after the payment of the debts from the whole estate. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

Where a widow has elected under this section [Code 1942, § 668] to take against her husband's will she becomes a co-tenant with the devisee in each and every parcel of real estate specifically devised by her deceased husband, and is not made a creditor of the estate by Code 1906, § 5089 (Code 1942, § 670). Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

16. Effect, tax deductions.

The estate tax marital deduction available under 26 USCS § 2056 is not limited to the amount of property the taxpayer could receive by renouncing the will under state law. Waldrup v. United States, 499 F. Supp. 820, 1980 U.S. Dist. LEXIS 16059 (N.D. Miss. 1980).

RESEARCH REFERENCES

ALR.

Waiver or abandonment of, or estoppel to assert, prior renunciation of, or election to take against, spouse's will. 29 A.L.R.2d 227.

What passes under provision of will that spouse shall take share of estate allowed or provided by law, or a provision of similar import. 36 A.L.R.2d 147.

Who must bear loss occasioned by election against will. 36 A.L.R.2d 291.

Revocation or withdrawal of election to take under or against will. 71 A.L.R.2d 942.

Election by spouse to take under or against will as exercisable by agent or personal representative. 83 A.L.R.2d 1077.

What constitutes or establishes beneficiary's acceptance or renunciation of devise or bequest. 93 A.L.R.2d 8.

Factors considered in making election for incompetent to take under or against will. 3 A.L.R.3d 6.

Time within which election must be made for incompetent to take under or against will. 3 A.L.R.3d 119.

Who may make election for incompetent to take under or against will. 21 A.L.R.3d 320.

Extension of time within which spouse may elect to accept or renounce will. 59 A.L.R.3d 767.

Acceptance of benefits under will as election precluding enforcement of contract right as to property bequeathed. 60 A.L.R.3d 1147.

Surviving spouse taking elective share as chargeable with estate or inheritance tax. 67 A.L.R.3d 199.

Conflict of laws regarding election for or against will, and effect in one jurisdiction of election in another. 69 A.L.R.3d 1081.

Liability for administration expenses of spouse electing against will. 89 A.L.R.3d 315.

Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death. 7 A.L.R.4th 989.

Construction, application, and effect of statutes which deny or qualify surviving spouse's right to elect against deceased spouse's will. 48 A.L.R.4th 972.

Determination of, and charges against, "augmented estate" upon which share of spouse electing to take against will is determined under Uniform Probate Code sec. 2-202. 63 A.L.R.4th 1173.

Surviving spouse's right to marital share as affected by valid contract to convey by will. 85 A.L.R.4th 418.

Am. Jur.

31 Am. Jur. 2d (Rev), Executors and Administrators §§ 677-681.

80 Am. Jur. 2d, Wills § 1355 et seq.

25 Am. Jur. Pl & Pr Forms (Rev), Wills, Forms 161 et seq. (election whether to take under will).

CJS.

34 C.J.S., Executors and Administrators §§ 460-462, 466 et seq.

Law Reviews.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-5-27. Effect of no provision for husband or wife.

If the will of the husband or wife shall not make any provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in case of unsatisfactory provision in the will of the husband or wife for the other of them. In such case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory and it had been renounced.

HISTORY:

Codes, 1880, § 1173; 1892, § 4497; 1906, § 5087; Hemingway's 1917, § 3375; 1930, § 3562; 1942, § 669.

JUDICIAL DECISIONS

1. In general.

Trial court erred in failing to determine whether a widow clearly deserted or abandoned her marriage when she left the decedent's home by her own volition after his leg was amputated, and was living in her own home when he died such that she was not entitled to take a child's share of the estate under Miss. Code Ann. § 91-5-27. In re Estate of Estes, 111 So. 3d 1223, 2012 Miss. App. LEXIS 820 (Miss. Ct. App. 2012).

No revocation of will as matter of law occurred when, subsequent to death of beneficiary, constructive trust was imposed on assets of estate resulting in husband's will making no provision for wife. Shattuck v. Estate of Tyson, 508 So. 2d 1077, 1987 Miss. LEXIS 2556 (Miss. 1987).

The trial court erred in holding that a husband was not entitled to an undivided one-half interest in the real and personal property owned by his deceased wife where, although the parties had lived apart for 15 to 20 years, there was no substantial evidence to show a desertion or abandonment as to estop the husband from claiming under the statute; at most the evidence proved that there had been a long separation between the parties. Tillman v. Williams, 403 So. 2d 880, 1981 Miss. LEXIS 2188 (Miss. 1981).

A wife's failure to renounce her husband's will in the six months after its probate constituted a waiver of her right to do so. Rush v. Rush, 360 So. 2d 1240, 1978 Miss. LEXIS 2341 (Miss. 1978).

In an action between the beneficiaries under testator's will and the heirs of his widow, who had renounced the will, the chancellor, after finding the testator's net estate and the widow's net estate at the time of testator's death, correctly determined that the estate should be distributed according to Code 1942, § 670, and that the widow's heirs were entitled to the difference between one half of the net estate of the testator and the net value of the widow's estate. The contention by the heirs at law of the widow that under the provisions of this section [Code 1942, § 669] the widow was entitled to one half of the real and personal estate of the testator without regard to Code 1942, § 670, and that in any event they were entitled to an undivided one third interest in the real property and one third of the net distribution of the personal property of the deceased, was rejected. Carter v. Evans, 230 Miss. 803, 94 So. 2d 237, 1957 Miss. LEXIS 425 (Miss. 1957).

Husband's will giving property to one who provided for him pursuant to contract prior to his marriage to the wife who survived him, and while a former wife was still living, was not abrogation of contract which would enable widow to renounce will. Price v. Craig, 164 Miss. 42, 143 So. 694, 1932 Miss. LEXIS 218 (Miss. 1932).

Husband not provided for in will, held entitled to undivided one-half interest in homestead lands devised by wife. Cain v. Barnwell, 125 Miss. 123, 87 So. 481, 1920 Miss. LEXIS 339 (Miss. 1921).

Husband without separate estate entitled to undivided interest in land devised where wife's will made no provision for him. Caine v. Barnwell, 120 Miss. 209, 82 So. 65, 1919 Miss. LEXIS 79 (Miss. 1919).

RESEARCH REFERENCES

ALR.

Inclusion of funds in savings bank trust (Totten Trust) in determining surviving spouse's interest in decedent's estate. 64 A.L.R.3d 187.

Surviving spouse's right to marital share as affected by valid contract to convey by will. 85 A.L.R.4th 418.

Am. Jur.

25 Am. Jur. Pl & Pr Forms (Rev), Wills, Forms 161 et seq. (election whether to take under will).

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-5-29. Effect of wife or husband having separate estate.

In case the wife have a separate property at the time of the death of her husband, equal in value to what would be her lawful portion of her husband's real and personal estate, and he have made a will, she shall not be at liberty to signify her dissent to the will or to renounce any provision or bequest therein in her favor and elect to take her portion of his estate. If her separate property be not equal in value to what would be the value of her portion of her husband's estate, then she may signify her dissent to the will, as in other cases provided by law, and claim to have the deficiency made up to her, notwithstanding the will. The court in which the will is probated may appoint three commissioners to ascertain, by valuation of the estate, what her lawful portion thereof would be worth; and the commissioners shall also value her own separate estate and report their valuation to the court. Whereupon the court shall make the proper order for allowing her to share in her husband's real and personal estate to make up the deficiency after the following rule: if her separate property be equal in value to two thirds of what she would be entitled to, she shall have one third of her lawful portion of the land and one third of what would be her distributive share of the personalty; if her separate property be worth half in value what she would be entitled to, then she shall be entitled to half her lawful portion of real estate and half of what would be her distributive share of the personalty; if her separate property be worth only one third in value what she would be entitled to, then she shall be entitled to two thirds of her lawful portion of real estate and two thirds of what would be her distributive share in the personalty. This section shall not preclude or prevent any married woman from renouncing the provisions of her husband's will and electing to take her lawful portion if her separate property do not amount in value to one fifth of what she would be entitled to. This section shall apply to a husband renouncing the will of his wife, and shall govern as to his right to share in her estate in such case.

HISTORY:

Codes, 1857, ch. 40, art. 30; 1871, § 1789; 1880, § 1175; 1892, § 4499; 1906, § 5089; Hemingway's 1917, § 3377; 1930, § 3563; 1942, § 670.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Institution of valuation proceedings.
3. What includible in survivor's separate estate.
4. What includible in deceased's estate.
5. Particular applications.

1. In general.

The rule for the distribution of the estate of a decedent upon renunciation of a will is to determine the value of the gross estate of the decedent, deduct from that amount the debts of the decedent, administrative expenses and funeral expenses, leaving the net value of the decedent's estate; when the surviving spouse is entitled to one-half of the estate, the net value must be divided by two and the net value of the estate of the surviving spouse is deducted from such figure, and any balance remaining would be a deficiency to be made up to the surviving spouse. Banks v. Junk, 264 So. 2d 387, 1972 Miss. LEXIS 1356 (Miss. 1972).

Husband whose property greatly exceeds that of his wife may not renounce her will. Biggs v. Roberts, 237 Miss. 406, 115 So. 2d 151, 1959 Miss. LEXIS 485 (Miss. 1959).

Widow who had entered into a property settlement agreement with husband may not elect to take against his will unless her estate is less than one half of her deceased husband's estate. Will of Best v. Brewer, 236 Miss. 359, 111 So. 2d 262, 1959 Miss. LEXIS 325 (Miss. 1959).

Where a husband can properly renounce his wife's will, and there are no children, he is entitled to one half of the estate of his deceased wife; however, the right of a husband to renounce is qualified by this section [Code 1942, § 670], which expressly applies to husband renouncing the will of his wife. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828, 1957 Miss. LEXIS 409 (Miss. 1957).

Under Code 1942, § 668, together with this section [Code 1942, § 670], the widow is entitled to one-half of testator's net estate, where he died leaving widow and adopted son as only heirs of law. Campbell v. Cason, 206 Miss. 420, 40 So. 2d 258, 1949 Miss. LEXIS 271 (Miss. 1949).

The effect of renunciation is to make the deceased spouse an intestate as to one-half of the willed property, leaving the will to stand as to the other half, so that the deductions provided in this section [Code 1942, § 670] on account of the separate estate of the surviving spouse are to be taken out of the half of the total estate to which the surviving spouse is limited by Code 1942, § 668. Davis v. Miller, 202 Miss. 880, 32 So. 2d 871, 1947 Miss. LEXIS 351 (Miss. 1947).

The widow is not made a creditor of the estate by this section [Code 1942, § 670] where she has elected to take against her husband's will. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

2. Institution of valuation proceedings.

Beneficiaries under will desiring to have widow's separate estate counted against her apportionment should file petition stating facts, but the petition cannot be heard until 12 months after probate and before final settlement. Simpson v. Simpson, 120 Miss. 197, 82 So. 3, 1919 Miss. LEXIS 77 (Miss. 1919).

Proceeding to appoint commissioner may be instituted by executor or any person interested, but all interested persons must be made parties. Jones v. Jones, 94 Miss. 460, 49 So. 115, 1909 Miss. LEXIS 367 (Miss. 1909).

3. What includible in survivor's separate estate.

Contention by the heirs at law of widow that joint and survivorship bank accounts in the name of the widow and the testator, who predeceased widow, were not properly a part of the widow's separate estate, was rejected. Carter v. Evans, 230 Miss. 803, 94 So. 2d 237, 1957 Miss. LEXIS 425 (Miss. 1957).

Proceeds of insurance which widow took as sole heir of husband were not part of her separate estate. O'Reily v. Laughlin, 92 Miss. 1, 45 So. 19, 1907 Miss. LEXIS 7 (Miss. 1907).

4. What includible in deceased's estate.

Contention by the heirs at law of widow that joint and survivorship bank accounts in the name of the widow and the testator, who predeceased widow, were not properly a part of the widow's separate estate, was rejected. Carter v. Evans, 230 Miss. 803, 94 So. 2d 237, 1957 Miss. LEXIS 425 (Miss. 1957).

Where the testator prior to her marriage to appellant had signed and acknowledged a warranty deed conveying her farm to her niece, reserving to herself a life estate, and handed the deed to her brother with the instructions to keep and deliver it to the niece upon the testator's death, there was a valid delivery from the testator to the niece, so that the value of the farm did not form a part of the testator's estate. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828, 1957 Miss. LEXIS 409 (Miss. 1957).

Where a number of Series E Savings Bonds were payable jointly to the wife or some third persons designated therein, the bonds, upon the wife's death, were not a portion of her estate, since the surviving co-owners of the bonds became the sole and absolute owners. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828, 1957 Miss. LEXIS 409 (Miss. 1957).

Where a certificate of deposit in the bank was payable to the wife or the wife's brother, upon the death of the wife, this deposit became the property of the brother, and was no portion of the wife's estate. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828, 1957 Miss. LEXIS 409 (Miss. 1957).

5. Particular applications.

In an action between the beneficiaries under testator's will and the heirs of his widow, who had renounced the will, the chancellor, after finding the testator's net estate and the widow's net estate at the time of testator's death, correctly determined that the estate should be distributed according to this section [Code 1942, § 670], and that the widow's heirs were entitled to the difference between one half of the net estate of the testator and the net value of widow's estate. Carter v. Evans, 230 Miss. 803, 94 So. 2d 237, 1957 Miss. LEXIS 425 (Miss. 1957).

In a proceeding to determine whether a surviving husband's separate estate was equal in value to one half portion of his deceased wife's estate, the chancellor properly found that the husband had not conveyed his one half interest in certain Louisiana property to his children prior to death of testator, but that he had given his children the property by an act of donation after the event; thus, the value of the husband's one half interest in the Louisiana property, less one half of the outstanding mortgage loan, should have been included in the valuation of his separate estate along with the value of his personal property, and he was precluded by this section [Code 1942, § 670] from renouncing his wife's will, which made no provision for him, since his property at the time of her death was more than equal in value to what would have been his lawful portion of her estate. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828, 1957 Miss. LEXIS 409 (Miss. 1957).

Where a testatrix had willed an estate of the value of $90,000, and surviving husband had a separate estate worth $30,000, upon renunciation the surviving husband was entitled only to have the value of his separate estate deducted from one-half of the value of testatrix's estate, leaving the sum of $15,000 as a deficiency to be made up for the surviving husband. Davis v. Miller, 202 Miss. 880, 32 So. 2d 871, 1947 Miss. LEXIS 351 (Miss. 1947).

RESEARCH REFERENCES

ALR.

Waiver or abandonment of, or estoppel to assert, prior renunciation of, or election to take against, spouse's will. 29 A.L.R.2d 227.

What passes under provision of will that spouse shall take share of estate allowed or provided by law, or a provision of similar import. 36 A.L.R.2d 147.

Who must bear loss occasioned by election against will. 36 A.L.R.2d 291.

What constitutes transfer outside the will precluding surviving spouse from electing statutory share under Uniform Probate Code § 2-301. 11 A.L.R.4th 1213.

Surviving spouse's right to marital share as affected by valid contract to convey by will. 85 A.L.R.4th 418.

Am. Jur.

25 Am. Jur. Pl & Pr Forms (Rev), Wills, Forms 161 et seq. (election whether to take under will).

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-5-31. Repealed.

Repealed by Laws, 1993, ch. 342, § 1, eff from and after passage (approved March 10, 1993).

[Codes, 1892, § 4501; 1906, § 5091; Hemingway's 1917, § 3379; 1930, § 3565; 1942, § 671; Laws, 1940, ch. 318; Laws, 1988, ch. 489, § 1]

Editor's Notes —

Former § 91-5-31 was a statute of mortmain, and provided certain restrictions on how a person could, by will, bequeath or devise his assets to charitable, religious, educational or civil institutions. Similar provisions are contained in Miss. Const., Art. 14, § 270.

JUDICIAL DECISIONS

1. In general.

The legislature intended the repeal of the statute to be effective as of its date of passage in that there is no savings clause included. Hudson v. Moon, 732 So. 2d 927, 1999 Miss. LEXIS 53 (Miss. 1999).

Where heirs at law had a vested remainder, subject to defeasance by the exercise of a power of disposition by the defendant foundation, but the foundation failed to exercise such power, the subsequent repeal of the statute did not affect the heirs' rights and they maintained rights in the land not disposed of by the foundation. Hudson v. Moon, 732 So. 2d 927, 1999 Miss. LEXIS 53 (Miss. 1999).

§ 91-5-33. Person who kills another not to take under his will.

If any person shall wilfully cause or procure the death of another in any manner, he shall not take the property, or any part thereof, real or personal, of such other under any will, testament, or codicil. Any devise to such person shall be void and, as to the property so devised, the decedent shall be deemed to have died intestate.

This shall not defeat the title of a bona fide purchaser for value of the property so devised, who acquired the same after one year from the probation of the will without notice that the person to whom the same was devised so caused or procured the death of the testator.

HISTORY:

Codes, 1892, § 4502; 1906, § 5092; Hemingway's 1917, § 3380; 1930, § 3566; 1942, § 672.

Cross References —

Inheritance by killer from his victim, see § 91-1-25.

JUDICIAL DECISIONS

1. In general.

This section requires a finding of willful conduct to preclude a person from inheriting from his or her victim. Because an insane person lacks the requisite ability willfully to kill another person, the Slayer Statute is not applicable in cases where the killer is determined to be insane at the time of the killing. Armstrong v. Armstrong (In re Estate of Armstrong), 170 So. 3d 510, 2015 Miss. LEXIS 378 (Miss. 2015).

Evidence of a guilty plea to a charge of manslaughter is not sufficient, standing alone, to enable a fact finder to conclude that one is prohibited from inheriting under §§ 91-1-25 and 91-5-33. Hood v. VanDevender, 661 So. 2d 198, 1995 Miss. LEXIS 456 (Miss. 1995).

Equitable estoppel does not and cannot authorize the exercise of a personal right which terminates with the death of a spouse, and the fact that a husband shot and killed his wife, an act which would have precluded his inheriting her estate, is no justification for permitting the deceased wife's personal representatives to renounce the husband's will, an act which by law can only be invoked personally by a surviving spouse. Jenkins v. Borodofsky, 211 So. 2d 874, 1968 Miss. LEXIS 1288 (Miss. 1968).

RESEARCH REFERENCES

ALR.

Felonious killing of testator as affecting slayer's rights as beneficiary under will. 36 A.L.R.2d 960.

Felonious killing of ancestor as affecting intestate succession. 39 A.L.R.2d 477.

Homicide as precluding taking under will or by intestacy. 25 A.L.R.4th 787.

Am. Jur.
79 Am. Jur. 2d, Wills § 148.

CJS.
95 C.J.S., Wills §§ 99-102.

Law Reviews.
1978 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 165, March, 1979.

§ 91-5-35. Will devising real property admitted to probate as muniment of title only; rights of interested parties unaffected.

(1) When a person dies testate owning at the time of death real property in the State of Mississippi and his will purports to devise such realty, then said will may be admitted to probate, as a muniment of title only, by petition signed and sworn to by all beneficiaries named in the will, and the spouse of such deceased person if such spouse is not named as a beneficiary in the will, without the necessity of administration or the appointment of an executor or administrator with the will annexed, provided it be shown by said petition that:

(a) The value of the decedent's personal estate in the State of Mississippi at the time of his or her death, exclusive of any interest in real property, did not exceed the sum of Ten Thousand Dollars ($10,000.00), exclusive of exempt property; and

(b) All known debts of the decedent and his estate have been paid, including estate and income taxes, if any.

(2) If any beneficiary to any will admitted to probate pursuant to this section shall be under a disability, then the petition may be signed for him by one of his parents or his legal guardian.

(3) The probate of a will under this section shall in no way affect the rights of any interested party to petition for a formal administration of the estate or to contest the will as provided by Section 91-7-23, Mississippi Code of 1972, or the right of anyone desiring to contest a will presented for probate as provided by Section 91-7-21, or as otherwise provided by law.

(4) This section shall apply to wills admitted to probate from and after July 1, 1984, notwithstanding that the testator or testatrix may have died on or before July 1, 1984.

HISTORY:
Laws, 1983, ch. 385; Laws, 1984, ch. 467; Laws, 1989, ch. 582, § 1, eff from and after July 1, 1989.

CHAPTER 7.

EXECUTORS AND ADMINISTRATORS

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§ 91-7-1. Venue of proof of wills.

Wills shall be proved in and letters testamentary thereon granted by the chancery court of the county in which the testator had a fixed place of residence. If he had no fixed place of residence and land be devised in the will, it shall be proved in and letters granted by the chancery court of the county where the land, or some part thereof, is situated. If the testator had no fixed place of residence and personal property only be disposed of by the will, it may be proved in and letters granted by the chancery court of the county where the testator died, or of the county in which some part of the property may be.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (24); 1857, ch. 60, art. 42; 1871, § 1098; 1880, § 1960; 1892, § 1813; 1906, § 1988; Hemingway's 1917, § 1653; 1930, § 1599; 1942, § 495.

Cross References —

Definition of "will", see § 1-3-61.

Jurisdiction of chancery court over matters of administration of estates, see § 9-5-83.

Wills and testaments generally, see § 91-5-1 et seq.

Probate of will as prima facie evidence of its validity, see § 91-7-27.

Grant of letters of administration, see § 91-7-63.

Applicability of Mississippi Rules of Civil Procedure to proceedings which are subject to the provisions of Title 91, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Forum county pursuant to Miss. Const. Art. VI, § 159 had full jurisdiction over admission of the testator's will to probate. Indeed, under that constitutional provision it had full jurisdiction over matters testamentary and of administration, and the forum county under Miss. Code Ann. § 91-7-1 was the proper location to hear probate matters concerning the testator's estate because the testator at the time of his death had a fixed residence in the forum county. Ellzey v. McCormick, 17 So. 3d 583, 2009 Miss. App. LEXIS 118 (Miss. Ct. App. 2009).

Hancock County was the proper venue to admit a nondomiciliary's will where the decedent, after living in the county for more than 30 years, had at least acquired some clothing or other personal property in the county in which he died. In re Estate of Kelly v. Cuevas, 951 So. 2d 564, 2005 Miss. App. LEXIS 995 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

As decedent's will was not a foreign will, but a domestic will, sounding in Mississippi law, executed by the decedent in Mississippi where he had resided in a residential care facility for 25 years, and where he died, the trial court properly determined that it had subject matter jurisdiction to probate the will under Miss. Code Ann. § 91-7-1. Estate of Kelly v. Cuevas, 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

If the testator had no fixed place of residence, and only personal property is to be disposed of by the will, it may be proved in, and letters granted by, the chancery court of the county where the testator died, or the county in which some part of the property may be. Halford v. Hines, 223 Miss. 786, 79 So. 2d 264, 1955 Miss. LEXIS 439 (Miss. 1955).

Where it was shown that the testator had lived for seventy years on the farm, and when he moved to a town did not move any of his household effects and a witness testified that the testator was coming back home, the evidence was sufficient to support the finding that the testator had not changed his residence. Halford v. Hines, 223 Miss. 786, 79 So. 2d 264, 1955 Miss. LEXIS 439 (Miss. 1955).

Domestic will when probated and recorded in county in which testator resided at time of death constituted notice throughout state to subsequent mortgagee of land in Mississippi devised by will, without necessity of recording will in county wherein land was situated. Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864, 166 So. 345, 1935 Miss. LEXIS 27 (Miss. 1935).

Probate of will is a proceeding in rem having no effect on property outside of jurisdiction where will probated. Woodville v. Pizzati, 119 Miss. 442, 81 So. 127, 1919 Miss. LEXIS 22 (Miss. 1919).

RESEARCH REFERENCES

ALR.

Adverse interest or position as qualification for appointment of administrator, executor, or other personal representative. 11 A.L.R.4th 638.

Am. Jur.

79 Am. Jur. 2d, Wills § 732 et seq.

CJS.

95 C.J.S., Wills § 549 et seq.

Law Reviews.

Weems and Evans, Mississippi law of intestate succession, wills, and administration and the proposed Mississippi Uniform Probate

Code: a comparative analysis. 62 Miss. L. J. 1, Spring, 1992.

Practice References.

Bickel and Flannery, Living Trusts: Forms and Practice (Matthew Bender).

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Schoenblum, Estate Planning Forms and Clauses with CD Rom (Matthew Bender).

Wyatt, Trust Administration and Taxation (Matthew Bender).

LexisNexis® CD – Estate Planning Package (CD-ROM) (LexisNexis).

Murphy's Will Clauses: Annotations and Forms with Tax Effects (Matthew Bender).

§ 91-7-3. By whom presented.

When any last will and testament is exhibited to be proved, the court may take the probate thereof, and any one interested in a will may propound it for probate. Summons may be issued by the clerk for the subscribing witnesses, or for other witnesses, to be examined as to such will.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (29); 1857, ch. 60, art. 43; 1871, § 1099; 1880, §§ 1961, 1992; 1892, § 1814; 1906, § 1989; Hemingway's 1917, § 1654; 1930, § 1600; 1942, § 496.

JUDICIAL DECISIONS

1. In general.

The probation of 1980 will in common form and its admission to probate created prima facie evidence that the will was valid. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

The probate of a will in common form is not a final adjudication of its validity but is an "incipient step" necessary to enable the court to proceed to carry the will into execution, and it is not conclusive against heirs and distributees, and if they desire to contest the validity of the will this shall be done by an issue devisavit vel non. Perry v. Aldrich, 251 Miss. 429, 169 So. 2d 786, 1964 Miss. LEXIS 361 (Miss. 1964).

Where a niece and two nephews had recited in a sworn petition for letters of administration that their aunt had died intestate some five years previously, although at the time admittedly all knew of the existence of the aunt's will, and the estate had been administered and discharged, the niece was estopped 21 years later from offering the aunt's will to probate. Logan v. Smith, 229 Miss. 513, 91 So. 2d 707, 1956 Miss. LEXIS 633 (Miss. 1956).

If from any cause the original will cannot be had, secondary evidence of its contents is admissible, and it may be probated in that form. Pratt v. Hargraves, 77 Miss. 892, 28 So. 722, 1900 Miss. LEXIS 52 (Miss. 1900).

The refusal to probate a will in common form because of insufficient proof does not preclude the subsequent probate on sufficient evidence. Martin v. Perkins, 56 Miss. 204, 1878 Miss. LEXIS 60 (Miss. 1878).

RESEARCH REFERENCES

ALR.

Probate where two or more testamentary documents, bearing the same date or undated, are proffered. 17 A.L.R.3d 603.

What circumstances excuse failure to submit will for probate within time limit set by statute. 17 A.L.R.3d 1361.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 386.

79 Am. Jur. 2d, Wills § 760 et seq.

CJS.

95 C.J.S., Wills § 489.

§ 91-7-5. Production of will compelled.

The chancery court of the proper county, on being informed that any person has the last will and testament of a testator or testatrix, may compel such person to produce it.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (22); 1857, ch. 60, art. 47; 1871, § 1103; 1880, § 1977; 1892, § 1830; 1906, § 2005; Hemingway's 1917, § 1670; 1930, § 1601; 1942, § 497.

RESEARCH REFERENCES

ALR.
Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 A.L.R.4th 561.

Am. Jur.
79 Am. Jur. 2d, Wills § 714 et seq.

CJS.
95 C.J.S., Wills §§ 474-477, 710.

§ 91-7-7. Proof of due execution of will.

The due execution of the will, whether heretofore or hereafter executed, must be proved by at least one (1) of the subscribing witnesses, if alive and competent to testify. If none of the subscribing witnesses can be produced to prove the execution of the will, it may be established by proving the handwriting of a testator and of the subscribing witnesses to the will, or of some of them. The execution of the will may be proved by affidavits of subscribing witnesses. The affidavits may be annexed to the will or may be a part of the will, and shall state the address of each subscribing witness. Such affidavits may be signed at the time that the will is executed.

HISTORY:
Codes, 1871, § 1117; 1880, § 1963; 1892, § 1815; 1906, § 1991; Hemingway's 1917, § 1656; 1930, § 1602; 1942, § 498; Laws, 1946, ch. 335, § 1; Laws, 1992, ch. 383, § 1, eff from and after July 1, 1992.

Cross References —
Number of witnesses of will required, see § 91-5-1.
Nuncupative wills, see § 91-5-15.
Wills of members of armed forces and mariners, see § 91-5-21.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Resort to secondary evidence.

1. In general.

A record of probate in common form which does not contain the affidavit of a subscribing witness or other testimony in writing proving the validity of the will, and no explanation of the absence of such proof, is not prima facie evidence of the validity of the will. Gibson v. Jones, 238 Miss. 186, 117 So. 2d 879, 1960 Miss. LEXIS 394 (Miss. 1960).

In a will contest where proponents introduced a record of probate of will in common form, it was not necessary that they go further and make proof of will by having one of subscribing witnesses present to testify. Bearden v. Gibson, 215 Miss. 218, 60 So. 2d 655, 1952 Miss. LEXIS 555 (Miss. 1952).

This section [Code 1942, § 498] does not require that the execution of the will be proved by more than one of the subscribing witnesses, and where one of two subscribing witnesses testifies to every fact necessary to the due execution of a lost will, together with evidence that the testator made corroborative statements up to the time of her death, the proponent was held to have met the burden of proof, notwithstanding that the other subscribing witnesses denied his attestation or presence at the execution thereof. Warren v. Sidney's Estate, 183 Miss. 669, 184 So. 806, 1938 Miss. LEXIS 281 (Miss. 1938).

Evidence of subscribing witness that testatrix told him that instrument was her will, that she had signed it and wanted him to sign it as a witness, and that he did so in her presence, and testimony of other witness who did not sign in presence of other subscribing witness and was not present when other witness signed that testatrix told him instrument was her will and requested him to sign it as a witness, was sufficient to authorize admission of will to probate in solemn form. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

If contestant introduces attesting witness, failure of proponents to do so is corrected. Ward v. Ward, 124 Miss. 697, 87 So. 153, 1920 Miss. LEXIS 559 (Miss. 1921).

2. Resort to secondary evidence.

The trial court properly set aside a jury verdict finding that the decedent's lost or destroyed will had been properly executed where there was neither direct nor secondary evidence that the alleged lost or destroyed will was ever signed, witnessed, and executed according to law. Gaston v. Gaston, 358 So. 2d 376, 1978 Miss. LEXIS 2527 (Miss. 1978).

When the witnesses to a lost will are dead, their attestation may be proved by secondary evidence. Estate of Willis v. Willis, 207 So. 2d 348, 1968 Miss. LEXIS 1609 (Miss. 1968).

Although under Code 1942, § 498 the testimony of only one living witness is sufficient to establish a will's proper execution, proof of two signatures of witnesses is required to prove due execution where the witnesses to a will are deceased. Estate of Willis v. Willis, 207 So. 2d 348, 1968 Miss. LEXIS 1609 (Miss. 1968).

Proof of the due execution of the will may, if necessary, be made by others than subscribing witnesses, although subscribing witnesses must be produced, if possible. Warren v. Sidney's Estate, 183 Miss. 669, 184 So. 806, 1938 Miss. LEXIS 281 (Miss. 1938).

Where subscribing witness will and can prove facts as to execution of will, secondary evidence cannot be used until they have been called or produced. Helm v. Sheeks, 116 Miss. 726, 77 So. 820, 1917 Miss. LEXIS 366 (Miss. 1917); Warren v. Sidney's Estate, 183 Miss. 669, 184 So. 806, 1938 Miss. LEXIS 281 (Miss. 1938).

RESEARCH REFERENCES

ALR.

"Attestation" or "witnessing" of will, required by statute, as including witnesses' subscription. 45 A.L.R.2d 1365.

Failure of attesting witness to write or state place of residence as affecting will. 55 A.L.R.2d 1053.

Requirement that holographic will, or its material provisions, be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting. 37 A.L.R.4th 528.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 A.L.R.4th 561.

Am. Jur.

80 Am. Jur. 2d, Wills § 852 et seq., 859 et seq.

1 Am. Jur. Proof of Facts 2, Mistake in the Inducement in Wills, § 5 et seq. (proof of mistake in the inducement).

24 Am. Jur. Proof of Facts 3d 667, Identification of Handprinting and Numerals.

25 Am. Jur. Proof of Facts 3d 637, Illegible Signatures and Writing in Litigation.

Practice References.

Young, Trial Handbook for Mississippi Lawyers §§ 22:4, 22:5.

CJS.

95 C.J.S., Wills §§ 637, 638, 658-665.

§ 91-7-9. Affidavit of subscribing witness receivable.

The affidavit of any subscribing witness to a will, made before and certified by any officer in the state competent to administer oaths, shall be received as a substitute for the personal attendance of the affiant to prove the will where there is no contest about it.

HISTORY:

Codes, 1880, § 1964; 1892, § 1817; 1906, § 1992; Hemingway's 1917, § 1657; 1930, § 1603; 1942, § 499.

Editor's Notes —

Laws, 1974, ch. 375, § 1, amended this section by adding a second paragraph. At the direction of the State Attorney General, the amendment was not executed, and instead, the second paragraph was designated as new code § 91-7-10.

JUDICIAL DECISIONS

1. In general.

As the will was not contested, the affidavits of two attesting witnesses that the decedent was of sound and disposing mind at the time he executed his will was sufficient to establish the will was properly executed. In re Estate of Kelly v. Cuevas, 951 So. 2d 564, 2005 Miss. App. LEXIS 995 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

Under Code 1942, § 499 where there was no will contest, the affidavit of the subscribing witness constituted testimony of the attesting witness for the proponent of the will. Chapman v. Chapman, 264 So. 2d 395, 1972 Miss. LEXIS 1357 (Miss. 1972).

The logical basis of the rule that subscribing witnesses to a will that has been admitted to probate in common form should be produced is that the affidavit of proof of due execution of a will authorized by statute is an ex parte statement by the subscribing witnesses. Chapman v. Chapman, 264 So. 2d 395, 1972 Miss. LEXIS 1357 (Miss. 1972).

A person contesting a will should be allowed to examine the subscribing witnesses to the will as to all matters relevant to the will's execution and to inquire into surrounding facts and circumstances so that the court may determine if the will was properly signed and attested, if attestation be required, and if the testator was mentally competent and free of undue influence. Chapman v. Chapman, 264 So. 2d 395, 1972 Miss. LEXIS 1357 (Miss. 1972).

The contestant of a will was entitled to impeach the testimony of subscribing witnesses who were called by the contestant as adverse witnesses, in an affidavit which was the basis for admission of the will to probate, even if such impeachment was made by the witnesses' own testimony. Chapman v. Chapman, 264 So. 2d 395, 1972 Miss. LEXIS 1357 (Miss. 1972).

A record of probate in common form which does not contain the affidavit of a subscribing witness or other testimony in writing proving the validity of the will, and no explanation of the absence of such proof, is not prima facie evidence of the validity of the will. Gibson v. Jones, 238 Miss. 186, 117 So. 2d 879, 1960 Miss. LEXIS 394 (Miss. 1960).

In a will contest where proponents introduced a record of probate of will in common form, it was not necessary that they go further and make proof of will by having one of subscribing witnesses present to testify. Bearden v. Gibson, 215 Miss. 218, 60 So. 2d 655, 1952 Miss. LEXIS 555 (Miss. 1952).

In a will contest after probate, proponents of a will, executed in Texas, were not required to make proof of the validity of the will by having the subscribing witnesses present to testify, or their testimony in the form of depositions, and a prima facie case of the validity of the will was properly made out by introducing the probate of the will in common form by the affidavits of the subscribing witnesses who resided in Texas. Hilton v. Johnson, 194 Miss. 671, 12 So. 2d 524, 1943 Miss. LEXIS 77 (Miss. 1943).

The affidavits of two subscribing witnesses to a will were sufficient for the probate thereof in common form. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

§ 91-7-10. Affidavits may be used to authenticate holographic wills or codicils.

Where there is not contest about it, a holographic will or codicil may be proved at the time of presentment for probate by the affidavits, made before an officer in the state authorized to administer oaths, of at least two (2) persons, in no wise interested in the estate of the testator or testatrix, attesting to the authenticity of the will or codicil and the competency of the testator or testatrix to make testamentary disposition of his or her property; provided, however, that such affiants shall be persons familiar with the handwriting and signature of the testator or testatrix, and the affidavits so presented shall contain statements made on the personal knowledge of such affiants attesting that such handwriting and such signature are genuine and were made and done by the testator or testatrix; and in such case the affidavits made and presented in conformity herewith may be received as a substitute for the personal attendance of witnesses to prove such will or codicil.

HISTORY:

Laws, 1974, ch. 375, § 1, eff from and after passage (approved March 19, 1974).

Editor's Notes —

Laws, 1974, ch. 375, § 1, amended § 91-7-9 by adding a second paragraph. At the direction of the State Attorney General, the second paragraph was designated as new code § 91-7-10.

RESEARCH REFERENCES

ALR.

Competency of interested witnesses to testify to signature or handwriting of deceased. 13 A.L.R.3d 404.

Am. Jur.

79 Am. Jur. 2d, Wills § 605.

25 Am. Jur. Pl & Pr Forms (Rev), Wills, Form 55 (petition or application to probate holographic will).

CJS.

95 C.J.S., Wills §§ 330-339, 478-481, 679-682, 734, 735.

§ 91-7-11. Testimony of absent witness.

When any will shall be exhibited for probate and any witness who attested the will shall reside out of the state or be not found, either of the following methods may be used to prove the execution of the will, to wit:

(a) A commission may issue to take his or her deposition, as in other cases of nonresident witnesses, to which the will shall be attached. Before such original will shall be sent abroad for proof, the clerk shall make and certify to a true copy thereof and file the copy in his office, and such certified true copy shall have the same legal force and effect of the original will and may be substituted for the original will should the original will be lost. Provided, however, where there is no contest, the affidavit of such nonresident subscribing witness may be made before any officer competent to administer oaths in the state where such nonresident witness may be found.

(b) Or, in lieu of sending the original will abroad for such proof, the clerk may have made a photostatic copy of said original will and certify to same as being a photostatic copy of said original will and send said certified photostatic copy of said original will abroad, instead of the original will; and in which case, the clerk shall file the original will in his office.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (28); 1857, ch. 60, art. 44; 1871, § 1100; 1880, § 1972; 1892, § 1819; 1906, § 1994; Hemingway's 1917, § 1659; 1930, § 1604; 1942, § 500; Laws, 1954, ch. 215; Laws, 1966, ch. 322, § 1, eff from and after passage (approved May 20, 1966).

§ 91-7-13. Testimony on probating will reduced to writing.

If the will shall appear to have been duly executed, it shall be admitted to probate. All testimony taken in probating it shall be reduced to writing and filed and carefully preserved in the clerk's office.

HISTORY:

Codes, 1880, § 1965; 1892, § 1818; 1906, § 1993; Hemingway's 1917, § 1658; 1930, § 1605; 1942, § 501.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 501] and Code 1942, § 507 must be read together. Gibson v. Jones, 238 Miss. 186, 117 So. 2d 879, 1960 Miss. LEXIS 394 (Miss. 1960).

A record of probate in common form which fails to show compliance with this section [Code 1942, § 501] does not constitute prima facie evidence of the validity of the will. Gibson v. Jones, 238 Miss. 186, 117 So. 2d 879, 1960 Miss. LEXIS 394 (Miss. 1960).

§ 91-7-15. Will executed by person in armed forces — additional manner of proof.

In addition to the manner in which wills may be proved and admitted to probate in the State of Mississippi under other laws, any will executed by any member of the armed forces of the United States during the Korean War, or any other war, may be proved and admitted to probate, and letters testamentary thereon granted, by the chancery court or the chancellor in vacation of the county in which such testator lived when he became a member of such armed forces, or by the chancery court or the chancellor in vacation of the county in which such testator owned land at the time of his death, on the affidavit of any reliable person or persons sufficient to satisfy the chancellor that the testator is dead, that the writing propounded for probate was signed by the testator as his last will and testament, that the affidavit or testimony of the subscribing witnesses to such will cannot reasonably be obtained, and that there is good reason for such will to be then probated.

HISTORY:

Codes, 1942, § 501-01; Laws, 1944, ch. 167, § 1; Laws, 1952, ch. 254.

RESEARCH REFERENCES

Am. Jur.

25 Am. Jur. Proof of Facts 3d 637, Illegible Signatures and Writing in Litigation.

§ 91-7-17. Rejection of will not binding.

The rejection of an ex parte application to probate a will shall not bind any one or extinguish any right.

HISTORY:

Codes, 1880, § 1966; 1892, § 1920; 1906, § 1995; Hemingway's 1917, § 1660; 1930, § 1606; 1942, § 502.

§ 91-7-19. All interested may be made parties.

Any proponent of a will for probate may, in the first instance, make all interested persons parties to his application to probate the will, and in such case all who are made parties shall be concluded by the probate of the will. At the request of either party to such proceeding, an issue shall be made up and tried by a jury as to whether or not the writing propounded be the will of the alleged testator.

HISTORY:

Codes, 1880, § 1967; 1892, § 1821; 1906, § 1996; Hemingway's 1917, § 1661; 1930, § 1607; 1942, § 503.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Interested parties.
3. Conclusiveness of decree.

1. In general.

Trial court did not err in granting beneficiaries summary judgment in a will contest because they established a prima facie case that the will was valid and that the testator possessed testamentary capacity, and the son failed to rebut the prima facie case with any summary-judgment evidence that there was a genuine issue for trial; the will was admitted to probate, and the beneficiaries attached affidavits of individuals that testified as to the testator's mental capacity. Froemel v. Estate of Froemel, — So. 3d —, 2018 Miss. App. LEXIS 230 (Miss. Ct. App. May 8, 2018).

Chancellor erred in holding that Miss. Code Ann. § 91-7-33 absolutely barred the sister from initially proving a lost foreign will in Mississippi where the will disposed of property in this state. Given the existence of genuine issues of material fact regarding the validity of the testator's will, the chancellor should have proceeded with the will contest and impaneled a jury to decide the will's validity. Watt v. Cobb (In re Estate of High), 19 So. 3d 1282, 2009 Miss. App. LEXIS 743 (Miss. Ct. App. 2009).

Summary judgment is properly granted where no genuine issues of material fact have been presented although question of will or no will is primary issue in will contest and either party to will contest has automatic right to jury trial. Gallagher v. Warden, 507 So. 2d 27 (Miss. 1987).

Evidence that testator of advanced years living in nursing home was dependent upon beneficiary to some degree is insufficient basis for finding of confidential relationship resulting in will being product of undue influence where there is no proof that testator looked to beneficiary to care for personal needs, to tend to him, or to handle his affairs. In re Will & Estate of Varvaris, 477 So. 2d 273, 1985 Miss. LEXIS 2256 (Miss. 1985).

Party who desires jury to try issue of devisavit vel non is under duty to specifically request jury before hearing on matter. In re Will & Estate of Varvaris, 477 So. 2d 273, 1985 Miss. LEXIS 2256 (Miss. 1985).

In a probate action the chancery court properly overruled a motion to exclude the jury on the issue involving probate of a 1961 will, where the mover's pleading involving a 1979 will raised the issue of revocation of the 1961 will, and where the question of revocation was a proper question for the jury. Deposit Guaranty Nat'l Bank v. Cotten, 420 So. 2d 242, 1982 Miss. LEXIS 2203 (Miss. 1982).

Although the evidence was conflicting, jury's finding that an alleged holographic will was not in the handwriting of the deceased would not be disturbed by the supreme court where there was ample evidence to warrant that conclusion, and the chancellor's decree had upheld a jury's verdict. In re Estate of Rumley, 234 Miss. 490, 106 So. 2d 678, 1958 Miss. LEXIS 522 (Miss. 1958).

It was not required in a probate proceeding that an issue devisavit vel non be tried to a jury. Darby v. Arrington, 194 Miss. 123, 11 So. 2d 220, 1942 Miss. LEXIS 170 (Miss. 1942).

Where cousins of a testatrix's heir, who would inherit the estate if the will, under which the heir would receive a life estate, should be set aside, were precluded from prosecuting an appeal from a decree validating the will, upon the death of the heir pending the appeal, since the proceedings involved the only persons then interested, and the cousins were not beneficiaries, his administrator, in his naked right as administrator of the only "interested person," could not (there being no creditors of the deceased heir's estate), prosecute the appeal, either on behalf of the estate or of the cousins. Darby v. Arrington, 194 Miss. 123, 11 So. 2d 220, 1942 Miss. LEXIS 170 (Miss. 1942).

2. Interested parties.

An administrator is not such an "interested party" within statutes providing that a proponent may make all interested persons parties to application for probate of will and that any interested person may at any time within two years contest validity of will probated without notice, as is authorized to contest will subsequently presented for probate. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

3. Conclusiveness of decree.

The admission of a will to probate was only prima facie evidence of its validity and would not conclude the heirs at law as interested parties from contesting will within two years in manner prescribed by statute, where the heirs at law had not been made parties to the petition for the probate thereof. Austin v. Patrick, 179

Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

In proceeding to probate will and to remove administratrix theretofore appointed, chancery court was without jurisdiction to hear contest as to validity of will where none of the interested parties as such were before the court, and hence such parties would not be concluded by decree adjudicating validity of will. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

RESEARCH REFERENCES

ALR.

Judgment denying validity of will because of undue influence, lack of mental capacity, or the like, as res judicata as to validity of another will, deed, or other instrument. 25 A.L.R.2d 657.

Necessity that executor or administrator be represented by counsel in presenting matters in probate court. 19 A.L.R.3d 1104.

Am. Jur.

79 Am. Jur. 2d, Wills § 760 et seq.

25 Am. Jur. Pl & Pr Forms (Rev), Wills, Forms 72, 72.1, 72.2 (notice).

§ 91-7-21. Caveat against probate may be filed.

Any one desiring to contest a will presented for probate may do so before probate by entering in the clerk's office in which it shall be presented his objection to the probate thereof, and causing all parties interested and who do not join him in such objection to be made parties defendant. Thereupon the issue devisavit vel non shall be made up and tried, and proceedings had as in other like cases. When an objection to the probate of a will has been made in writing, filed with the clerk, probate shall not be had of such will without notice to the objector.

HISTORY:

Codes, 1880, § 1970; 1892, § 1815; 1906, § 1990; Hemingway's 1917, § 1655; 1930, § 1608; 1942, § 504.

Cross References —

Right to renounce will, see § 91-5-25 et seq.

Rights of interested parties to contest will devising real property which is admitted to probate as muniment of title only, see § 91-5-35.

JUDICIAL DECISIONS

1. In general.

A chancery court did not have jurisdiction to hear a will contest where the executor failed to properly designate the beneficiaries as necessary parties, since the "interested and necessary parties" were not timely noticed and properly joined in the lawsuit; the chancellor should have joined all necessary and proper parties before exercising jurisdiction. Padron v. Martell (In re Estate of McClerkin), 651 So. 2d 1052, 1995 Miss. LEXIS 135 (Miss. 1995).

In an action to probate a will, the chancellor erred in sustaining the executor's and beneficiaries' motions to dismiss a caveat against probate filed by will contestants on the ground that the will was not contested within 2 years as required by § 91-7-23 where the beneficiaries were not listed as interested parties on the petition to probate the will, since the beneficiaries were necessary parties entitled to notice of the action. Padron v. Martell (In re Estate of McClerkin), 651 So. 2d 1052, 1995 Miss. LEXIS 135 (Miss. 1995).

Pleadings filed by the executor and sole beneficiary of 1980 will constituted a caveat against or contest of 1982 will sought to be substituted for earlier will for probate. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Where a will has been admitted to probate in common form as the last will of a testator, it will remain the last will of the testator unless (within the time allowed by law) it is set aside by an order of the chancery court upon a contest and issue devisavit vel non. Perry v. Aldrich, 251 Miss. 429, 169 So. 2d 786, 1964 Miss. LEXIS 361 (Miss. 1964).

Where contest of a will was filed after admission of the will to probate by the clerk in vacation without notice to the objectors but before such admission was approved and confirmed by the court, such contest was not filed "before probate" within the meaning of this section [Code 1942, § 504], so as to preclude introduction in evidence of the probate of the will as prima facie evidence of its validity, in the trial of the will contest. Bigleben v. Henry, 196 Miss. 586, 17 So. 2d 602, 1944 Miss. LEXIS 238 (Miss. 1944).

Entry by the clerk of his order in vacation admitting a will to probate is an adjudication by him that the instrument has been duly proven by the presentation thereof with the affidavits of the subscribing witnesses thereto attached. Bigleben v. Henry, 196 Miss. 586, 17 So. 2d 602, 1944 Miss. LEXIS 238 (Miss. 1944).

Probate of a will in common form before the clerk in vacation should be deemed prima facie evidence of the validity of the will unless and until its invalidity shall have been determined by the court. Bigleben v. Henry, 196 Miss. 586, 17 So. 2d 602, 1944 Miss. LEXIS 238 (Miss. 1944).

Where instrument purporting to be a will was admitted to probate by the clerk in vacation, without notice to the objectors, and will contest was filed thereafter but before approval and confirmation of clerk's acts in question, and admission to probate was thereafter approved and confirmed over objection of contestants, and on subsequent trial of will contest probate of the instrument was offered in evidence but contestant offered no evidence, peremptory instruction in favor of proponent was correct. Bigleben v. Henry, 196 Miss. 586, 17 So. 2d 602, 1944 Miss. LEXIS 238 (Miss. 1944).

Surviving wife, only heir at law, may contest husband's will. Woodville v. Pizzati, 119 Miss. 442, 81 So. 127, 1919 Miss. LEXIS 22 (Miss. 1919).

Acquiescence in probate of will in Louisiana, by surviving wife, held not to estop her from contesting will in Mississippi. Woodville v. Pizzati, 119 Miss. 442, 81 So. 127, 1919 Miss. LEXIS 22 (Miss. 1919).

RESEARCH REFERENCES

ALR.

Right of executor or administrator to contest will codicil of his decedent. 31 A.L.R.2d 756.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so. 42 A.L.R.2d 1319.

Decedent's spouse as a proper party to contest will. 78 A.L.R.2d 1060.

Right of trustee named in earlier will to contest, or seek to revoke probate of, later will. 94 A.L.R.2d 1409.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder. 78 A.L.R.4th 90.

Am. Jur.

79 Am. Jur. 2d, Wills §§ 726 et seq., 780.

25 Am. Jur. Pl & Pr Forms (Rev), Wills, Forms 241 et seq. (opposition and contest).

9 Am. Jur. Trials, Will Contests, § 1 et seq.

CJS.

95 C.J.S., Wills §§ 498, 499, 501-510, 537 et seq.

§ 91-7-23. Validity contested within two years.

Any person interested may, at any time within two years, by petition or bill, contest the validity of the will probated without notice; and an issue shall be made up and tried as other issues to determine whether the writing produced be the will of the testator or not. If some person does not appear within two years to contest the will, the probate shall be final and forever binding, saving to infants and persons of unsound mind the period of two years to contest the will after the removal of their respective disabilities. In case of concealed fraud, the limitation shall commence to run at, and not before, the time when such fraud shall be, or with reasonable diligence might have been, first known or discovered.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (29); 1857, ch. 60, art. 43; 1871, § 1099; 1880, § 1961; 1892, § 1822; 1906, § 1997; Hemingway's 1917, § 1662; 1930, § 1609; 1942, § 505.

Cross References —

Rights of interested parties to contest will devising real property which is admitted to probate as muniment of title only, see § 91-5-35.

Criminal offense of alteration, destruction, or secretion of wills, see § 97-9-77.

Criminal offense of forgery of will, see § 97-21-63.

JUDICIAL DECISIONS

ANALYSIS

1. Construction and application in general.
2. Who may contest, or procure construction of, will.
3. Issues which may be submitted or considered at same time.
4. Concealed fraud.

1. Construction and application in general.

Daughter of testator was not entitled to go forward on the daughter's will contest filed in the forum county more than two years after the testator's will was admitted to probate there. Pursuant to Miss. Code Ann. § 91-7-23, the daughter had to file the daughter's will contest within two years from the date the will was admitted to probate, and the daughter did not do so. Ellzey v. McCormick, 17 So. 3d 583, 2009 Miss. App. LEXIS 118 (Miss. Ct. App. 2009).

As decedent's brother did not contest the decedent's will within the two-year limitations period for contesting a will admitted to probate in common form, the probate in common form was binding and final. In re Estate of Kelly v. Cuevas, 951 So. 2d 564, 2005 Miss. App. LEXIS 995 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

In an action to probate a will, the chancellor erred in sustaining the executor's and beneficiaries' motions to dismiss a caveat against probate filed by will contestants on the ground that the will was not contested within 2 years as required by § 91-7-23 where the beneficiaries were not listed as interested parties on the petition to probate the will, since the beneficiaries were necessary parties entitled to notice of the action. Padron v. Martell (In re Estate of McClerkin), 651 So. 2d 1052, 1995 Miss. LEXIS 135 (Miss. 1995).

The failure to join known interested parties within 2 years from the date of probate of a will did not require dismissal of a petition to contest the will; treatment of the "persons interested" as necessary parties would be governed by Rules 19 and 21, Miss. R. Civ. P., and therefore the chancery court was required to make the interested persons parties and process issue accordingly. Estate of Schneider, 585 So. 2d 1275, 1991 Miss. LEXIS 643 (Miss. 1991).

The word "probate" within the meaning of § 91-7-23 refers to the act of the clerk accepting the will for probate, rather than the date upon which the estate closed and, therefore, the 2-year limitations period runs from the date the clerk admits the will to probate. In re Will of Fields, 570 So. 2d 1202, 1990 Miss. LEXIS 708 (Miss. 1990).

Attempt to contest will was unseasonable where, while chancery court was in vacation, chancery clerk on January 24, 1983, admitted will and codicils to probate, thereafter issuing Letters Testamentary; on June 13, 1983, chancellor entered order ratifying actions by chancery clerk conducted while court was in vacation; and, action to set aside will alleging mental incompetency when making will was commenced on May 6, 1985. Sims v. Stennis, 510 So. 2d 798 (Miss. 1987).

The sole issue in a will contest is devisavit vel non, or will or no will. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

In an action by a devisee under a 1935 will to perfect his title in certain realty, the trial court correctly dismissed the pending proceedings upon the motion of such devisee, even though a contest of the will had been filed, where it was discovered that the original will had been admitted to probate in 1937 and where the contestants made no attempt to come within the exceptions to the two-year statute of limitations for will contests. In re Last Will & Testament of Hickman, 374 So. 2d 239, 1979 Miss. LEXIS 2339 (Miss. 1979).

Under Code 1972 § 11-5-3, § 91-7-23, and § 91-7-29, prescribing will contest procedures, trial judge erred in directing verdict in favor of proponents of will on issue of testamentary capacity and undue influence, since roll of jury in will contest is same as that of jury in civil trial in court of law and is not "merely advisory." Fowler v. Fisher, 353 So. 2d 497, 1977 Miss. LEXIS 2002 (Miss. 1977).

Under former provisions, it was held that in a proceeding on a petition for probate of a will and revocation of a will previously probated by the defendants, where the plaintiff had filed a petition within the two-year statute of limitations but did not request service of process to issue until after the limitation period, the suit was barred by limitations, since to constitute "legal filing" of the suit, so as to toll the statute of limitations, the presentation of the bill or petition to the clerk must be followed by the issuance of process in the normal and usual manner without undue delay. Knuckles v. Wells, 222 So. 2d 660 (Miss. 1969).

Where a will has been admitted to probate in common form as the last will of a testator, it will remain the last will of the testator unless within the time allowed by law it is set aside by an order of the chancery court upon a contest and issue devisavit vel non. Perry v. Aldrich, 251 Miss. 429, 169 So. 2d 786, 1964 Miss. LEXIS 361 (Miss. 1964).

In the contest of a will, the burden was on the proponent to prove the validity of the will, i.e., that the testator had mental capacity to make it, and that he was not procured to make it by the pressure of undue influence upon him, and this burden was met by the introduction of evidence that the will had been duly admitted to probate. O'Bannon v. Henrich, 191 Miss. 815, 4 So. 2d 208, 1941 Miss. LEXIS 176 (Miss. 1941).

The admission of a will to probate was only prima facie evidence of its validity and would not conclude the heirs at law as interested parties from contesting will within two years in manner prescribed by statute, where the heirs at law had not been made parties to the petition for the probate thereof. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

Contest as to the validity of a will probated without notice must be brought in the court in which the will was probated, the contest being merely supplementary to and a continuation of, the probate proceedings, and, accordingly, the contest is not maintainable in federal courts. In re Armistead's Estate, 4 F. Supp. 606, 1933 U.S. Dist. LEXIS 1282 (D. Miss. 1933).

Parties seeking to set aside will as forgery have burden of showing forgery by clear and convincing pleading, and evidence. Didlake v. Ellis, 158 Miss. 816, 131 So. 267, 1930 Miss. LEXIS 112 (Miss. 1930).

2. Who may contest, or procure construction of, will.

Grandchildren of decedent had no standing to maintain an action challenging the validity of the decedent's will because they were not interest parties at the time of the will's entry into probate as required by Miss. Code Ann. § 91-7-23. They had no direct, pecuniary interest in the estate at the time it was entered into probate or within the two-year statute of limitations. Tatum v. Wells, 2 So. 3d 739, 2009 Miss. App. LEXIS 49 (Miss. Ct. App. 2009).

Putative illegitimate children were not interested persons because they failed to establish any right to inherit as illegitimates, therefore, they lacked standing to contest the last will and testament of the decedent. Parks v. Mathis (In re Estate of Mathis), 800 So. 2d 119, 2001 Miss. App. LEXIS 455 (Miss. Ct. App. 2001).

A will contestant who alleged that she was the only natural child and heir at law of the decedent had standing to contest the will, even though she would take more under the will than she would without it under her existing status, since her status could change pending the hearing on heirship, and she would take more without the will than under the will if she was found to be the sole heir at law. Dees v. Estate of Moore, 562 So. 2d 109, 1990 Miss. LEXIS 257 (Miss. 1990).

A widow could not contest her husband's will more than two years after it was probated, notwithstanding her contention that she was lulled into refraining from contesting it by promises of the testator's children to take care of her and to let her share in the estate. Rush v. Rush, 360 So. 2d 1240, 1978 Miss. LEXIS 2341 (Miss. 1978).

Children of deceased, who entered into agreement with their father not to interfere with his plans as to the future or to make any claim on other property of decedent, in return for gift of property, were not barred from subsequently contesting will where the chancellor found that the agreement was lacking in certainty as to the purpose and extent of the waiver. Ward v. Ward, 203 Miss. 32, 33 So. 2d 294, 1948 Miss. LEXIS 227 (Miss. 1948).

An administrator is not such an "interested party" within statutes providing that a proponent may make all interested persons parties to application for probate of will and that any interested person may at any time within two years contest validity of will probated without notice, as is authorized to contest will subsequently presented for probate. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

Parties having no interest in property devised under will admitted to probate cannot complain of forgery or fraud of person beneficially interested. Didlake v. Ellis, 158 Miss. 816, 131 So. 267, 1930 Miss. LEXIS 112 (Miss. 1930).

Bill seeking to revoke probate of will for forgery and fraud, not showing complainants were interested parties nor essential requisites to probate of destroyed will, held insufficient. Didlake v. Ellis, 158 Miss. 816, 131 So. 267, 1930 Miss. LEXIS 112 (Miss. 1930).

Administrator may not contest will subsequently presented for probate. Cajoleas v. Attaya, 145 Miss. 436, 111 So. 359, 1927 Miss. LEXIS 158 (Miss. 1927).

Complainant having no interest subject to enforcement in equity cannot secure construction of will. Orman v. Hall, 91 So. 273 (Miss. 1922).

A person who takes more under a will than he would as heir cannot contest the validity of the will. Biles v. Dean, 14 So. 536 (Miss. 1893).

3. Issues which may be submitted or considered at same time.

A party may combine a suit to determine heirship with a suit to contest a will. Dees v.

Estate of Moore, 562 So. 2d 109, 1990 Miss. LEXIS 257 (Miss. 1990).

Whether writing produced is testator's will is sole question to be determined on issue of devisavit vel non, and questions as to construction, sufficiency of identification of beneficiaries, and description of property devised cannot be considered. Kinard v. Whites, 175 Miss. 480, 167 So. 636, 1936 Miss. LEXIS 66 (Miss. 1936).

If the interest or heirship of the contestants be denied, that issue should be determined before the issue as to the validity of the will; and a submission of both issues to the same jury is erroneous. Edwards v. Gaulding, 38 Miss. 118, 1859 Miss. LEXIS 101 (Miss. 1859).

4. Concealed fraud.

Appellants' claim that the chancellor erred in finding that a property interest had passed through inheritance was not considered on appeal where the argument was not raised before the chancellor, the will at issue was probated in 1986, no issue of concealed fraud had been raised, and thus, consistent with Miss. Code Ann. § 91-7-23 (Rev. 2013), the inheritance issue was procedurally barred. Wood v. Miller, 179 So. 3d 48, 2015 Miss. App. LEXIS 300 (Miss. Ct. App. 2015).

A will contest initiated by the daughter of a predeceased son of the decedent, in which she alleged that she was inadvertently omitted from the will, was time-barred where it was not commenced within two years, notwithstanding her contention that the executrix and the attorney for the estate intentionally misled her by stating that she did not need to worry because there was no objection to her and her siblings receiving a share of the estate since she knew from almost the moment the will was offered for probate that she was not included in the estate and the probate of the estate was not hidden from her. Williams v. Estate of Winding (In re Last Will & Testament of Winding), 783 So. 2d 707, 2001 Miss. LEXIS 102 (Miss. 2001).

"Concealed fraud," within statute extending time for contesting validity of will probated without notice, is designed fraud by which party knowing to whom right belongs conceals circumstances giving that right, thereby enabling himself to enter and hold. Wilson v. Wilson, 166 Miss. 369, 146 So. 855, 1933 Miss. LEXIS 358 (Miss. 1933).

Where plaintiffs knew from beginning facts which would have avoided will, but testator's widow promised them she would make division of property and after two years expired repudiated promise, there was no "concealed fraud" extending time for contesting validity of will. Wilson v. Wilson, 166 Miss. 369, 146 So. 855, 1933 Miss. LEXIS 358 (Miss. 1933).

Estoppel could not operate to prevent defendant from pleading statute of limitations applying to will contest, which set up its own exceptions. Wilson v. Wilson, 166 Miss. 369, 146 So. 855, 1933 Miss. LEXIS 358 (Miss. 1933).

RESEARCH REFERENCES

ALR.

Provision of will for forfeiture in case of contest, as applied to contest by one not a beneficiary. 7 A.L.R.2d 1357.

Instructions, in will contest, defining natural objects of testator's bounty. 11 A.L.R.2d 731.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so. 42 A.L.R.2d 1319.

Decedent's spouse as a proper party to contest will. 78 A.L.R.2d 1060.

Wills: challenge in collateral proceeding to decree admitting will to probate, on ground of fraud inducing complainant not to resist probate. 84 A.L.R.3d 1119.

Modern status: inheritability or descendability of right to contest will. 11 A.L.R.4th 907.

Word "child" or "children" in will as including grandchild or grandchildren. 30 A.L.R.4th 319.

Fraud as extending statutory limitations period for contesting will or its probate. 48 A.L.R.4th 1094.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 A.L.R.4th 561.

§ 91-7-25. Necessary parties to contest.

In any proceeding to contest the validity of a will, all persons interested in such contest shall be made parties.

HISTORY:

Codes, 1880, § 1968; 1892, § 1823; 1906, § 1998; Hemingway's 1917, § 1663; 1930, § 1610; 1942, § 506.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Standing.

1. In general.

Chancery court's judgment denying daughters' petition to contest the will of their mother had to be reversed and set aside because all necessary parties were not joined. Schmidt v. True (In re Will of True), 220 So. 3d 276, 2017 Miss. App. LEXIS 288 (Miss. Ct. App. 2017).

A chancery court did not have jurisdiction to hear a will contest where the executor failed to properly designate the beneficiaries as necessary parties, since the "interested and necessary parties" were not timely noticed and properly joined in the lawsuit; the chancellor should have joined all necessary and proper parties before exercising jurisdiction. Padron v. Martell (In re Estate of McClerkin), 651 So. 2d 1052, 1995 Miss. LEXIS 135 (Miss. 1995).

In an action to probate a will, the chancellor erred in sustaining the executor's and beneficiaries' motions to dismiss a caveat against probate filed by will contestants on the ground that the will was not contested within 2 years as required by § 91-7-23 where the beneficiaries were not listed as interested parties on the petition to probate the will, since the beneficiaries were necessary parties entitled to notice of the action. Padron v. Martell (In re Estate of McClerkin), 651 So. 2d 1052, 1995 Miss. LEXIS 135 (Miss. 1995).

The failure to join known interested parties within 2 years from the date of probate of a will did not require dismissal of a petition to contest the will; treatment of the "persons interested" as necessary parties would be governed by Rules 19 and 21, Miss. R. Civ. P., and therefore the chancery court was required to make the interested persons parties and process issue accordingly. Estate of Schneider, 585 So. 2d 1275, 1991 Miss. LEXIS 643 (Miss. 1991).

All legatees are indispensable parties to a will contest. Moore v. Jackson, 247 Miss. 854, 157 So. 2d 785, 1963 Miss. LEXIS 364 (Miss. 1963).

Proponent's failure to plead nonjoinder of necessary parties to will contest does not waive the objection. Moore v. Jackson, 247 Miss. 854, 157 So. 2d 785, 1963 Miss. LEXIS 364 (Miss. 1963).

Heirs at law who would take property of the deceased in the absence of a valid will are necessary parties. Provenza v. Provenza, 201 Miss. 836, 29 So. 2d 669, 1947 Miss. LEXIS 453 (Miss. 1947).

Once the court has acquired jurisdiction of all interested parties, jurisdiction is not lost by the withdrawal of an answer filed on behalf of one of the defendants by one duly authorized to make such filing. Provenza v. Provenza, 201 Miss. 836, 29 So. 2d 669, 1947 Miss. LEXIS 453 (Miss. 1947).

In suit to confirm title to land, seeking construction of will to effect that it did not convey title to the land because it was devised to no named legatees, all the beneficiaries should have been under valid process. Dorsey v. Sullivan, 199 Miss. 602, 24 So. 2d 852, 1946 Miss. LEXIS 231 (Miss. 1946).

All "interested parties," or those whose interest detrimentally affected by will, are necessary parties to will contest; heirs at law who would take property but for will, are interested parties; where contestants rely on prior will, all beneficiaries therein are interested parties; all beneficiaries in intermediate will are necessary parties in will contest. Hoskins v. Holmes County Community Hospital, 135 Miss. 89, 99 So. 570, 1924 Miss. LEXIS 19 (Miss. 1924).

2. Standing.

Appellant was properly ordered to pay an estate's attorneys' fees under Miss. R. Civ. P. 11, as appellant's arguments on the issue of his standing to contest the will were frivolous, his filings contained misrepresented facts, and the estate was forced to incur unnecessary attorney's fees in responding to those filings. Covington v. McDaniel (In re Estate of Necaise), 126 So. 3d 49, 2013 Miss. App. LEXIS 108 (Miss. Ct. App.), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

As appellant failed to obtain a judgment, or status as a creditor of the estate, because the statute of limitations had expired and the action was not properly served upon the estate or the decedent during his lifetime, appellant did not have a direct pecuniary interest against the estate and thus was not an interested party under Miss. Code Ann. § 91-7-25; therefore, he was not a proper party to the will contest. Covington v. McDaniel (In re Estate of Necaise), 126 So. 3d 49, 2013 Miss. App. LEXIS 108 (Miss. Ct. App.), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

RESEARCH REFERENCES

ALR.

Standing of legatee or devisee under alleged prior or subsequent will to oppose probate or contest will. 39 A.L.R.3d 321.

Right of heir's assignee to contest will. 39 A.L.R.3d 696.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder. 78 A.L.R.4th 90.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary. 3 A.L.R.5th 590.

Am. Jur.

79 Am. Jur. 2d, Wills § 760 et seq.

§ 91-7-27. Probate of will prima facie evidence.

On the trial of an issue made up to determine the validity of a will which has been duly admitted to probate, such probate shall be prima facie evidence of the validity of the will.

HISTORY:

Codes, 1880, § 1969; 1892, § 1824; 1906, § 1999; Hemingway's 1917, § 1664; 1930, § 1611; 1942, § 507.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction.
3. Particular applications.

1. In general.

The probation of 1980 will in common form and its admission to probate created prima facie evidence that the will was valid. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

The probate of a will in common form is not a final adjudication of its validity but is an "incipient step" necessary to enable the court to proceed to carry the will into execution, and it is not conclusive against heirs and distributees, and if they desire to contest the validity of the will this shall be done by an issue devisavit vel non. Perry v. Aldrich, 251 Miss. 429, 169 So. 2d 786, 1964 Miss. LEXIS 361 (Miss. 1964).

2. Construction.

This section [Code 1942, § 507] must be read together with Code 1942, § 501. Gibson v. Jones, 238 Miss. 186, 117 So. 2d 879, 1960 Miss. LEXIS 394 (Miss. 1960).

3. Particular applications.

Will was properly upheld because the wife made a prima facie case for the will's validity when she probated it in common form, and evidence indicated that although she and the testator had a close relationship, she had not overcome the testator's will so as to exert undue influence on him. Estate of Chapman v. Chapman, 966 So. 2d 1262, 2007 Miss. App. LEXIS 722 (Miss. Ct. App. 2007).

A will is not shown to have been duly admitted to probate in common form, by a record which fails to show compliance with Code 1942, § 501 and makes no attempt to excuse such noncompliance. Gibson v. Jones, 238 Miss. 186, 117 So. 2d 879, 1960 Miss. LEXIS 394 (Miss. 1960).

In a will contest, proof of the probate is all that is required of proponents initially in meeting the burden of proof resting upon them. Wallace v. Harrison, 218 Miss. 153, 65 So. 2d 456, 1953 Miss. LEXIS 525 (Miss. 1953).

In a will contest, a prima facie case was made by proponents by introduction of the proof of probate in common form and this extends to every aspect of the will touching upon its validity and without more, the proponents have introduced sufficient evidence to sustain their burden. Bearden v. Gibson, 215 Miss. 218, 60 So. 2d 655, 1952 Miss. LEXIS 555 (Miss. 1952).

In a will contest where proponents introduced a record of probate of will in common form, it was not necessary that they go further and make proof of will by having one of subscribing witnesses present to testify. Bearden v. Gibson, 215 Miss. 218, 60 So. 2d 655, 1952 Miss. LEXIS 555 (Miss. 1952).

Probate of will in common form before chancery clerk in vacation is prima facie evidence of validity of will until will is declared invalid and set aside by proper and lawful proceeding in proper court, having jurisdiction of subject matter and of parties in interest. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195, 1949 Miss. LEXIS 382 (Miss. 1949).

Probate of a will in common form before the clerk in vacation should be deemed prima facie evidence of the validity of the will unless and until its invalidity shall have been determined by the court. Bigleben v. Henry, 196 Miss. 586, 17 So. 2d 602, 1944 Miss. LEXIS 238 (Miss. 1944).

Entry by the clerk of his order in vacation admitting a will to probate is an adjudication by him that the instrument has been duly proven by the presentation thereof with the affidavits of the subscribing witnesses thereto attached. Bigleben v. Henry, 196 Miss. 586, 17 So. 2d 602, 1944 Miss. LEXIS 238 (Miss. 1944).

In a will contest after probate, proponents of a will, executed in Texas, were not required to make proof of the validity of the will by having the subscribing witnesses present to testify, or their testimony in the form of depositions, and a prima facie case of the validity of the will was properly made out by introducing the probate of the will in common form by the affidavits of the subscribing witnesses who resided in Texas. Hilton v. Johnson, 194 Miss. 671, 12 So. 2d 524, 1943 Miss. LEXIS 77 (Miss. 1943).

In the contest of a will, the burden was on the proponent to prove the validity of the will, i.e., that the testator had mental capacity to make it, and that he was not procured to make it by the pressure of undue influence upon him, and this burden was met by the introduction of evidence that the will had been duly admitted to probate. O'Bannon v. Henrich, 191 Miss. 815, 4 So. 2d 208, 1941 Miss. LEXIS 176 (Miss. 1941).

RESEARCH REFERENCES

ALR.

Probate of copy of last will as precluding later contest of will under doctrine of res judicata. 55 A.L.R.3d 755.

Am. Jur.

80 Am. Jur. 2d, Wills § 809 et seq.

CJS.

95 C.J.S., Wills §§ 616, 617 et seq.

§ 91-7-29. Trial of issue devisavit vel non.

On the trial of such issue, the proponent of the will shall have the affirmative of the issue and be entitled to all the rights of one occupying such position. The witnesses shall be examined orally before the jury, except where in the circuit court depositions would be admissible; and the testimony taken on the probate of the will shall be admissible if the witnesses who delivered it be dead, out of the state, or have since become incompetent.

HISTORY:

Codes, 1880, § 1971; 1892, § 1825; 1906, § 2000; Hemingway's 1917, § 1665; 1930, § 1612; 1942, § 508.

Cross References —

Appeals in matters testamentary, see §§ 11-51-3, 11-51-9.

JUDICIAL DECISIONS

ANALYSIS

1. Burden of proof.
2. Admissibility and sufficiency of evidence.
3. —Proof of incapacity or undue influence.
4. Competency of witnesses.
5. Miscellaneous.

1. Burden of proof.

The proponent of a will at all times bears the burden of persuading the trier of fact on all issues requisite to the validity of the will, e.g., due execution and testamentary capacity. At the outset, the proponent bears the burden of producing evidence of due execution and testamentary capacity. This burden is conventionally met by offering the will itself, the affidavits of subscribing witnesses and the judgment admitting the will to probate; these offerings make out the proponent's prima facie case. Once the proponent has shouldered his or her burden of production such that he or she has made out a prima facie case, the burden of production shifts to the contestants. The burden of persuading the trier of fact on the issues of due execution and testamentary capacity rests on the proponent throughout and never shifts to the contestants; that burden of persuasion is subject to the preponderance of the evidence standard. Clardy v. National Bank of Commerce, 555 So. 2d 64, 1989 Miss. LEXIS 507 (Miss. 1989).

The burden of proof of a proponent of a will is met by the offering and receipt into evidence of the will and the record of its probate and a prima facie case is made by the proponent solely by this proof; the contestants then must offer proof to overcome such prima facie case and although the burden of proof is still with the proponent, the burden of going forward with proof of undue influence or lack of testamentary capacity, or other defenses, shifts to the contestants. Harris v. Sellers, 446 So. 2d 1012, 1984 Miss. LEXIS 1649 (Miss. 1984), overruled in part, Mullins v. Ratcliff, 515 So. 2d 1183, 1987 Miss. LEXIS 2933 (Miss. 1987).

In a will contest an instruction for the proponents that the material inquiry was the capacity of a testator on the very day and at the very time of the execution of the instrument, properly informed the jury of the issue, and was not invalidated by additional language to the effect that such was true regardless of what the jury might think or believe as to the mental capacity of the testator at any other time. Sides v. Adams, 243 So. 2d 59, 1971 Miss. LEXIS 1502 (Miss. 1971).

In will contest on ground of lack of testamentary capacity and existence of undue influence, there is but a single issue-will or no will, and burden is no proponent throughout. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

In cases where a too close issue of fact is involved, instructions on burden of proof should go no further than to advise jury that proponent of will or plaintiff in other civil cases is required to establish issue by preponderance of evidence. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

In will contest on ground of mental incapacity and undue influence, instructions are not prejudicially erroneous if, when all of instructions are considered as whole, jury is correctly informed that burden resting upon proponents is to show testamentary capacity and lack of undue influence by preponderance of evidence, although two of instructions given were to effect that burden of proof is upon proponents of will to show by preponderance of evidence that alleged testatrix was at time of execution of alleged will of sound and disposing mind and that if jury finds burden has not been met and that it is left uncertain and doubtful whether testatrix was of sound mind then jury should find for contestants. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

Instruction that probating of will was prima facie evidence of its validity, and that burden of proving forgery thereof was on contestant, held erroneous. Ellis v. Ellis, 160 Miss. 345, 134 So. 150, 1931 Miss. LEXIS 187 (Miss. 1931).

Error in placing on contestant burden of proving will was forgery held not cured by instruction that burden was on proponent to prove signature was genuine. Ellis v. Ellis, 160 Miss. 345, 134 So. 150, 1931 Miss. LEXIS 187 (Miss. 1931).

In suit to probate a will, and to cancel the probate of prior wills, the burden of proof was on complainant. Mims v. Johnson, 129 Miss. 403, 92 So. 577, 1922 Miss. LEXIS 58 (Miss. 1922).

2. Admissibility and sufficiency of evidence.

When attesting witnesses deny execution or fail to testify, secondary evidence may be introduced by proponents of the will. Ward v. Ward, 124 Miss. 697, 87 So. 153, 1920 Miss. LEXIS 559 (Miss. 1921).

The proponents on an issue devisavit vel non may introduce evidence in rebuttal of that offered by contestants. Sheehan v. Kearney, 82 Miss. 688, 21 So. 41, 1903 Miss. LEXIS 99 (Miss. 1896).

3. —Proof of incapacity or undue influence.

A daughter overcame the presumption of undue influence arising from her father's execution of a will leaving her ½ of his estate to the exclusion of a friend and charitable organizations where the father had told 2 totally disinterested witnesses that he wanted to change his will, the will was executed openly at a medical center in the presence of the 2 subscribing witnesses and medical personnel, and there was evidence that the father understood the extent and value of his assets and was rational, strong-willed, and independent up until the time of his death. Pallatin v. Jones (In re Will of Fankboner), 638 So. 2d 493, 1994 Miss. LEXIS 314 (Miss. 1994).

The test for rebutting a presumption of undue influence has been modified and no longer requires the independent advice of a competent person, but instead requires a showing of the grantor's "independent consent and action." Marsalis v. Lehmann, 566 So. 2d 217, 1990 Miss. LEXIS 532 (Miss. 1990).

Evidence that testator of advanced years living in nursing home was dependent upon beneficiary to some degree is insufficient basis for finding of confidential relationship resulting in will being product of undue influence where there is no proof that testator looked to beneficiary to care for personal needs, to tend to him, or to handle his affairs. In re Will & Estate of Varvaris, 477 So. 2d 273, 1985 Miss. LEXIS 2256 (Miss. 1985).

In an action contesting a will there is a presumption of undue influence that the law imposes where a confidential or fiduciary relationship exists. Harris v. Sellers, 446 So. 2d 1012, 1984 Miss. LEXIS 1649 (Miss. 1984), overruled in part, Mullins v. Ratcliff, 515 So. 2d 1183, 1987 Miss. LEXIS 2933 (Miss. 1987).

In a proceeding devisavit vel non involving a will which was challenged on the ground of lack of testamentary capacity and of undue influence, the submission to jury of both issues was error where the evidence as to undue influence was insufficient. In re Alexander's Will, 221 Miss. 478, 73 So. 2d 172, 1954 Miss. LEXIS 553 (Miss. 1954).

In will contest on ground of lack of testamentary capacity and existence of undue influence, general verdict of jury on issue of whether or not proponents have shown by preponderance of evidence both testamentary capacity and lack of undue influence at time of execution of will should be sustained if proponents fail to prove either or both of these necessary requirements. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

In will contest on ground of lack of testamentary capacity and existence of undue influence, it should be assumed that general verdict of jury against validity of will was on ground of want of testamentary capacity which was amply supported by evidence, where proof was insufficient to sustain verdict on ground of undue influence. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

As to undue influence testator's declarations at time of execution of will admissible as res gestae. Sanders v. Sanders, 126 Miss. 610, 89 So. 261, 1921 Miss. LEXIS 70 (Miss. 1921).

Instruction on "undue influence" omitting element of destruction of free agency, is erroneous. Scally v. Wardlaw, 123 Miss. 857, 86 So. 625, 1920 Miss. LEXIS 89 (Miss. 1920).

Where evidence will not support a finding of incapacity, peremptory instruction for proponent proper. Scally v. Wardlaw, 123 Miss. 857, 86 So. 625, 1920 Miss. LEXIS 89 (Miss. 1920).

On an issue devisavit vel non, where the question is as to the sanity of the testator, the contestants are not required to prove his insanity beyond all reasonable doubt. King v. Rowan, 82 Miss. 1, 34 So. 325, 1903 Miss. LEXIS 158 (Miss. 1903).

Upon an issue devisavit vel non, an instruction for contestants is erroneous if it authorizes the jury, without qualification or limitation, to consider the reasonableness or unreasonableness of the will. King v. Rowan, 82 Miss. 1, 34 So. 325, 1903 Miss. LEXIS 158 (Miss. 1903).

4. Competency of witnesses.

Lay witnesses are competent to testify on issue of capacity of testator to make will on date of its alleged execution where they first give facts upon which their opinions are based. Blalock v. Magee, 205 Miss. 209, 38 So. 2d 708, 1949 Miss. LEXIS 426 (Miss. 1949).

At the trial of an issue devisavit vel non, the contestant, or the proponent, although the personal legatee, can testify in support of the will. Tucker v. Whitehead, 59 Miss. 594, 1882 Miss. LEXIS 169 (Miss. 1882).

5. Miscellaneous.

A breach of a contract not to revoke a will is not grounds for contesting the will pertaining to the contract. Trotter v. Trotter, 490 So. 2d 827, 1986 Miss. LEXIS 2485 (Miss. 1986).

Party who desires jury to try issue of devisavit vel non is under duty to specifically request jury before hearing on matter. In re Will & Estate of Varvaris, 477 So. 2d 273, 1985 Miss. LEXIS 2256 (Miss. 1985).

Under Code 1972 § 11-5-3, § 91-7-23, and § 91-7-29, prescribing will contest procedures, trial judge erred in directing verdict in favor of proponents of will on issue of testamentary capacity and undue influence, since roll of jury in will contest is same as that of jury in civil trial in court of law and is not "merely advisory." Fowler v. Fisher, 353 So. 2d 497, 1977 Miss. LEXIS 2002 (Miss. 1977).

The probate of a will in common form is not a final adjudication of its validity but is an "incipient step" necessary to enable the court to proceed to carry the will into execution, and it is not conclusive against heirs and distributees, and if they desire to contest the validity of the will this shall be done by an issue devisavit vel non. Perry v. Aldrich, 251 Miss. 429, 169 So. 2d 786, 1964 Miss. LEXIS 361 (Miss. 1964).

On trial of devisavit vel non after probate of will and record of probate proceedings, failure to submit such record to the jury was reversible error. Edgington v. Mabry, 111 Miss. 492, 71 So. 801, 1916 Miss. LEXIS 325 (Miss. 1916).

RESEARCH REFERENCES

ALR.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder. 28 A.L.R.2d 116.

Alzheimer's disease as affecting testamentary capacity. 47 A.L.R.5th 523.

Am. Jur.
80 Am. Jur. 2d, Wills § 872 et seq.

CJS.
95 C.J.S., Wills § 684 et seq.

§ 91-7-31. Wills recorded.

All original wills, after probate thereof, shall be recorded and remain in the office of the clerk of the court where they were proved, except during the time they may be removed to any other court under proper process, from which they shall be duly returned to the proper office. Authenticated copies of such wills may be recorded in any county in this state.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (23); 1857, ch. 60, art. 48; 1871, § 1004; 1880, § 1975; 1892, § 1828; 1906, § 2003; Hemingway's 1917, § 1668; 1930, § 1613; 1942, § 509.

Cross References —
Criminal offense of forgery of record of will, see § 97-21-45.

JUDICIAL DECISIONS

1. In general.
Under the provisions of Code 1972 § 91-7-33, the original will of a non-resident testatrix was properly probated in this state, and this section prohibited withdrawal of the original will for transfer to another state. Crum v. First Nat'l Bank, 321 So. 2d 287 (Miss. 1975).

Court may take notice of fact that it has not been the practice to record domestic wills in counties other than that of original probate. Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864, 166 So. 345, 1935 Miss. LEXIS 27 (Miss. 1935).

Statute providing that authenticated copies of wills may be recorded in any county is not mandatory. Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864, 166 So. 345, 1935 Miss. LEXIS 27 (Miss. 1935).

Domestic will when probated and recorded in county in which testator resided at time of death constituted notice throughout state to subsequent mortgagee of land in Mississippi devised by will, without necessity of recording will in county wherein land was situated. Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864, 166 So. 345, 1935 Miss. LEXIS 27 (Miss. 1935).

§ 91-7-33. Foreign wills recorded.

Authenticated copies of wills proven according to the laws of any of the states of the union, of the territories, of the District of Columbia, or of any foreign country, and affecting or disposing of property within this state, may be admitted to probate in the proper court. Such will may be contested as the original might have been if it had been executed in this state, or the original will may be proven and admitted to record here.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (25); 1857, ch. 60, art. 49; 1871, § 1105; 1880, § 1976; 1892, § 1829; 1906, § 2004; Hemingway's 1917, § 1669; 1930, § 1614; 1942, § 510.

Cross References —
Revocation of letters testamentary granted to nonresident, see § 91-7-89.

JUDICIAL DECISIONS

1. In general.
Chancellor erred in holding that Miss. Code Ann. § 91-7-33 absolutely barred the sister from initially proving a lost foreign will in

Mississippi where the will disposed of property in this state. Given the existence of genuine issues of material fact regarding the validity of the testator's will, the chancellor should have proceeded with the will contest and impaneled a jury to decide the will's validity. Watt v. Cobb (In re Estate of High), 19 So. 3d 1282, 2009 Miss. App. LEXIS 743 (Miss. Ct. App. 2009).

Trial court had jurisdiction to admit to probate in Mississippi the will of nondomiciliary as the decedent had lived in a Mississippi county for more than 30 years, and the chancery court properly determined that at the time of his death decedent would have owned some clothing or other personal property in the county, and Miss. Code Ann. § 91-7-33 does not require that the property be of a certain value or amount. In re Estate of Kelly v. Cuevas, 951 So. 2d 564, 2005 Miss. App. LEXIS 995 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

Mississippi courts may intervene when disposition of decedent's interests involve property interests which are subject to its jurisdiction. Davis v. Davis, 507 So. 2d 24 (Miss. 1987).

Under the provisions of this section, the original will of a non-resident testatrix was properly probated in this state, and Code 1972 § 91-7-31 prohibited the withdrawal of the original will for transfer to another state. Crum v. First Nat'l Bank, 321 So. 2d 287 (Miss. 1975).

Having properly assumed jurisdiction of the will of a non-resident testatrix, the Mississippi court was not required by comity to defer to the courts of the domiciliary state on the issue of which of the parties should bear the burden of the estate taxes and other debts of the estate. Crum v. First Nat'l Bank, 321 So. 2d 287 (Miss. 1975).

Beneficiary's acquiescence in probate proceedings in Louisiana held not to estop him from seeking annulment of proceedings in Mississippi under certified copy of Louisiana proceedings. Gilmore v. Gilmore, 144 Miss. 424, 110 So. 111, 1926 Miss. LEXIS 377 (Miss. 1926).

Will of nonresident devising property within state may be probated in first instance in county where situated. Bolton v. Barnett, 131 Miss. 802, 95 So. 721, 1923 Miss. LEXIS 220 (Miss. 1923).

Foreign will ineffective as conveyance until probated, when it relates back; purchaser with notice of will takes subject to probate. Belt v. Adams, 125 Miss. 387, 87 So. 666, 1921 Miss. LEXIS 127 (Miss. 1921).

Judgment of Louisiana court establishing instrument as will, not conclusive on Mississippi court. Woodville v. Pizzati, 119 Miss. 442, 81 So. 127, 1919 Miss. LEXIS 22 (Miss. 1919).

All rights derived through a will insofar as it affects property situated in this state are governed by Mississippi law. Heard v. Drennen, 93 Miss. 236, 46 So. 243, 1908 Miss. LEXIS 67 (Miss. 1908).

The probate of an authenticated copy does not authorize an executor to maintain an ejectment without taking out letters in this state. Sims v. Walden, 65 Miss. 211, 3 So. 457 (Miss. 1887); Pratt v. Hargraves, 77 Miss. 892, 28 So. 722, 1900 Miss. LEXIS 52 (Miss. 1900).

RESEARCH REFERENCES

ALR.

Probate, in state where assets are found, of will of nonresident which has not been admitted to probate in state of domicil. 20 A.L.R.3d 1033.

Law Reviews.

1987 Mississippi Supreme Court Review, Wills and estates. 57 Miss. L. J. 542, August, 1987.

§ 91-7-35. Grant of letters testamentary.

The executor named in any last will and testament, whether made in this state or out of it and admitted to probate here on an authenticated copy or on the original, shall be entitled to letters testamentary thereon if not legally disqualified. A person shall not be capable of being executor who, at the time when letters testamentary ought to be granted, is under the age of eighteen years, of unsound mind, or convicted of a felony.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (25); 1857, ch. 60, art. 50; 1871, § 1106; 1880, § 1978; 1892, § 1831; 1906, § 2006; Hemingway's 1917, § 1671; 1930, § 1615; 1942, § 511.

Cross References —

Recording of letters testamentary by chancery clerk, see § 9-5-137.

Grant of letters testamentary by chancery clerk, see § 9-5-141.

Power of bank to act as executor or administrator, see § 81-5-33.

Accounts of fiduciaries in savings associations, see § 81-12-139.

Persons disqualified to administer estate, see § 91-7-65.

Appointment of testamentary guardian, see § 93-13-7.

JUDICIAL DECISIONS

1. In general.

Appellant was never qualified to act as executor of the estate because appellant had been convicted of possesion of a controlled substance (a felony) and sentenced to serve two years in prison. Dodson v. Dodson (In re Estate of Dodson), 20 So. 3d 73, 2009 Miss. App. LEXIS 716 (Miss. Ct. App. 2009).

Executor or administrator is regarded as officer of court subject to direction, supervision and control of court until estate is closed and he is finally discharged. Bailey v. Sayle, 206 Miss. 757, 40 So. 2d 618, 1949 Miss. LEXIS 298 (Miss. 1949).

Where foreign will is probated on authenticated copy, the court should appoint executors named therein if not disqualified under the laws of Mississippi, whether or not they are disqualified in the state where will is made. Heard v. Drennen, 93 Miss. 236, 46 So. 243, 1908 Miss. LEXIS 67 (Miss. 1908).

RESEARCH REFERENCES

ALR.

Delegation by will of the power to nominate executor. 11 A.L.R.2d 1284.

Construction and effect of statutory provision disqualifying persons wanting integrity. 73 A.L.R.2d 458.

Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative. 11 A.L.R.4th 638.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 158, 159, 160, 162.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1 et seq. (appointment, qualification, and tenure).

8 Am. Jur. Legal Forms 2d, Executors and Administrators, §§ 104:13 et seq. (appointment, qualification, and tenure).

CJS.

33 C.J.S., Executors and Administrators §§ 21-23 et seq.

Law Reviews.

1978 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 165, March, 1979.

§ 91-7-37. Eighteen the age of majority for executors and administrators.

The age of eighteen (18) years shall be the age of majority of an executor, executrix, administrator or administratrix. In case letters testamentary or of administration shall be granted to any one under twenty-one (21) years, the bond executed by such person for the performance of the duties shall be as valid and binding as if such person were of full age.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (36); 1857, ch. 60, art. 51; 1871, § 1107; 1880, § 1979; 1892, § 1832; 1906, § 2007; Hemingway's 1917, § 1672; 1930, § 1616; 1942, § 512; Laws, 1974, ch. 446, eff from and after passage (approved March 26, 1974).

Cross References —

Removal of disability of minority generally, see § 93-19-1 et seq.

JUDICIAL DECISIONS

1. In general.

Approved sale or lease by minor administrator is valid. Giglio v. Woollard, 126 Miss. 6, 88 So. 401, 1921 Miss. LEXIS 5 (Miss. 1921).

RESEARCH REFERENCES

ALR.
Capacity of infant to act as executor or administrator, and effect of improper appointment. 8 A.L.R.3d 590.

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators § 202.

CJS.
33 C.J.S., Executors and Administrators §§ 40, 41.

§ 91-7-39. Administration with will annexed.

If there be no executor named in any last will and testament, or if the executors named all renounce the executorship or, being required to qualify, shall all refuse or fail to do so or shall refuse or wilfully neglect, for the space of forty days after the death of the testator, to exhibit the will and testament for probate or shall all be disqualified, then administration with the will annexed shall be granted to the person who would be entitled to administer according to the rule prescribed for granting administration. Before granting such administration, each executor named in the will and testament who has not renounced the executorship shall be summoned to show cause why administration should not be granted. If any executor named be absent from the state at the time of the probate of the will and administration should be granted during his absence, such executor shall be allowed forty days after his return to make application for letters testamentary and, on his qualifying, the letters of administration shall be revoked; and the administrator shall deliver all the estate which has come to his hands to the executor and settle the account of his administration.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (31); 1857, ch. 60, art. 52; 1871, § 1108; 1880, § 1980; 1892, § 1833; 1906, § 2008; Hemingway's 1917, § 1673; 1930, § 1617; 1942, § 513.

Cross References —
Power of bank to act as executor or administrator, see § 81-5-33.

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators § 1014 et seq.
10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1271-1273 (petition or application for letters of administration de bonis non with will annexed); Form 1275 (order appointing administrator de bonis non with will attached).

CJS.
34 C.J.S., Executors and Administrators §§ 1143-1153.

§ 91-7-41. Oath and bond of executor or administrator with will annexed.

Every executor or administrator with the will annexed, at or prior to the time of obtaining letters testamentary or of administration, shall take and subscribe the following oath, viz.:

"I do swear that the writing exhibited by me is the true last will and

> testament of ________, as far as I know and believe, and that I, if and when appointed as executor, will well and truly execute the same according to its tenor, and discharge the duties required by law." In the case of an administrator with the will annexed, then say "I, as administrator, will," and "when appointed as administrator, will" etc.

He will also give bond in such penalty as will be equal to the full value of the estate, and with such sureties as may be approved of by the court or by the clerk, payable to the state, with the following conditions, viz.:

> "The condition of this bond is, that if the above bound ________, as executor of the last will and testament of ________, shall well and truly execute the will as far as the same may be consistent with law, and faithfully discharge all the duties required of him by law, then this obligation shall be void." If the obligor be administrator with the will annexed, then say "the above bound ________, as administrator with the will of ________ annexed, will," etc.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (33); 1857, ch. 60, art. 53; 1871, § 1109; 1880, § 1981; 1892, § 1834; 1906, § 2009; Hemingway's 1917, § 1674; 1930, § 1618; 1942, § 514; Laws, 2001, ch. 422, § 1, eff from and after July 1, 2001.

Cross References —

Cancellation or reduction of bond, see § 9-5-103.

Bond of administrator de bonis non, see §§ 91-7-69, 91-7-71.

Bond of temporary administrator, see § 91-7-55.

Oath and bond of administrator, see § 91-7-67.

Bond and oath of county administrator, see § 91-7-75.

Additional bond for county administrator, see § 91-7-77.

Recording of bond, see § 91-7-311.

New bonds for executors and administrators, see §§ 91-7-315, 91-7-317.

Credit for cost of bond, see § 91-7-319.

JUDICIAL DECISIONS

1. In general.

The liability of the surety of an administrator c. t. a. must be determined by the condition of the bond to the effect that the administrator should faithfully discharge all the duties required of him by law, when considered in connection with Code 1942, § 514. Fidelity & Deposit Co. v. Doughtry, 181 Miss. 586, 179 So. 846, 1938 Miss. LEXIS 99 (Miss. 1938).

RESEARCH REFERENCES

ALR.

What funds, not part of the estate, are received under color of office so as to render liable surety on executor's or administrator's bond. 82 A.L.R.3d 869.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 312, 313, 321, 322.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 341 et seq. (administration bonds).

CJS.

33 C.J.S., Executors and Administrators §§ 90-99.

34 C.J.S., Executors and Administrators §§ 325.

§ 91-7-43. Executor as residuary legatee.

If the executor be a residuary legatee, he may, instead of the bond required of other executors, give bond payable to the state in a sum, with two or more sureties, to the satisfaction of the court or clerk, conditioned to pay all the debts and legacies of the testator within one year. In such case the executor shall not be required to return an inventory or appraisement, but he shall file with his petition a sworn statement of the amount of the indebtedness of the testator, so far as he can ascertain the same. The giving of such bond shall not discharge the estate of the testator from liability for the payment of his debts; and such bond shall be subject to suits in the same manner as the bond required of other executors.

HISTORY:

Codes, 1892, § 1835; 1906, § 2010; Hemingway's 1917, § 1675; 1930, § 1619; 1942, § 515.

§ 91-7-45. When bond not required.

If the testator, by will, direct that his executor shall not be required to give bond, then none shall be required unless the court or the clerk, at the time of granting the letters or afterwards, shall have reason to require bond, in which event it shall be the duty of the court or clerk to require bond with sufficient sureties. If any creditor of such testator petition the court or the clerk in vacation, under oath, stating his claim and that he believes he is in danger of losing his demand, or some of it, by the bad management of said estate or by the personal insolvency of the executor, such executor, having had five days' notice of the petition, shall be required to give a bond with sureties, to be approved by the court or clerk in vacation, payable to said creditor in a sufficient sum to cover his legal demand, and conditioned to save him from all loss by reason of any act or omission of such executor. Instead of such bond, the executor may give bond as if he had not been relieved from it by the will. If the bond required in either case be not given, it shall be the duty of the court or clerk to remove the executor and grant letters of administration, with the will annexed, to some other person.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (34); 1857, ch. 60, art. 54; 1871, § 1110; 1880, § 1982; 1892, § 1836; 1906, § 2011; Hemingway's 1917, § 1676; 1930, § 1620; 1942, § 516.

JUDICIAL DECISIONS

1. In general.

In a probate proceeding, a chancellor did not err in not requiring the executor, the decedents' son, to pay a bond because the will contained a provision that waived any bond. Carson Family Trust v. Carson (In re Estate of Carson), 986 So. 2d 1072, 2008 Miss. App. LEXIS 434 (Miss. Ct. App. 2008).

Executrix who was life tenant under will and who asserted absolute estate in all of property bequeathed, held properly required to give bond, notwithstanding testator's direction no bond was required. Brown v. Franklin, 157 Miss. 38, 127 So. 561, 1930 Miss. LEXIS 256 (Miss. 1930).

RESEARCH REFERENCES

ALR.

Testamentary option to purchase estate property as surviving optionee's death. 18 A.L.R.4th 578.

§ 91-7-47. Rights and duties of executor or administrator with will annexed.

(1) Every executor or administrator with the will annexed, who has qualified, shall have the right to the possession of all the personal estate of the deceased, unless otherwise directed in the will; and he shall take all proper steps to acquire possession of any part thereof that may be withheld from him, and shall manage the same for the best interest of those concerned, consistently with the will, and according to law. He shall have the proper appraisements made, return true and complete inventories except as otherwise provided by law, shall collect all debts due the estate as speedily as may be, pay all debts that may be due from it which are properly probated and registered, so far as the means in his hands will allow, shall settle his accounts as often as the law may require, pay all the legacies and bequests as far as the estate may be sufficient, and shall well and truly execute the will if the law permit. He shall also have a right to the possession of the real estate so far as may be necessary to execute the will, and may have proper remedy therefor.

(2) In addition to the rights and duties contained in this section, he shall also have those rights, powers and remedies as set forth in Section 91-9-9.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (32); 1857, ch. 60, art. 55; 1871, § 1111; 1880, § 1983; 1892, § 1837; 1906, § 2012; Hemingway's 1917, § 1677; 1930, § 1621; 1942, § 517; Laws, 1994, ch. 589, § 3; Laws, 1999, ch. 374, § 1; Laws, 2002, ch. 612 , § 1; Laws, 2008, ch. 452, § 1, eff from and after passage (approved Apr. 8, 2008).

Editor's Notes —

Section 91-9-9, referred to in (2), was repealed by Laws 2014, ch. 421, § 105, effective July 1, 2014.

Cross References —

Accounts of executors in savings associations, see § 81-12-139.

Additional obligations of fiduciary, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

1. In general.

Decedent's son appointed as temporary administrator of the decedent's son did not fail to file a required accounting because (1) the chancellor found such an accounting was filed, and (2) the decedent's daughter admitted possessing a copy of the accounting. Flowers v. Flowers (In re Estate of Flowers), — So. 3d —, 2018 Miss. App. LEXIS 2 (Miss. Ct. App. Jan. 2, 2018).

Judicial estoppel applied because plaintiff had a duty to discover all of the assets of his father's estate before he agreed to close the estate and he could not now take a position that was opposed to his previous position which was to his benefit at the time. Furthermore, plaintiff was aware of the properties at the time he closed the estate. Johnson v. Herron, 33 So. 3d 1160, 2009 Miss. App. LEXIS 744 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 227 (Miss. 2010).

An executor's actions constituted civil contempt and did not measure up to the standard of prudence, caution and trust required of an executor where the estate was deprived of a substantial sum of money largely due to his inaction, even though he claimed that he relied on the advice of counsel for everything he did as executor. Holloway v. Holloway (In re Estate of Holloway), 631 So. 2d 127, 1993 Miss. LEXIS 603 (Miss. 1993).

Although one person may be named as both executrix and testamentary trustee, the executrix performs only such duties and powers granted to her as the law and will designates, and the power designated by the will only for the testamentary trustee does not transfer to the executrix unless the will so designates. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Where a testamentary trust has not come into being, the authority to act as executrix, of one who is named both as executrix and as testamentary trustee by the will, is not governed by the trust powers granted to her as testamentary trustee. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Court authority is not per se necessary to authorize an executrix with will annexed to exercise the estate's stock voting rights in a closely held corporation. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Where will did not confer authority, neither executor nor administrator with will annexed had authority to collect rents on realty except during year of testator's death. Fidelity & Deposit Co. v. Doughtry, 181 Miss. 586, 179 So. 846, 1938 Miss. LEXIS 99 (Miss. 1938).

Action of administrator with will annexed in leasing realty following year of testator's death, without court authority, was in his capacity as tenant in common with coheirs and codevisees and not as administrator. Fidelity & Deposit Co. v. Doughtry, 181 Miss. 586, 179 So. 846, 1938 Miss. LEXIS 99 (Miss. 1938).

Where to follow terms of will by not operating farm beyond certain period would result in permanent impairment and partial destruction of estate, court could authorize executor or trustee to operate farm for another year. Low v. First Nat'l Bank & Trust Co., 162 Miss. 53, 138 So. 586, 1932 Miss. LEXIS 102 (Miss. 1932).

Powers of executor co-extensive with will. Ricks v. Johnson, 134 Miss. 676, 99 So. 142, 1924 Miss. LEXIS 288 (Miss. 1924).

Executor entitled to execute trust where trustee not named; court must appoint named person executor if qualified. Ricks v. Johnson, 134 Miss. 676, 99 So. 142, 1924 Miss. LEXIS 288 (Miss. 1924).

Heirs and devisees should have notice and hearing on proceeding by executor to obtain possession of real estate, if executor not given specific control by will and there was sufficient cash to pay debts. Miles v. Fink, 119 Miss. 147, 80 So. 532, 1918 Miss. LEXIS 24 (Miss. 1918).

Executor before discharge cannot acquire tax title to land so as to defeat title of life devisee and remainderman. Deanes v. Whitfield, 107 Miss. 273, 65 So. 246, 1914 Miss. LEXIS 78 (Miss. 1914).

Chancery court cannot enlarge statutory powers of administrator. Alexander v. Herring, 99 Miss. 427, 55 So. 360, 1910 Miss. LEXIS 34 (Miss. 1910).

Chancery court cannot authorize administrator to engage in business with estate funds. Alexander v. Herring, 99 Miss. 427, 55 So. 360, 1910 Miss. LEXIS 34 (Miss. 1910).

Executor or administrator acting within authority is as much bound by estoppel as individuals. Caldwell v. Kimbrough, 91 Miss. 877, 45 So. 7, 1907 Miss. LEXIS 167 (Miss. 1908).

RESEARCH REFERENCES

ALR.

Power and responsibility of executor or administrator to compromise claim due estate. 72 A.L.R.2d 191.

Power and responsibility of executor or administrator to compromise claim against estate. 72 A.L.R.2d 243.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death. 72 A.L.R.2d 285.

Judicial resolution of impasse between joint executors or administrators where concurrent action is required. 85 A.L.R.3d 1124.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 1029 et seq.

8 Am. Jur. Legal Forms 2d, Executors and Administrators § 104:55 (letter from attorney to executor or administrator of estate as to duties and liabilities).

8 Am. Jur. Legal Forms 2d, Executors and Administrators § 104:89 et seq. (custody and management of estate); § 104:157 et seq. (creditors' claims).

CJS.

34 C.J.S., Executors and Administrators §§ 1151-1153.

§ 91-7-49. Directions of will to be followed.

Whenever any last will and testament shall empower and direct the executor as to the sale of property, the payment of debts and legacies, and the management of the estate, the directions of the will shall be followed by the executor, and the provisions herein contained shall not so operate as to require the executor to pursue a different course from that prescribed in the will, if it be lawful. If land be directed by the will to be sold, the sale shall be made and the proper conveyance executed by the executors, or such of them as shall undertake the execution of the will, or by the person appointed by the will to execute the trust. If the executor fail to qualify or die before he execute the will, and if the person appointed fail to execute the trust, the sale shall be made by the administrator with the will annexed. The executor shall, in all cases, make publication for creditors to probate their claims, as required in the administration of the estates of intestates and with like effect, any provision of the will to the contrary notwithstanding.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (113); 1857, ch. 60, art. 136; 1871, § 1194; 1880, § 1984; 1892, § 1838; 1906, § 2013; Hemingway's 1917, § 1678; 1930, § 1622; 1942, § 518; Laws, 1940, ch. 232.

Cross References —

Additional provisions governing conduct of executor, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sale of property.
3. —Exercise of discretion.
4. —Notice; advertising.
5. —Taxes and expenses; surcharges.
6. —Multiple executors.

1. In general.

Chancery court did not err by considering the final accounting, the petition to close a decedent's estate, and the wife's objections to the final accounting because the daughter, who was appointed executor, repeatedly failed to comply with the chancery court's orders; as executor, the daughter bore a responsibility to administer and close the estate, and she could not complain of errors she caused by failing to properly fulfill her duty. Chester v. Labasse (In re Estate of Labasse), 242 So. 3d 167, 2017 Miss. App. LEXIS 540 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 192 (Miss. 2018).

Executrix was properly surcharged for payment of decedent's debts which had not been probated, registered, or allowed. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Crops growing on devised land at time of death of testatrix which are not needed by executor for payment of debts or cost of administration of estate pass to devisee of land rather than into estate for benefit of residuary legatees where will devised land and all trucks, farm implements, tractors and equipment thereon and directed that immediately after death of devisor devisee should be vested with entire control over her part of property. Oberst v. Mullens, 43 So. 2d 560 (Miss. 1949).

Intention of testator ascertained from entire will given effect if not illegal. Lesche v. Cutrer, 135 Miss. 469, 99 So. 136, 1924 Miss. LEXIS 1 (Miss. 1924).

Where a will creates an express trust for the payment of debts, by virtue of this section [Code 1942, § 518], the statute of limitations barring claims unless probated within one year after notice to creditors has no application. Gordon v. McDougall, 84 Miss. 715, 37 So. 298, 1904 Miss. LEXIS 96 (Miss. 1904).

The statute of limitations is no bar to the payment of unprobated claims in carrying out a will creating an express trust for the payment of debts. Gordon v. McDougall, 84 Miss. 715, 37 So. 298, 1904 Miss. LEXIS 96 (Miss. 1904).

Executors who have paid unprobated claims in pursuance of wills creating express trusts for their payment are entitled to be credited therewith in their accounts. Gordon v. McDougall, 84 Miss. 715, 37 So. 298, 1904 Miss. LEXIS 96 (Miss. 1904).

2. Sale of property.

Where a power of sale of the real estate is conferred by a testator because of his personal trust and confidence in the named executors neither the surviving executor, where more than one is designated, nor an administrator with the will annexed, where the named executors fail to qualify, die or resign, can convey title to the real property of testator without a valid order of court authorizing and empowering the sale and conveyance. Batson v. Humble Oil &

Refining Co., 213 Miss. 340, 56 So. 2d 828, 1952 Miss. LEXIS 372 (Miss. 1952).

Where will gives power of sale to pay legacies, or for distribution, without stating by whom the sale is to be made, the executor takes the power by implication. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

Under will providing "after my house and the rest of jewelry have been sold, I want the money equally divided between two named legatees," and "should either boy die before of age this money to revert to the estate for further distribution of other request," executrix had implied power to sell the realty, although proceeds therefrom were not to be delivered until the legatees became of age. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

Sale by executrix of realty under power of sale in will is not a judicial sale, and needs no court order justifying it. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

Gratuitous advice given by chancellor pursuant to request by executrix concerning implied power under will to sell realty does not diminish power of executrix in respect thereto. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

In a contest between residuary legatees of a will and beneficiaries of an alleged gift inter vivos of certain separate stock which was by the will directed to be sold by the executors along with other assets of the estate for the payment of numerous legacies, wherein the residuary legatee sought to compel a more complete inventory by including such corporate stock, the burden of proof was upon the surviving executor and those claiming the stock, not as purchasers for value, to prove that such stock was not a part of the assets of the estate being administered. Lindeman's Estate v. Herbert, 188 Miss. 842, 193 So. 790, 1940 Miss. LEXIS 13 (Miss. 1940).

Authority conferred upon executors to sell lands held not discretionary, but to require sale at all events. Glidewell v. Pannell, 158 Miss. 249, 130 So. 288, 1930 Miss. LEXIS 45 (Miss. 1930).

Executor, unable to sell testator's business at public auction, may be authorized by court to sell same to beneficiary for herself and as guardian of infant beneficiary. United States Fidelity & Guaranty Co. v. State, 110 Miss. 16, 69 So. 1007, 1915 Miss. LEXIS 20 (Miss. 1915).

3. —Exercise of discretion.

Decision to sell, made by executor, given discretion by will to sell or to operate wholesale grocery business, cannot be said to be other than act of ordinarily prudent business man, when success of business was due to decedent, whose place could not be filled because of war, great uncertainty prevailed in business field, good sale could be made, and objectors showed no certainty of profit from operations, or better sale later after attempt at continuation of business. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

Supreme court will not say that confirmation of sale of wholesale grocery business by executor, acting under authority of will, was manifestly wrong, when it is not pointed out by what means or manner a higher price could have been obtained for the assets of the estate nor in what respect beneficiaries in will suffered any loss. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

4. —Notice; advertising.

Sale of decedent's property without legal citation to beneficiaries in will is valid where will relieves executor from legal citation to interested parties. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

Objection to executor's sale of wholesale grocery business on ground that it was not sufficiently advertised is not well taken when, under the terms of will under which sale was made, no public notice of proposed sale was required to be given. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

Objection to executor's sale of wholesale grocery business on ground that it was not sufficiently advertised is not well taken where publication containing elements of sale was made in three newspapers for period of approximately a week, prospective bidders were notified by telephone and letters, many people inspected property, successful bid exceeded appraised value, and objectors produced no proof more than possibility or speculation that had sale been postponed for ten or twenty days there would have been higher, or more numerous, bids on the later date. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

Fact that no notice was given to interested parties respecting sale of realty by executrix under power of sale in will, either in proceedings for sale or those whereby directions of court were sought, does not constitute a valid defense in executrix's suit against purchaser at sale for specific performance. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

5. —Taxes and expenses; surcharges.

Executrix would be surcharged for the

amount the testamentary trust property was damaged or put in jeopardy due to her mortgaging of estate's unencumbered real property as security for debt incurred by testator which was never probated. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Reasonable expenditures for better sale of land were properly made out of general funds of estate where will directed sale of land and payment of proceeds, in different amounts, to special legatees with provision for reduction in proper proportion of each in event property did not sell for total amount devised, since special legatees are to be favored over residuary legatees to end that they may receive entire amount bequeathed to them respectively if property designated for that purpose could be caused to bring enough for that purpose by reasonable expenditures to promote advantageous sale. Oberst v. Mullens, 43 So. 2d 560 (Miss. 1949).

Unpaid taxes did not constitute valid defense to executrix's suit for specific performance against purchaser of realty sold under power of sale in will, since executrix has duty under Code 1942, § 572 to pay the taxes and such obligation can be readily accounted for under the decree for specific performance. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

In compliance with decree for specific performance of realty sold by executrix under power of sale in will, purchaser is entitled to deed free from lien for unpaid taxes. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

6. —Multiple executors.

A testamentary power of sale conferred on two named executors did not survive the death of one of them and sales of real property made by the surviving executor were set aside where the intention of the testator, as indicated by repeated references in the will to actions to be taken by the co-executors in their joint discretion, was that the power of the remaining executor not survive. Reynolds v. State, 331 So. 2d 913, 1976 Miss. LEXIS 1887 (Miss. 1976).

The court would not order specific performance of a contract for the sale of land, which contract was signed by only one of two coexecutors where the second coexecutor knew nothing of the execution of the will and had not authorized the other executor to sign it for him, and where the contract itself did not purport to be signed by the executor for himself and for the coexecutor as joint executors, and where, although the second coexecutor signed a deed as contemplated by the contract, such deed was delivered not to the purchaser but merely to the attorney for the two coexecutors, such act not constituting delivery of the deed nor a ratification of the contract by the second coexecutor. Carter v. Hurst, 234 So. 2d 616, 1970 Miss. LEXIS 1412 (Miss. 1970).

Where will required sale of lands at all events, power vested in executors could be exercised by survivors, and court erroneously directed different course from that prescribed. Glidewell v. Pannell, 158 Miss. 249, 130 So. 288, 1930 Miss. LEXIS 45 (Miss. 1930).

§ 91-7-51. Effect of receipt for money by executor or trustee.

The receipt by an executor or any trustee, whether under a will or other instrument, for any money payable to him in the execution of his trust shall discharge the person paying it from any liability to see to the application of the money, unless otherwise expressly provided in the instrument which creates the trust.

HISTORY:

Codes, 1880, § 1985; 1892, § 1839; 1906, § 2014; Hemingway's 1917, § 1679; 1930, § 1623; 1942, § 519.

JUDICIAL DECISIONS

1. In general.

If plaintiff had had a valid claim to the proceeds of an estate sale, his sole legal recourse would have been to probate a claim against the estate pursuant to § 91-7-51, and since he did not do so, he was barred from claiming the proceeds of the sale of minerals from the funds of the estate. Kelly v. Shoemake, 460 So. 2d 811, 1984 Miss. LEXIS 2019 (Miss. 1984).

§ 91-7-53. Temporary administrator.

Whenever it shall be necessary for the care and preservation of the estate of a decedent before the grant of letters testamentary, or of administration, to the person entitled thereto, the chancery court or chancellor in vacation, or the clerk of such court, on the petition of any creditor or other interested person, shall appoint a suitable person to be known as "temporary administrator." The person named as executor or the person apparently entitled to letters of administration may be appointed temporary administrator, unless the court shall find that the circumstances require the appointment of a different person.

Whenever an appeal shall be taken from the grant of letters testamentary, or of administration, or whenever a last will and testament shall be contested, the chancery court or chancellor in vacation, on petition of any interested person, may appoint a temporary administrator if it shall appear necessary for the protection of the rights of the parties, and may make such appointment on such terms and impose such conditions as may seem proper.

The powers of such temporary administrator may be special or general, as the court may find proper, and he may be authorized to take charge of, preserve, and administer the estate until the appeal or contest shall be determined. Letters may be issued to him in ordinary form, except that he shall be therein designated as temporary administrator, and any terms or conditions imposed shall be stated therein; and the letters shall state that he is to act only until another appointment shall be made, either temporary or permanent.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (13); 1857, ch. 60, art. 30; 1871, § 1194; 1880, § 1986; 1892, § 1840; 1906, § 2015; Hemingway's 1917, § 1680; 1930, § 1624; 1942, § 520; Laws, 1900, ch. 94; Laws, 1948, ch. 228, § 1.

Cross References —

Letters of administration, see § 91-7-63 et seq.

Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

1. In general.

It was not an abuse of discretion to appoint a decedent's son as the administrator of the decedent's estate, even though the son was not so named in the decedent's will, because (1) the administrator named in the will died, (2) the court had considerable discretion to appoint a temporary administrator to conserve the estate, and (3) the decedent's daughters received sufficient notice of the appointment during the course of the litigation. Flowers v. Flowers (In re Estate of Flowers), — So. 3d —, 2018 Miss. App. LEXIS 2 (Miss. Ct. App. Jan. 2, 2018).

Because a chancellor applied the wrong legal standard and incorrectly believed that only uncontested evidence was sufficient to remove the executor of the decedent's estate, remand was necessary for a determination of whether a temporary executor was to be appointed. On remand, the chancellor was to use the correct legal standard, with the understanding that it is within the chancellor's discretion to remove the executor even though the will contestant's evidence may have been contested. Parker v. Benoist, 160 So. 3d 198, 2015 Miss. LEXIS 113 (Miss. 2015).

On a will contest, the chancellor was justified in refusing to appoint a temporary administrator of the estate when, at the time the opponent of the will filed his petition to probate a later will in solemn form, the executrix, acting under an earlier will previously admitted to probate, had fully administered the estate, including notice to creditors and payment of all debts properly probated and nothing remained to be done except final distribution of the assets after a final decree of the court terminating the litigation. Cupit v. International Paper Co., 196 So. 2d 521, 1967 Miss. LEXIS 1489 (Miss. 1967).

Where a will probated in common form is contested, the executor may be temporarily removed pending the contest, and a temporary administrator appointed, without first finding the executor disqualified or guilty of misconduct. Sandifer v. Sandifer, 237 Miss. 464, 115 So. 2d 46, 1959 Miss. LEXIS 491 (Miss. 1959).

In a proceeding on a petition for appointment of a permanent administrator, where the chancery court's determination of the heirs at law was not final because of a pending appeal, the appropriate action was appointment of a suitable person to act as a temporary administrator until the legal heirs of the decedent were finally determined. In re Estate of Burnside, 227 Miss. 110, 85 So. 2d 817, 1956 Miss. LEXIS 660 (Miss. 1956).

The status of an administrator is an issue distinct from other matters and it is not necessary that an appeal from an order withdrawing letters of administration await the final determination of the estate, and to hold otherwise would defeat the claim of a petitioner by permitting the incumbent to serve throughout the entire administration. Wells v. Boatner, 216 Miss. 108, 61 So. 2d 662, 1952 Miss. LEXIS 622 (Miss. 1952).

Chancery court has power under this section [Code 1942, § 520] to continue widow of deceased testator as administratrix for purpose of sale of land to pay debts in absence of sufficient personalty therefore, and failure of the court, after the existence of the will became known, to change the letters of administration granted to widow and sole heir at law to letters as temporary administratrix pending a will contest, did not render the action of the court absolutely void in ordering the land sold by her, but only voidable at most, since the court had constitutional jurisdiction of the subject matter and jurisdiction of all the parties in interest. Gill v. Johnson, 206 Miss. 707, 40 So. 2d 600, 1949 Miss. LEXIS 295 (Miss. 1949).

RESEARCH REFERENCES

ALR.

Loss of right to be appointed executor by delay in presenting will for probate or in seeking letters testamentary. 45 A.L.R.2d 916.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 1044 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1191-1195 (petition or application for appointment of special or temporary administrator); Forms 1209-1211 (letters of special or temporary administration).

CJS.

34 C.J.S., Executors and Administrators §§ 1154-1156 et seq.

§ 91-7-55. Estate to be appraised.

Before the temporary administrator shall act as such, he shall take and subscribe an oath at or prior to the time of his appointment to faithfully discharge the duties required of him by law as such temporary administrator, and shall give bond, payable to the state, in such penalty and with such sureties as may be approved by the court or clerk, conditioned for the faithful discharge of the duties required of him as such temporary administrator by law or by order of the court or clerk. Thereupon, the estate shall be appraised as now provided by law upon the grant of letters testamentary or of administration, unless the same shall be dispensed with by the court or clerk. The temporary administrator shall make and return to the court a complete inventory of the estate, as is required by law to be made by executors in general or regular administrators, and, as soon as practicable, shall publish the notice provided by law to be published by executors and administrators, requiring creditors to have their claims against the estate probated and registered. All the provisions of the law governing such notice, the proof and registering of claims, and the bar of such as are not proved and registered shall apply when the notice is published by the temporary administrator, as when published by an executor or a general or regular administrator. When the temporary administrator shall have published such notice, no further notice to creditors to have their claims probated and registered shall be given or published upon any subsequent grant of letters testamentary or of administration; and where the estate has been appraised upon the appointment of a temporary administrator, no other appraisement shall be made upon the grant of letters testamentary or of the administration thereafter, unless the court or clerk shall deem the appraisement necessary or advisable.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (37); 1857, ch. 60, art. 56; 1871, § 1112; 1880, § 1987; 1892, § 1841; 1906, § 2016; Hemingway's 1917, § 1681; 1930, § 1625; 1942, § 521; Laws, 2001, ch. 422, § 2, eff from and after July 1, 2001.

Cross References —

Inventory generally, see § 91-7-93 et seq.

Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 493.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 561 et seq. (appointment and qualification of appraisers).

CJS.

34 C.J.S., Executors and Administrators § 202 et seq.

§ 91-7-57. Powers of temporary administrator.

The temporary administrator shall have power, and it shall be his duty, to collect the goods, chattels, personal property and debts of the decedent and to give acquittances for debts and liabilities upon payment. He may sue and be sued in all cases in which a general or regular administrator may sue or be sued; and suits brought by or against him shall not abate by the termination of his authority, but may be prosecuted by or against the executor or administrator thereafter appointed, and judgments recovered by or against him may be enforced by or against the executor or regular administrator thereafter appointed. The court, or chancellor in vacation, may at any time authorize the temporary administrator to sell such of the estate as may be perishable, likely to deteriorate in value, or be expensive to keep, and to dispose of any crops for cash, and to account for such property sold or disposed of. The court or chancellor, in ordering the sale of such property, shall take into consideration any disposition thereof by last will and testament, in case there be such, and shall order the sale of such property or not, as may be best for the parties in interest. After ninety (90) days from the time the temporary administrator was appointed and the time for probating claims has expired, the court or chancellor in vacation may order the temporary administrator to pay the claims of creditors and to hold the balance of the estate to await the ultimate probate or defeat of such last will and testament. In case the court, or chancellor in vacation, shall order the temporary administrator to pay creditors and make distribution, or to do either, he shall have all the powers and rights for the purpose over the estate, real and personal, that are conferred by law upon general or regular administrators; and all laws governing the acts and duties of a general or regular administrator shall then apply to and govern the temporary administrator.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (37); 1857, ch. 60, art. 57; 1871, § 1113; 1880, § 1988; 1892, § 1842; 1906, § 2017; Hemingway's 1917, § 1682; 1930, § 1626; 1942, § 522; Laws, 1936, ch. 240; Laws, 1975, ch. 373, § 2, eff from and after January 1, 1976.

Cross References —

Power of executor or administrator to sue for rent due, see § 89-7-13.

Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

1. In general.

Executor or administrator acting within his authority is as much bound by estoppel as individuals. Caldwell v. Kimbrough, 91 Miss. 877, 45 So. 7, 1907 Miss. LEXIS 167 (Miss. 1908).

RESEARCH REFERENCES

ALR.

Waiver or tolling of statute of limitations by executor or administrator. 8 A.L.R.2d 660.

Power and responsibility of executor or administrator to compromise claim due estate. 72 A.L.R.2d 191.

Power and responsibility of executor or administrator to compromise claim against estate. 72 A.L.R.2d 243.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death. 72 A.L.R.2d 285.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 1048, 1054.

CJS.

34 C.J.S., Executors and Administrators §§ 1167-1172.

§ 91-7-59. Compensation of temporary administrator.

On the grant of letters testamentary or of administration, the powers of a temporary administrator shall cease, and it shall be his duty at once to settle his accounts with the court or chancellor in vacation and to deliver all the estate that may be in his hands to the person to whom letters testamentary or of administration shall have been granted. In case of refusal, the court or chancellor may proceed against him by attachment and impose a fine, as for a contempt, not exceeding twenty percent (20%) upon the amount of the estate in his hands; and his bond may be put in suit by the executor or administrator. The temporary administrator shall, at the same time, furnish the executor or administrator with a list of all judgments or suits to which he is a party. The court, or chancellor in vacation, may allow the temporary administrator such compensation as may be just, not exceeding five percent (5%) on the amount of the estate inventoried by him.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (40); 1857, ch. 60, art. 58; 1871, §§ 1114, 1115; 1880, §§ 1989, 1990; 1892, § 1843; 1906, § 2018; Hemingway's 1917, § 1683; 1930, § 1627; 1942, § 523.

Cross References —

Allowance for losses, see § 91-7-299.

JUDICIAL DECISIONS

1. In general.

Temporary administrator held entitled to compensation for, and necessary attorney fees incurred in, performance of his duties on same basis as regular administrator, where order appointing temporary administrator directed him to pay deceased's debts and all but his incidental acts and expenditures were authorized by court and his services were for best interest of estate. King v. Wade, 175 Miss. 72, 166 So. 327, 1936 Miss. LEXIS 8 (Miss. 1936).

Allowance of compensation and attorney's fees to administrator within limits prescribed by statute is addressed to sound discretion of chancery court. King v. Wade, 175 Miss. 72, 166 So. 327, 1936 Miss. LEXIS 8 (Miss. 1936).

Chancery court's allowance of compensation to temporary administrator which was less than three per cent of the estate as inventoried, and allowance for attorney's fees of slightly less than four per cent of estate, held not abuse of discretion. King v. Wade, 175 Miss. 72, 166 So. 327, 1936 Miss. LEXIS 8 (Miss. 1936).

Supreme court will not interfere with chancery court's exercise of discretion in regard to allowance of compensation and attorney's fees to administrator, except in cases of manifest and flagrant abuse. King v. Wade, 175 Miss. 72, 166 So. 327, 1936 Miss. LEXIS 8 (Miss. 1936).

RESEARCH REFERENCES

ALR.

Authority of probate court to depart from statutory schedule fixing amount of executor's commissions and attorneys' fees. 40 A.L.R.4th 1189.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 1041.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1451 et seq. (compensation and allowances).

§ 91-7-61. Administrator to institute suits.

If necessary, an administrator may be appointed to institute and conduct suits, whose power shall cease when the litigation is entirely closed and who shall only account for the proceeds of the suit.

HISTORY:

Codes, 1880, § 1992; 1892, § 1845; 1906, § 2019; Hemingway's 1917, § 1684; 1930, § 1628; 1942, § 524.

Cross References —

Actions by administrator de bonis non, see § 91-7-71.

Actions which accrue during administration, see § 91-7-231.

Actions between co-administrators, see § 91-7-247.

Suits by foreign executors or administrators, see § 91-7-259.

Requirement that administrator must, unless he is licensed to practice law, retain solicitor, see Miss. Uniform Chancery Court Rule 6.01.

JUDICIAL DECISIONS

1. In general.

Widow's failure to qualify as administratrix did not adversely affect the rights of husband's insurer to recover on items covered by a subrogation agreement and the subrogation provisions of policy since the insurer had the right under Code 1972 §§ 91-7-61, 91-7-63, to apply for and receive letters of administration to conduct whatever suits it deemed necessary to enforce its right. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

Decree in proceeding for appointment of administratrix and contract with attorney on part of administratrix for prosecution of death action can have no effect on right of widow and children to institute and maintain suit. Mississippi Power & Light Co. v. Smith, 169 Miss.

447, 153 So. 376, 1934 Miss. LEXIS 58 (Miss. 1934).

Railroad defendant cannot move for revocation of letters of administration granted for purpose of prosecuting suit for personal injuries. Yazoo & M. V. R. Co. v. Jeffries, 99 Miss. 534, 55 So. 354, 1911 Miss. LEXIS 224 (Miss. 1911).

RESEARCH REFERENCES

Am. Jur.

8 Am. Jur. Legal Forms 2d, Executors and Administrators, § 104:55, (letter from attorney to executor or administrator of estate as to duties and liabilities).

§ 91-7-63. Grant of administration.

(1) Letters of administration shall be granted by the chancery court of the county in which the intestate had, at the time of his death, a fixed place of residence; but if the intestate did not have a fixed place of residence, then by the chancery court of the county where the intestate died, or that in which his personal property or some part of it may be. The court shall grant letters of administration to the relative who may apply, preferring first the husband or wife and then such others as may be next entitled to distribution if not disqualified, selecting amongst those who may stand in equal right the person or persons best calculated to manage the estate; or the court may select a stranger, a trust company organized under the laws of this state, or of a national bank doing business in this state, if the kindred be incompetent. If such person does not apply for administration within thirty (30) days from the death of an intestate, the court may grant administration to a creditor or to any other suitable person.

(2) In addition to the rights and duties of the administrator contained in this chapter, he shall also have those rights, powers and remedies as set forth in Section 91-9-9.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (54); 1857, ch. 60, art. 61; 1871, §§ 1088, 1089; 1880, § 1993; 1892, § 1850; 1906, § 2024; Hemingway's 1917, § 1689; 1930, § 1629; 1942, § 525; Laws, 1928, ch. 83; Laws, 1994, ch. 589, § 4; Laws, 1999, ch. 374, § 2; Laws, 2002, ch. 612 , § 2; Laws, 2008, ch. 452, § 2, eff from and after passage (approved Apr. 8, 2008).

Editor's Notes —

Section 91-9-9, referred to in (2), was repealed by Laws 2014, ch. 421, § 105, effective July 1, 2014.

Cross References —

Power of chancery clerk to grant letters of administration, see § 9-5-141 et seq.

Payment of federal and state tax refunds due decedent without administration, see § 27-73-9.

Bank acting as administrator, see § 81-5-33.

Appointment of temporary administrator, see § 91-7-53.

Administrator de bonis non, see § 91-7-69.

County administrators, see § 91-7-73 et seq.

Appointment of sheriff as administrator, see § 91-7-83.

Executor in his own wrong, see § 91-7-249.

JUDICIAL DECISIONS

ANALYSIS

1. Construction and application in general.
2. Necessity of administration.
3. Administration on behalf of creditors.

1. Construction and application in general.

Because the evidence indicated that the decedent had not divorced her former husband when she purportedly married the administrator, a chancellor did not abuse his discretion under Miss. Code Ann. § 91-7-63(1) in removing and replacing the administrator. Estate of Wallace v. Mohamed, 55 So. 3d 1057, 2011 Miss. LEXIS 97 (Miss. 2011).

Widower who was replaced as administrator should have remained administrator for his wife's estate; given the statutory order of preference in Miss. Code Ann. § 91-7-63(1), he was preferred to serve over the chancery court clerk because he was the natural father of one of his wife's heirs. Estate of Wallace v. Mohamed, 55 So. 3d 1088, 2010 Miss. App. LEXIS 106 (Miss. Ct. App. 2010), rev'd, 55 So. 3d 1057, 2011 Miss. LEXIS 97 (Miss. 2011).

Widower should have remained administrator for his wife's estate, in keeping with Miss. Code Ann. § 91-7-63(1), because the evidence before the chancery court was wholly inadequate to show that the widower was not the decedent's legal husband at the time of her death. There were no clerks' certificates affirmatively showing that there was no divorce in counties where the decedent and her prior husband had lived. Estate of Wallace v. Mohamed, 55 So. 3d 1088, 2010 Miss. App. LEXIS 106 (Miss. Ct. App. 2010), rev'd, 55 So. 3d 1057, 2011 Miss. LEXIS 97 (Miss. 2011).

Deceased musician's half-sister became executrix de son tort of decedent's unprobated estate by entering agreement, in which she purported to be sister and only surviving heir of decedent, for assignment of decedent's works, photographs, and materials in exchange for share of royalties. Johnson v. Harris (In re Estate of Johnson), 705 So. 2d 819, 1997 Miss. LEXIS 381 (Miss. 1997), cert. denied, Harris v. Johnson, 522 U.S. 1109, 118 S. Ct. 1037, 140 L. Ed. 2d 104, 1998 U.S. LEXIS 888 (U.S. 1998).

Where an administratrix was appointed in a county with no evidence that the decedent resided there, then the estate was transferred to the decedent's county of residence and the estate filed a negligence action against defendants, summary judgment should have been granted to defendants because under Miss. Code Ann. § 91-7-63(1), no legitimate estate ever existed and the appointment of the administratrix was void. Nat'l Heritage Realty, Inc. v. Estate of Boles, 947 So. 2d 238, 2006 Miss. LEXIS 473 (Miss. 2006), overruled in part, Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

Miss. Code Ann. § 91-7-63(1) is jurisdictional in nature. Nat'l Heritage Realty, Inc. v. Estate of Boles, 947 So. 2d 238, 2006 Miss. LEXIS 473 (Miss. 2006), overruled in part, Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

Status as executrix de son tort, in favor of alleged illegitimate child of deceased musician, was assumed when irrevocable power of attorney was accepted from decedent's half-sister after half-sister had assigned all rights to musician's copyrights, as well as by later accepting appointment as personal representative of half-sister's estate. Johnson v. Harris (In re Estate of Johnson), 705 So. 2d 819, 1997 Miss. LEXIS 381 (Miss. 1997), cert. denied, Harris v. Johnson, 522 U.S. 1109, 118 S. Ct. 1037, 140 L. Ed. 2d 104, 1998 U.S. LEXIS 888 (U.S. 1998).

Although the appointment of non-distributee relatives lies within the discretion of the chancery court under § 91-7-63, a non-distributee relative had a legal right to letters of administration under the statute where she was the guardian of the sole minor heir. In re Estate of Moreland, 537 So. 2d 1337, 1989 Miss. LEXIS 2 (Miss. 1989).

The chancery court is given wide discretion in the appointment and revocation of administrators, including the discretionary authority to waive compliance with the 30-day period to apply for administration set forth in § 91-7-63. In re Estate of Moreland, 537 So. 2d 1337, 1989 Miss. LEXIS 2 (Miss. 1989).

Notice to creditors of decedent's estate signed by the then duly appointed and qualified administrator was valid, notwithstanding that he was removed, on motion of decedent's widow, on the same date that notice to the creditors was first published, and a creditor's claim filed some 2 months after expiration of the 90 day period from first publication date was time barred. Estate of Myers v. Myers, 498 So. 2d 376, 1986 Miss. LEXIS 2844 (Miss. 1986).

Widow's failure to qualify as administratrix did not adversely affect the rights of husband's insurer to recover on items covered by a subrogation agreement and the subrogation provisions of policy since the insurer had the right under Code 1972 §§ 91-7-61, 91-7-63, to apply for and receive letters of administration to conduct whatever suits it deemed necessary to enforce its right. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

The provision of a state probate code giving a mandatory preference for appointment as administrator of a decedent's estate to a male applicant over a female applicant otherwise equally qualified violates the equal protection clause of the Fourteenth Amendment; giving a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of a hearing on the merits of the applicants, constitutes an arbitrary legislative choice forbidden by the Fourteenth Amendment. Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225, 1971 U.S. LEXIS 8 (U.S. 1971).

A daughter of a decedent who is his sole heir and distributee, and fully competent, is entitled, as against decedent's guardian, to be appointed administratrix of his estate. Moore v. Roecker, 239 Miss. 606, 124 So. 2d 473, 1960 Miss. LEXIS 329 (Miss. 1960).

Action of attorneys for plaintiff, who had a cause of action arising out of a motor vehicle collision, in actively participating in securing the appointment of another as administrator of decedent's estate in order that the action against the estate might be brought in Simpson County and, thus, draw two other codefendants into the circuit court of that county was not improper, in the absence of a fraudulent agreement between plaintiff's attorneys and the administrator, and the codefendant's motion for a change of venue was properly denied. Great Southern Box Co. v. Barrett, 231 Miss. 101, 94 So. 2d 912, 1957 Miss. LEXIS 494 (Miss. 1957).

A chancellor has large discretion in the selection of the person to be appointed administrator of an estate except in cases made mandatory by the statute. In re Estate of Burnside, 227 Miss. 110, 85 So. 2d 817, 1956 Miss. LEXIS 660 (Miss. 1956).

In a proceeding on a petition for an appointment of an administrator, where a will appointing executors for decedent's estate was set aside, the court did not abuse its discretion in denying an application for appointment as administrator and declining to remove the executors theretofore appointed. In re Estate of Burnside, 227 Miss. 110, 85 So. 2d 817, 1956 Miss. LEXIS 660 (Miss. 1956).

Executor or administrator is regarded as officer of court subject to direction, supervision and control of court until estate is closed and he is finally discharged. Bailey v. Sayle, 206 Miss. 757, 40 So. 2d 618, 1949 Miss. LEXIS 298 (Miss. 1949).

Chancellor has large measure of discretion, within limitations, in appointment and revocation of administration of decedents' estates. Stribling v. Washington, 204 Miss. 529, 37 So. 2d 759, 1948 Miss. LEXIS 386 (Miss. 1948).

The right of husband, wife, or distributees to preference in granting of administration of intestate's estate is legal right, unless incompetent, but matter is within sound discretion of court as to others. Stribling v. Washington, 204 Miss. 529, 37 So. 2d 759, 1948 Miss. LEXIS 386 (Miss. 1948).

Removal of appointed administratrix and appointment of deceased's widow on petition by widow filed more than thirty days after intestate's death is exercise of sound discretion of chancellor and proper when original administratrix was appointed on petition of daughter who withheld from chancellor all information as to widow, stating deceased was survived by three children, and widow knew nothing of proceedings and did not know administration was necessary. Stribling v. Washington, 204 Miss. 529, 37 So. 2d 759, 1948 Miss. LEXIS 386 (Miss. 1948).

Appointment of one other than husband of deceased as administrator within thirty-day period is not void, but appointee is subject to removal on husband's application within thirty days, provided husband is fit person for appointment. Kevey v. Johnson, 167 Miss. 775, 150 So. 532, 1933 Miss. LEXIS 152 (Miss. 1933).

Sister of deceased appointed as administratrix held entitled to have administration expenses fixed as charge on real property inherited by husband who did not apply for appointment as administrator within thirty-day period. Kevey v. Johnson, 167 Miss. 775, 150 So. 532, 1933 Miss. LEXIS 152 (Miss. 1933).

2. Necessity of administration.

Heirs suing for debt to decedent must allege and prove no necessity of local administration. Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 1920 Miss. LEXIS 472 (Miss. 1920).

Foreign administrator has no interest in personalty situated in Mississippi. Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 1920 Miss. LEXIS 472 (Miss. 1920).

Where insurance policy was expressly payable to daughter of deceased alone, administrator to collect policy not necessary. Young v. Roach, 105 Miss. 6, 61 So. 984, 1913 Miss. LEXIS 184 (Miss. 1913).

3. Administration on behalf of creditors.

Where a nonresident and a resident were killed in an automobile collision in Mississippi allegedly as the result of the nonresident's negligence, the heirs of the deceased resident had a cause of action against the personal representative of the deceased nonresident under the wrongful death statute Code 1942, § 1453, and were creditors of the nonresident's estate, and upon their petition the chancery court of the county where the nonresident's death occurred had jurisdiction to grant administration upon the estate of the nonresident. Day v. Hart, 232 Miss. 516, 99 So. 2d 656, 1958 Miss. LEXIS 301 (Miss. 1958).

Provision of this section [Code 1942, § 525] that if such persons as are preferred do not apply for administration within thirty days from death of intestate court may grant administration to creditor or other person is primarily for benefit of creditors, and only secondarily for benefit of persons inferior in priority to right to administer. Stribling v. Washington, 204 Miss. 529, 37 So. 2d 759, 1948 Miss. LEXIS 386 (Miss. 1948).

Recalcitrant heirs will not be permitted to hamper creditors to prejudice of creditors' rights against an estate by failure promptly to institute administration thereof. Stribling v. Washington, 204 Miss. 529, 37 So. 2d 759, 1948 Miss. LEXIS 386 (Miss. 1948).

Creditors of decedent have first claim against his estate, and it is paramount duty of administrator to protect their interest. Stribling v. Washington, 204 Miss. 529, 37 So. 2d 759, 1948 Miss. LEXIS 386 (Miss. 1948).

The receiver of an alleged creditor of a decedent could not request appointment of administrator for decedent's estate, unless it appeared that decedent died owing debt to alleged creditor. Thompson v. Carter's Estate, 180 Miss. 104, 177 So. 356, 1937 Miss. LEXIS 117 (Miss. 1937).

The possession and ownership of a decedent's note on which there was a balance due disclosed, prima facie, such a debt as entitled receiver of alleged creditor of decedent to request appointment of administrator for decedent's estate. Thompson v. Carter's Estate, 180 Miss. 104, 177 So. 356, 1937 Miss. LEXIS 117 (Miss. 1937).

A decedent's heirs could not set up that amount of bank deposit due decedent exceeded amount of note held by receiver of bank, to prevent appointment of administrator for decedent's estate on application of receiver, but such issue could only be raised in course of administration, or in suit on note against administrator. Thompson v. Carter's Estate, 180 Miss. 104, 177 So. 356, 1937 Miss. LEXIS 117 (Miss. 1937).

RESEARCH REFERENCES

ALR.

Right of surviving spouse, personally incompetent to serve as administrator because of being younger than age specified, to nominate administrator. 64 A.L.R.2d 1152.

Propriety of court's appointment, as administrator of decedent's estate, of stranger rather than person having statutory preference. 84 A.L.R.3d 707.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 158 et seq.

8 Am. Jur. Legal Forms 2d (Rev), Executors and Administrators § 104:9 et seq. (appointment, qualification, and tenure).

CJS.

33 C.J.S., Executors and Administrators § 39 et seq.

§ 91-7-65. Persons disqualified to administer.

Letters of administration shall not be granted to a person under the age of eighteen (18) years, of unsound mind, or convicted of any felony.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (60); 1857, ch. 60, art. 62; 1871, § 1090; 1880, § 1994; 1892, § 1851; 1906, § 2025; Hemingway's 1917, § 1690; 1930, § 1630; 1942, § 526; Laws, 1976, ch. 375, eff from and after July 1, 1976.

Cross References —

Grant of letters testamentary to person under twenty-one, see § 91-7-35.

JUDICIAL DECISIONS

1. In general.

An infant can neither be an administrator nor dictate who shall be appointed. Rea v. Englesing, 56 Miss. 463, 1879 Miss. LEXIS 145 (Miss. 1879).

RESEARCH REFERENCES

ALR.

Construction and effect of statutory provision that no person is competent to act as executor or administrator whom court finds incompetent by reason of want of integrity. 73 A.L.R.2d 458.

Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative. 11 A.L.R.4th 638.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 198, 199.

CJS.

33 C.J.S., Executors and Administrators §§ 54-59.

§ 91-7-67. Oath and bond of administrator.

The person to whom administration is granted, at or prior to the granting thereof, shall take and prescribe the following oath:

> "I do swear that ________, deceased, died without any will, as far as I know or believe, and that I, if and when appointed, will well and truly administer all the goods, chattels, and credits of the deceased, and pay his debts as far as his goods, chattels, and credits will extend and the law requires me, and that I will make a true and perfect inventory of the said goods, chattels, and credits, and a just account, when thereto required. So help me God."

He shall give bond in a penalty equal to the value of all the personal estate, with such sureties as may be approved by the court or clerk, payable to the state, with condition in form or to the effect following, to wit:

> "The condition of this bond is, that if the above bound ________, as administrator of the goods, chattels, rights, and credits of ________, deceased, shall faithfully discharge all the duties required of him by law, then this obligation shall be void."

The chancellor, in termtime or in vacation, may waive or reduce the bond if the administrator is the decedent's sole heir or if all the heirs are competent and present their sworn petition to waive or reduce such bond.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (56); 1857, ch. 60, art. 63; 1871, § 1118; 1880, § 1995; 1892, § 1852; 1906, § 2026; Hemingway's 1917, § 1691; 1930, § 1631; 1942, § 527; Laws, 1975, ch. 462; Laws, 2001, ch. 422, § 3, eff from and after July 1, 2001.

Cross References —

Oath and bond of executor or administrator with will annexed, see § 91-7-41.

Bond and oath of county administrator, see § 91-7-75.

Recording of bond, see § 91-7-311.

New bonds for executors and administrators, see §§ 91-7-315, 91-7-317.

Credit for cost of bond, see § 91-7-319.

Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

1. In general.

That an administrator wrote designing and misleading letters intending to prevent, and which did prevent, a creditor from probating his claim, whereby it was lost, is not a breach of his bond. Nagle v. Ball, 71 Miss. 330, 13 So. 929, 1893 Miss. LEXIS 150 (Miss. 1893).

RESEARCH REFERENCES

ALR.
What funds, not part of the estate, are received under color of office so as to render liable surety on executor's or administrator's bond. 82 A.L.R.3d 869.

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators §§ 261, 312, 313, 321, 322.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 311 et seq. (administration bonds).

CJS.
33 C.J.S., Executors and Administrators §§ 89-99.

§ 91-7-68. Administrator of estate of intestate under legal disability.

Upon the death intestate of any person under legal disability for whom a guardian, conservator or other fiduciary has been appointed by a court of competent jurisdiction and is serving, the judge or clerk of such court, upon proof of death of such person, may issue letters of administration to the already acting fiduciary, unless some relative or other person entitled to administer the estate shall within thirty days after the death of such person apply to the court for such administration. Upon the issuance of letters of administration to the already acting fiduciary, such fiduciary shall thereupon publish notice to creditors and administer the decedent's estate in the manner required by law. Such fiduciary's bond shall continue in force and he shall make only one (1) final account, unless the court, on the motion of any interested party or its own motion, shall require additional bond or accounting.

HISTORY:
Codes, 1942, § 525.5; Laws, 1972, ch. 386, § 1, eff from and after passage (approved April 26, 1972).

JUDICIAL DECISIONS

1. In general.
The guardian of a life tenant did not automatically become the administrator of the life tenant's estate on her death pursuant to § 91-7-68, and thus she was not the proper party to prosecute an action to recover damages for personal injury, emotional distress, and reduction in value of the life estate following the life tenant's death, since there is no administrator of the estate of a deceased person until one is qualified and appointed by the court. Madison v. Vintage Petroleum, 872 F. Supp. 340, 1994 U.S. Dist. LEXIS 18918 (S.D. Miss. 1994), dismissed, 85 F.3d 625, 1996 U.S. App. LEXIS 12907 (5th Cir. Miss. 1996), aff'd, 87 F.3d 1311, 1996 U.S. App. LEXIS 16949 (5th Cir. Miss. 1996).

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators § 14.

CJS.
33 C.J.S., Executors and Administrators § 12.

§ 91-7-69. Administration de bonis non.

If an executor or administrator die, resign, be removed, or become incompetent, letters of administration de bonis non with the will annexed, or de bonis non, shall be granted to the person entitled, and he shall proceed in the administration of the estate. The letters, bond, and oath shall be in the common form, substituting proper words to show the character of the administration. The executor of an executor shall not be entitled, in right of his office, to administration de bonis non of the first estate; but such executor, or the administrator of an executor, or the executor or administrator of an administrator shall settle the accounts of his testator or intestate in the administration of the first estate, and for that purpose shall be amenable to the jurisdiction of the court.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (59); 1857, ch. 60, art. 65; 1871, § 1120; 1880, § 1997; 1892, § 1856; 1906, § 2031; Hemingway's 1917, § 1696; 1930, § 1632; 1942, § 528.

Cross References —

Chancery clerk's power to grant letters of administration de bonis non, see § 9-5-141 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Powers and duties of administrator de bonis non.
3. Powers and duties of administrator of administrator.

1. In general.

Where administrator after final account and approval misappropriated money and absconded, distributees could sue on bond without administrator de bonis non. Davis v. State, 118 Miss. 577, 79 So. 764, 1918 Miss. LEXIS 98 (Miss. 1918).

It is not necessary to give notice to the legatees or wait until final settlement by the executor in order to appoint an administrator de bonis non cum testamento annexo. Sivley v. Summers, 57 Miss. 712, 1880 Miss. LEXIS 44 (Miss. 1880).

2. Powers and duties of administrator de bonis non.

Although administratrix de bonis non is only liable for unadministered assets of estate coming into her hands, she must file final account and have it approved. Hayes v. Holman, 165 Miss. 494, 144 So. 690, 1932 Miss. LEXIS 291 (Miss. 1932).

Administrator de bonis non entitled to amend so as to sue for value of property sold defendant where note given was excluded because payable to original administrator individually. Barnes v. Barnes, 109 Miss. 273, 68 So. 248, 1915 Miss. LEXIS 146 (Miss. 1915).

3. Powers and duties of administrator of administrator.

Where administrator of deceased administrator did not file account required and evidence showed money was paid out by deceased administrator without showing purposes, estate of deceased administrator and his bondsmen were liable to heirs and distributees, payment to be enforced out of original property of administrator if legally possible and in default thereof, out of bondsmen of deceased administrator. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Bondsmen of deceased administrator's administrator, who failed to file account required by statute, were liable to distributees of first estate for all consequences of failure of principal as administrator to faithfully discharge duties required. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Where administrator of administrator did not file account as required, distributees of first estate could recover against bondsmen of administrator of administrator though demand was not probated, since demand was a liability, not a claim. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Until account by administrator of administrator has been approved, administrator of administrator must hold in his hands sufficient assets of estate of his decedent to pay balance due to first estate, whether such assets are derivative of first estate, or whether original property of deceased administrator. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Account by administrator of administrator must be filed with reasonable promptness. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Courts have no authority to excuse performance of duty of administrator of administrator to settle accounts of deceased administrator, regardless of circumstances. Hayes v. National

Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

In filing of account by administrator of administrator, the same requirements, including those in matter of notice to all proper parties in interest, must be observed which appertain to final accounts. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 1014 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1161 et seq. (administration de bonis non); Forms 1271 et seq. (administration de bonis non with will annexed).

CJS.

34 C.J.S., Executors and Administrators § 1129 et seq.

§ 91-7-71. Rights of administrator de bonis non.

Every administrator de bonis non shall be entitled to all choses in action taken or held by any former executor or administrator, and may institute suit therefor and, if necessary, enjoin the former executor or administrator from collecting the same. He may sue on the bond of any former executor or administrator of the estate, where the estate is insolvent or where suit and recovery may be necessary for the payment of the debts of the estate, for any money due by the former executor or administrator and which should have been accounted for and paid over by him. Where it shall be necessary for the payment of debts of the estate, an administrator de bonis non may except to the final account of a former executor or administrator, or surcharge and falsify an annual or partial settlement of such former executor or administrator, or file and maintain a bill to review any order or decree of the court allowing the account of such executor or administrator, in the same manner that distributees or legatees may do. The court or chancellor may require of an administrator de bonis non an additional bond to cover the money sought to be recovered by any such proceedings.

HISTORY:

Codes, 1857, ch. 60, art. 135; 1871, § 1193; 1880, § 1998; 1892, § 1857; 1906, § 2032; Hemingway's 1917, § 1697; 1930, § 1633; 1942, § 529.

Cross References —

Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

1. In general.

Administrator's right to recover funds wrongfully paid to deceased's sisters and to guardian of deceased's illegitimate child passed to administratrix de bonis non upon her appointment, and it was her right and duty to recover such funds. National Surety Corp. v. Laughlin, 178 Miss. 499, 172 So. 490, 1937 Miss. LEXIS 187 (Miss. 1937).

While, under statute, administrator de bonis non is entitled to all choses in action taken or held by former administrator, and can maintain suit therefor, he can sue on bond of former administrator only in case estate is insolvent or where suit and recovery may be necessary for payment of debts of estate. National Surety Corp. v. Laughlin, 178 Miss. 499, 172 So. 490, 1937 Miss. LEXIS 187 (Miss. 1937).

Under statute, administrator de bonis non could not sue on bond of former administrator de bonis non, in absence of allegation that estate was insolvent or that recovery was necessary for payment of debts. National Surety Corp. v. Laughlin, 178 Miss. 499, 172 So. 490, 1937 Miss. LEXIS 187 (Miss. 1937).

The right of the administrator de bonis non to sue on the bond will be lost if the debts against the estate become barred or be paid, but the right survives to the distributees. Weir v. Monahan, 67 Miss. 434, 7 So. 291, 1889 Miss. LEXIS 66 (Miss. 1889).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 1029 et seq.

8 Am. Jur. Legal Forms 2d, Executors and Administrators § 104:55 (letter from attorney to executor or administrator of estate as to duties and liabilities).

§ 91-7-73. County administrator.

It shall be the duty of the chancellor to appoint for each county of his district an officer to be styled "county administrator," to hold his office four years, and whose appointment shall be entered on the minutes of the court.

HISTORY:

Codes, 1871, § 1091; 1880, § 1999; 1892, § 1846; 1906, § 2020; Hemingway's 1917, § 1685; 1930, § 1634; 1942, § 530.

§ 91-7-75. Bond and oath of county administrator.

Before a county administrator shall perform any of the duties or functions of the office, and before any letters shall be granted to him, he shall execute and file in the office of the clerk of the chancery court a bond with two (2) or more sufficient sureties, to be approved by the chancellor in termtime or vacation, in a penalty of Five Thousand Dollars ($5,000.00) payable to the state, conditioned that he will discharge all the duties of the office of county administrator, which bond may be sued on at the instance of any person interested. He shall also take an oath at or prior to the granting of letters of administration, to be filed in the clerk's office, to administer according to law every estate which may be committed to his charge, and that he will account for and pay over all monies in his hands by virtue of his office when thereto required by order of the court.

HISTORY:

Codes, 1871, § 1093; 1880, § 2001; 1892, § 1847; 1906, § 2021; Hemingway's 1917, § 1686; 1930, § 1635; 1942, § 531; Laws, 2001, ch. 422, § 4, eff from and after July 1, 2001.

Cross References —

Oath and bond of executor or administrator with will annexed, see § 91-7-41.

Oath and bond of administrator, see § 91-7-67.

Recording of bonds, see § 91-7-311.

New bonds of executors and administrators, see §§ 91-7-315, 91-7-317.

Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

§ 91-7-77. Additional bond may be required.

Whenever it shall appear that the penalty of the bond of the county administrator, as fixed, is not sufficient in amount to secure a faithful discharge of the duties of the office, it shall be the duty of the court or the chancellor, or the clerk in vacation, after five days' notice given, to require him to give an additional bond in such penalty as the chancellor or clerk may deem sufficient to secure the rights of all parties interested; and on noncompliance, he may be removed from office.

HISTORY:
Codes, 1871, § 1095; 1880, § 2002; 1892, § 1848; 1906, § 2022; Hemingway's 1917, § 1687; 1930, § 1636; 1942, § 532.

RESEARCH REFERENCES

ALR.
What funds, not part of the estate, are received under color of office so as to render liable surety on executor's or administrator's bond. 82 A.L.R.3d 869.

§ 91-7-79. Letters granted to county administrator.

When it shall appear that any person has died, in this state or out of it, and has left real or personal property in this state, and some person has not applied for letters testamentary or of administration, the administration of the estate, after the expiration of sixty days from the death of such person, shall be committed to the county administrator, to whom letters of administration, administrator de bonis non, administration with the will annexed, or as the case may require, shall be granted. He shall administer the estate, as in other cases, under the direction of the court, with the same rights and liabilities as executors and other administrators. The county administrator shall not be bound to incur or be liable for costs, except such as the estate in his hands, in excess of his commissions shall be sufficient to pay. On the final settlement of the estate, he shall be allowed by the court, as his commissions, a sum not to exceed ten percent (10%) on the whole estate administered. The county administrator may also be appointed temporary administrator pending an appeal from the grant of letters testamentary or of administration, and administrator to institute suit in proper cases. He shall be liable in all cases on his official bond for his acts, and another bond need not be executed by him in any case unless, his official bond being insufficient, the court shall require an additional bond, or where he may be required to give bond to account for the proceeds of a sale of land.

HISTORY:
Codes, 1871, § 1092; 1880, §§ 2004, 2005; 1892, § 1858; 1906, § 2033; Hemingway's 1917, § 1698; 1930, § 1637; 1942, § 533.

Cross References —
Powers of chancery clerk generally, see § 9-5-141 et seq.

County administrator acting as escheator, see § 89-11-3.

RESEARCH REFERENCES

ALR.
Powers and duties of public administrator. 56 A.L.R.2d 1183.

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators § 1095 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1321 et seq. (public administrators).

CJS.
34 C.J.S., Executors and Administrators § 1195 et seq.

§ 91-7-81. Accounts to be filed when office vacated.

Should the county administrator resign his office or otherwise vacate it, he shall forthwith file an account of his administration in each case. Should such officer die, settlements of all estates committed to him shall be made by his executor or administrator.

HISTORY:

Codes, 1871, § 1094; 1880, § 2006; 1892, § 1849; 1906, § 2023; Hemingway's 1917, § 1688; 1930, § 1638; 1942, § 534.

Cross References —

Accounts generally, see § 91-7-277.

Contents of final accounts, see § 91-7-291.

Requirement that account filed by administrator must be personally signed and sworn to by him, see Miss. Uniform Chancery Court Rule 6.14.

§ 91-7-83. Sheriff administrator in certain cases.

If it appears that any person has died, in this state or out of it, and has left property, and some person will not qualify as executor or administrator, the court, or clerk in vacation, shall appoint the sheriff to be administrator, who shall administer the estate. The sheriff shall not be bound to incur any cost except out of the estate, and he shall be allowed not more than ten percent (10%) on the amount thereof. Any sheriff who may be appointed administrator shall make settlement of his administration, if he hath not done so before, at the termination of his office and deliver whatever property he may have of the estate at the time to his successor in office, or to such other person as may be appointed administrator. His official bond as sheriff shall be security for his faithful administration of such estate, and he shall not be required to execute any other bond, except to account for the proceeds of a sale of land.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 19 (1); 1857, ch. 60, art. 68; 1871, § 1092; 1880, § 2007; 1892, § 1859; 1906, § 2034; Hemingway's 1917, § 1699; 1930, § 1639; 1942, § 535.

Cross References —

Sheriffs generally, see § 19-25-1 et seq.

Delivery of property levied on by sheriff to successor, see § 19-25-57.

JUDICIAL DECISIONS

1. In general.

Appointment of the sheriff as administrator d.b.n. under this section [Code 1942, § 535], at instance of nonresident creditors, may properly be denied where local administration has been completed. Stargell v. White, 234 Miss. 601, 107 So. 2d 125, 1958 Miss. LEXIS 532 (Miss. 1958).

The power of the sheriff to act as administrator ceases with his term of office, and a suit by him may be revived in the name of his successor, although he be still amenable to account for his acts as administrator. Cox v. Martin, 75 Miss. 229, 21 So. 611, 1897 Miss. LEXIS 82 (Miss. 1897).

§ 91-7-85. Removal and surrender of trust.

Every executor or administrator may be removed if he become disqualified, or for improper conduct in office, at the instance of any person interested, on five days' notice to such executor or administrator; or may surrender the trust, and thereupon shall give the proper notice to the distributees or legatees and settle with the court. In case of removal or resignation, administration shall be granted as in case of the death of the executor or administrator, and with like effect. An executor or administrator who may be removed, or who may surrender his trust, shall continue to be answerable to the court until his final settlement and satisfaction be made, and until that time shall be liable on his bond.

HISTORY:

Codes, 1857, ch. 60, art. 67; 1871, § 1122; 1880, § 2008; 1892, § 1860; 1906, § 2035; Hemingway's 1917, § 1700; 1930, § 1640; 1942, § 536.

Cross References —

Removal of county administrator for failure to provide additional bond, see § 91-7-77.

Removal for failure to return inventory, see § 91-7-105.

Suits by or against administrator, see § 91-7-241.

Removal for failure to account, see §§ 91-7-277, 91-7-283.

Hearing on removal proceedings, see § 91-7-289.

Removal for failure to furnish new bond when required, see §§ 91-7-315, 91-7-317.

JUDICIAL DECISIONS

1. In general.

Executor's misrepresentation of the true facts to the chancery court (his brother's known claims of ownership to the livestock and the evidence of a valid inter vivos gift by the decedent), amounted to "improper conduct" under Miss. Code Ann. § 91-7-85, and his removal as executor of the estate was proper. Further, the chancellor properly found that the executor (and his attorney), violated the Mississippi Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 through 11-55-15 (Rev. 2002), and Miss. R. Civ. P. 11(b), by their misrepresentations in obtaining an order from the chancery court, permitting them to retrieve the subject livestock, and the chancellor's award of attorney's fees and expenses was proper. In re Estate of Ladner v. Ladner, 909 So. 2d 1051, 2004 Miss. LEXIS 1356 (Miss. 2004) (Miss. – 2004).

Chancellor's removal of executrix of decedent's estate was amply supported by record showing that she had paid unprobated claims, had failed to timely file estate tax returns, and had paid attorney's fees without court approval, as well as conflicts of interest in the matter of administering the estate. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Since the chancellor had the power to appoint a temporary administrator, it followed that if an executor had qualified, such executor must be removed during the pendency of the will contest in order to permit the temporary administrator to perform his duties pending the outcome of the contest, but since the petition for appointment of the temporary administrator was not brought under this section [Code 1942, § 536], if the will is upheld, appellant would be entitled to resume the office of executor, unless and until he is removed permanently under appropriate proceedings. Sandifer v. Sandifer, 237 Miss. 464, 115 So. 2d 46, 1959 Miss. LEXIS 491 (Miss. 1959).

Supreme court will not interfere with action of chancery court in removing trustee on its own motion, unless palpably unjust. Nutt v. State, 96 Miss. 473, 51 So. 401, 1910 Miss. LEXIS 171 (Miss. 1910).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 275, 279, 280.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 261 et seq. (termination of authority); Forms 301 et seq. (removal).

8 Am. Jur. Legal Forms 2d, Executors and Administrators, § 104:42 et seq. (renunciation and resignation).

CJS.

33 C.J.S., Executors and Administrators §§ 139, 140 et seq.

§ 91-7-87. Administration revoked by proof of will and grant of letters testamentary.

If a will shall be found and probated and letters testamentary be granted thereon, the same shall be a revocation of the administration; but acts lawfully done by the administrator without actual notice of such revocation shall be valid and binding.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (55); 1857, ch. 60, art. 64; 1871, § 1119; 1880, § 1996; 1892, § 1853; 1906, § 2027; Hemingway's 1917, § 1692; 1930, § 1641; 1942, § 537.

JUDICIAL DECISIONS

1. In general.

Where an instrument was considered to be a deed and there was a grant of intestate administration, this was not res judicata on the issue whether testator died leaving a will, and the grant of testator administration is not a bar to the subsequent probate of a will. White v. Inman, 212 Miss. 237, 54 So. 2d 375, 1951 Miss. LEXIS 447 (Miss. 1951).

Chancery court has power under Code 1942, § 520, to continue widow of deceased testator as administratrix for purpose of sale of land to pay debts in absence of sufficient personalty therefor, and failure of the court, after the existence of the will became known, to change the letters of administration granted to widow and sole heir at law to letters as temporary administratrix pending a will contest, did not render the action of the court absolutely void in ordering the land sold by her, but only voidable at most, since the court had constitutional jurisdiction of the subject-matter and jurisdiction of all the parties in interest. Gill v. Johnson, 206 Miss. 707, 40 So. 2d 600, 1949 Miss. LEXIS 295 (Miss. 1949).

Where testimony was sufficient to have will probated in solemn form, chancery court had authority to admit will to probate, grant letters testamentary to executor named therein, and set aside appointment of administratrix theretofore made under statute providing that if a will shall be found and probated, and letters testamentary granted thereon, the same shall be a revocation of administration. Austin v. Patrick, 179 Miss. 718, 176 So. 714, 1937 Miss. LEXIS 74 (Miss. 1937).

RESEARCH REFERENCES

ALR.

Statutes dealing with existing intestate administration, upon discovery of will. 65 A.L.R.2d 1201.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration. 2 A.L.R.4th 1315.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators, §§ 275, 279, 280.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Form 273 (petition or application to revoke letters of administration and for probate of will and issuance of letters testamentary).

CJS.

33 C.J.S., Executors and Administrators § 139, 140.

§ 91-7-89. Letters of certain nonresidents revoked.

If letters testamentary or of administration be granted to any person not a resident of the state, or if any executor or administrator after his appointment remove out of the state, and if such executor or administrator refuse or neglect to settle his accounts annually or neglect the due administration thereof in any other respect, the court, after publication made and proof thereof as in other cases, or personal notice, may revoke the letters of such executor or administrator and proceed to grant administration de bonis non as if such executor or administrator had died or resigned.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 21 (7); 1857, ch. 60, art. 130; 1871, § 1188; 1880, § 2009; 1892, § 1861; 1906, § 2036; Hemingway's 1917, § 1701; 1930, § 1642; 1942, § 538.

§ 91-7-91. Assets defined; unsecured creditors to give notice.

The goods, chattels, personal estate, choses in action and money of the deceased, or which may have accrued to his estate after his death from the sale of property, real, personal or otherwise, and the rent of lands accruing during the year of his death, whether he died testate or intestate, shall be assets and shall stand chargeable with all the just debts, funeral expenses of the deceased, and the expenses of settling the estate. The lands of the testator or intestate shall also stand chargeable for the debts and such expenses over and above what the personal estate may be sufficient to pay, and may be subjected thereto in the manner hereinafter directed. Provided, however, that in cases where no administration has been or shall be commenced on the estate of the decedent within three (3) years after his death, no creditor of the decedent shall be entitled to a lien or any claim whatsoever on any real property of the decedent, or the proceeds therefrom, against purchasers or encumbrancers for value of the heirs of the decedent unless such creditor shall, within three (3) years and ninety (90) days from the date of the death of the decedent, file on the lis pendens docket in the office of the clerk of the chancery court of the county in which said land is located notice of his claim, containing the name of the decedent, a brief statement of the nature, amount and maturity date of his claim and a description of the real property sought to be charged therewith. The provisions of this section requiring the filing of notice shall not apply to any secured creditor having a recorded lien on said property.

HISTORY:

Codes, 1857, ch. 60, art. 80; 1871, § 1134; 1880, § 2025; 1892, § 1881; 1906, § 2056; Hemingway's 1917, § 1721; 1930, § 1643; 1942, § 539; Laws, 1938, ch. 262; Laws, 1975, ch. 373, § 3, eff from and after January 1, 1976.

Cross References —

Payment to heirs of money in savings association account without administration, see § 81-12-143.

Rent as asset, see § 89-7-11.

Liability of exempt property for debts of decedent, see § 91-1-21 et seq.

Summary proceeding to discover assets, see § 91-7-103.

Receipt of property in compromise of claim, see § 91-7-229.

Use of assets by fiduciary, see § 91-7-253.

JUDICIAL DECISIONS

ANALYSIS

1. Construction and application in general.
2. Rents or other income as assets.
3. Particular claims or charges as debts.
4. Intent of testator.

1. Construction and application in general.

When executor bank obtains Mississippi court decision under § 91-7-91 requiring that federal estate taxes, debts and expenses of estate be paid out of personalty of estate, starting with residuum, and bank subsequently obtains conflicting court decision in another state requiring that tax liability of estate be apportioned equally among all estate beneficiaries, whether of real or personal property, pro rata, federal court in which bank files interpleader action will give full faith and credit and preclusive effect to latter state court decision. First Tennessee Bank N.A. v. Smith, 766 F.2d 255, 1985 U.S. App. LEXIS 20109 (6th Cir. Tenn. 1985).

In the absence of a direction to the contrary by the testator, estate taxes must be paid first from personal property not specifically devised by will, secondly from other personalty of the estate, and thirdly, if necessary, from the real estate. Stovall v. Stovall, 360 So. 2d 679, 1978 Miss. LEXIS 2295 (Miss. 1978).

Having properly assumed jurisdiction of the will of a non-resident testatrix, the Mississippi court was not required by comity to defer to the courts of the domiciliary state on the issue of which of the parties should bear the burden of the estate taxes and other debts of the estate. Crum v. First Nat'l Bank, 321 So. 2d 287 (Miss. 1975).

Property held by a decedent as trustee is no part of the assets of his estate, but his personal representative becomes trustee ex officio. Holliman v. Demoville, 243 Miss. 542, 138 So. 2d 734, 1962 Miss. LEXIS 373 (Miss. 1962).

Administration of decedent's estate covers only personal property belonging to estate and real property is not involved unless and until personal property becomes insufficient to pay debts and it becomes necessary to resort to land for payment of debts of estate. Barnes v. Rogers, 206 Miss. 887, 41 So. 2d 58, 1949 Miss. LEXIS 311 (Miss. 1949).

The term "assets," as applied to decedent's estate and as used in this section [Code 1942, § 539], means property which is available, if necessary, for the payment of debts and expenses. Gaines v. Klein, 203 Miss. 271, 34 So. 2d 489, 1948 Miss. LEXIS 262 (Miss. 1948).

Upon death of owner, personalty descends to personal representative for payment of debts and legacies, and realty goes to heirs and devisees. Gidden v. Gidden, 176 Miss. 98, 167 So. 785, 1936 Miss. LEXIS 116 (Miss. 1936).

Realty goes to heirs and devisees and is not subject to debts until personalty is exhausted, unless will expressly provides otherwise. Gidden v. Gidden, 176 Miss. 98, 167 So. 785, 1936 Miss. LEXIS 116 (Miss. 1936).

Lien of creditors of decedent under statute held charge only on right, title, and interest of deceased in land at date of death. Blum v. Planters' Bank & Trust Co., 161 Miss. 226, 135 So. 353, 1931 Miss. LEXIS 257 (Miss. 1931).

Lien of creditors on lands of decedent is not superior to rights acquired by third parties in such land before death of decedent. Blum v. Planters' Bank & Trust Co., 161 Miss. 226, 135 So. 353, 1931 Miss. LEXIS 257 (Miss. 1931).

Bank becoming creditor before lands were conveyed to decedent acquired no right to subject land to payment of debts superior to outstanding liens thereon or equities therein, recorded or unrecorded, existing at grantee's death. Blum v. Planters' Bank & Trust Co., 161 Miss. 226, 135 So. 353, 1931 Miss. LEXIS 257 (Miss. 1931).

Bequest of personalty not theretofore specifically willed was residuum and chargeable with payment of debts to exoneration of real estate. Anderson v. Gift, 156 Miss. 736, 126 So. 656, 1930 Miss. LEXIS 213 (Miss. 1930).

On accounting administrator is liable for actual value of property coming into his hands, not value fixed by appraisers. Davis v. Blumenberg, 107 Miss. 432, 65 So. 503, 1914 Miss. LEXIS 102 (Miss. 1914).

Under this section [Code 1942, § 539] and Code 1942, § 588 the personal estate must be exhausted before the lands may be resorted to for the payment of debts, unless a contrary intent be manifested in the will of the decedent. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

An administrator, by consent of the heirs, may lease out decedent's lands for the purpose of paying his debts. Ashley v. Young, 79 Miss. 129, 29 So. 822, 1901 Miss. LEXIS 16 (Miss. 1901).

2. Rents or other income as assets.

This section [Code 1942, § 539] simply makes rents liable for the debts and expenses of administration if needed for that purpose; if rents are collected from property specifically devised, they are the property of the devisee and not liable for such debts and expenses until the residuum of the estate has been exhausted. Gaines v. Klein, 203 Miss. 271, 34 So. 2d 489, 1948 Miss. LEXIS 262 (Miss. 1948).

Where testatrix in devise of real estate provided for possession thereof in the devisee immediately upon probate of her will if she should die before the month of April in any year thereafter, and she died prior to April, the rents accruing from such realty during the year of her death did not become part of her personal estate so as to be chargeable for her debts, this section [Code 1942, § 539] being inapplicable under such circumstances. Eatherly v. Winn, 185 Miss. 742, 189 So. 99, 1939 Miss. LEXIS 184 (Miss. 1939).

Where a testatrix provided for the payment of all her just and legal debts, taxes on real estate accruing and due for the year prior to her death were to be paid by her executors and were not chargeable against the devisee of such real estate devised to him subject to one-half of the mortgage debt thereon. Eatherly v. Winn, 185 Miss. 742, 189 So. 99, 1939 Miss. LEXIS 184 (Miss. 1939).

Where will did not confer authority, neither executor nor administrator with the will annexed had authority to collect rents on realty except during year of testator's death. Fidelity & Deposit Co. v. Doughtry, 181 Miss. 586, 179 So. 846, 1938 Miss. LEXIS 99 (Miss. 1938).

Rent accruing on decedent's realty during year of decedent's death held asset in administrator's hands. Wright v. Wright, 160 Miss. 235, 134 So. 197, 1931 Miss. LEXIS 202 (Miss. 1931).

Rent accruing on land in Mississippi is a debt governed by its laws. Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 1920 Miss. LEXIS 472 (Miss. 1920).

Under this section [Code 1942, § 539] and Code 1942, § 577 rents accruing during the year of decedent's death, and crops remaining on the lands at the date of his death, whether gathered or still in the field, and whether they are matured or not, are assets of decedent, whether testate or intestate, and as such pass into the hands of the personal representative for the payment of the debts and the expenses of administration. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

3. Particular claims or charges as debts.

Since all the personal and real property of a deceased surety of an administratrix of a veteran's estate were assets of his estate and chargeable as such with his debts, a proceeding to enforce such charge against the property in the hands of such deceased surety's sole distributee because of administratrix's maladministration of the veteran's estate must be recognized. Hill v. Ouzts, 190 Miss. 341, 200 So. 254, 1941 Miss. LEXIS 54 (Miss. 1941).

When bank became insolvent and closed, deceased stockholder's double liability matured, standing in same class as other unsecured debts, and became charge on estate's entire personalty and realty. Gift v. Love, 164 Miss. 442, 144 So. 562, 1932 Miss. LEXIS 252 (Miss. 1932).

Heirs hold legal title to land subject to charge of ancestor's debts, though indebtedness be not ascertained at death. Gift v. Love, 164 Miss. 442, 144 So. 562, 1932 Miss. LEXIS 252 (Miss. 1932).

Where devise was void and deceased bank stockholder's heirs obtained judgment against testamentary trustee for proceeds of land sold, judgment claim held inferior to bank's double liability claim on stock, and heirs took remaining land subject to such liability. Gift v. Love, 164 Miss. 442, 144 So. 562, 1932 Miss. LEXIS 252 (Miss. 1932).

Before bank went into liquidation, no compromise settlement could be made between bank, stockholder's heirs, and testamentary trustee, which would result in defeating bank's right to enforce double liability. Gift v. Love, 164 Miss. 442, 144 So. 562, 1932 Miss. LEXIS 252 (Miss. 1932).

Bank's quitclaim deed of deceased stockholder's and debtor's land to heirs in settlement transaction, whereby heirs took certain assets in satisfaction of their judgment against estate which was inferior to bank's claim, held not supported by consideration. Gift v. Love, 164 Miss. 442, 144 So. 562, 1932 Miss. LEXIS 252 (Miss. 1932).

That bank, without consideration, quitclaimed deceased bank stockholder's land to heirs, pursuant to compromise settlement, and took bank stock in satisfaction of bank's claim for loan held not to preclude superintendent of banks, after bank closed, from enforcing stockholder's double liability against land quitclaimed. Gift v. Love, 164 Miss. 442, 144 So. 562, 1932 Miss. LEXIS 252 (Miss. 1932).

The liability of a surety on a guardian's bond is a debt within the statute, charging the lands of a decedent with his estate over and above what his personal estate may be sufficient to pay. Savings Bldg. & Loan Ass'n v. Tart, 81 Miss. 276, 32 So. 115, 1902 Miss. LEXIS 103 (Miss. 1902).

4. Intent of testator.

A will manifests the testator's intention that the property transferred to his wife be free of estate taxes where "Item IV" exempts from the payment of estate taxes and administration costs those bequests made earlier in the will to his wife and "Item III" specifically states that his wife is to receive $4,800 a year "free of any debts" and therefore this property cannot bear the burden of estate taxes. Waldrup v. United States, 499 F. Supp. 820, 1980 U.S. Dist. LEXIS 16059 (N.D. Miss. 1980).

This statute does not prohibit the testator himself from making, by his will, his own directions as to the order or priority of the application of his estate in the payment of his debts. Temple v. First Nat'l Bank, 202 Miss. 92, 30 So. 2d 605, 1947 Miss. LEXIS 245 (Miss. 1947).

Notwithstanding the provisions of this section [Code 1942, § 539], a testator may charge his real property with the entire burden of the payment of his debts to the complete exoneration of his personalty, if and when the real estate is sufficient to do so, or he may apportion the burden between real and personal property, the will and not the statute controlling as between legatees, devisees, and distributees. Temple v. First Nat'l Bank, 202 Miss. 92, 30 So. 2d 605, 1947 Miss. LEXIS 245 (Miss. 1947).

This statute in no way affects the rule that when a testator makes bequests of his personalty and no devise of his realty, the latter is charged with his debts to the exoneration of the bequests. Temple v. First Nat'l Bank, 202 Miss. 92, 30 So. 2d 605, 1947 Miss. LEXIS 245 (Miss. 1947).

The property specifically set aside by testator to take care of debts, costs, and expenses of the estate proving insufficient, descendible personalty and realty were required to be first exhausted in the payment of such debts, etc., before encroaching upon the legacies provided for in the will, in view of testator's directions that such legacies should be invaded and abated for such purpose only as a last resort. Temple v. First Nat'l Bank, 202 Miss. 92, 30 So. 2d 605, 1947 Miss. LEXIS 245 (Miss. 1947).

RESEARCH REFERENCES

ALR.

Amount of funeral expenses allowable against decedent's estate. 4 A.L.R.2d 995.

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon. 17 A.L.R.4th 530.

Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay. 49 A.L.R.4th 242.

Law Reviews.

1978 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 165, March, 1979.

§ 91-7-93. Inventory of money, debts due decedent, and property not appraised.

The executor or administrator shall, within ninety days of the grant of his letters unless further time be allowed by the court or clerk, return an inventory, verified by oath, of the money belonging to the deceased which has come to his hands and of the debts due the deceased which have come to his knowledge, specifying the nature of each debt, setting down such as may be deemed hopeful distinct and separate from those which may be deemed doubtful and desperate. He shall, where appraisement is dispensed with or be not made, embrace in said inventory and give its value all property which has come to his hands; and where an appraisement has been made, he shall be charged therewith unless he show cause to the contrary.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (78); 1857, ch. 60, art. 73; 1871, § 1127; 1880, § 2018; 1892, § 1864; 1906, § 2039; Hemingway's 1917, § 1704; 1930, § 1644; 1942, § 540.

JUDICIAL DECISIONS

1. In general.

Intervention in estate proceedings is a proper mode of seeking correction of the inventory. Rayborn v. McGill, 243 Miss. 585, 139 So. 2d 356, 1962 Miss. LEXIS 379 (Miss. 1962).

One listed in the inventory as owing decedent's estate may intervene for the purpose of contesting the item. Rayborn v. McGill, 243 Miss. 585, 139 So. 2d 356, 1962 Miss. LEXIS 379 (Miss. 1962).

In determining what is received by administrator, court may look to appraisement. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Statutory provision that administrator shall be charged with what is shown by appraisement does not preclude proper parties from proving that articles appraised were actually worth more than respective appraised amounts. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Appraisement, as regards items with which it is authorized by law to deal, stands as correct charge prima facie against administrator. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Statutory provision, that administrator shall stand charged with appraisement unless he show cause to contrary, does not limit showing to one by administrator himself, but showing may be made by any proper person sought to be charged with administrator's liability. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

In action against administrator of administrator, apparent defects in appraisement, introduced to show what administrator received, were supplied by operation of presumption that incidental procedural steps which should have been taken were taken. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Appraisement was no evidence against administrator in regard to accounts due estate, life insurance, and money on hand, because appraisement does not legally deal with money and choses in action, since such items are to be returned by inventory. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

That administrator actually received more or less than was charged to him by appraisement may be shown by competent evidence adduced by any proper party in interest. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Although appraisement was no evidence against administrator regarding insurance and cash, he was chargeable with insurance collected and cash received where evidence outside appraisement showed he received them. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Where cotton crop was produced by tenants working on shares and landlord's estate was entitled to only one-third of crop, administrator was chargeable only with such one-third of crop. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

On accounting administrator is chargeable with actual value of property coming into his hands rather than value fixed by appraiser. Davis v. Blumenberg, 107 Miss. 432, 65 So. 503, 1914 Miss. LEXIS 102 (Miss. 1914).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 161 et seq.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 371 et seq. (inventory and appraisal).

CJS.

34 C.J.S., Executors and Administrators § 197 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-7-95. Additional inventory.

Whenever personal property of any kind, or assets not contained in the previous inventory, shall come to the possession or knowledge of the executor, administrator, or collector, an account or inventory of the same shall be returned within thirty days from the time of discovery, and the same shall be appraised by sworn appraisers unless the court or clerk shall deem it unnecessary.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (79); 1857, ch. 60, art. 75; 1871, § 1129; 1880, § 2020; 1892, § 1866; 1906, § 2041; Hemingway's 1917, § 1706; 1930, § 1645; 1942, § 541.

§ 91-7-97. Adoption of collector's inventory or new inventory.

In case an inventory be returned by a temporary administrator, the executor or administrator who may succeed to the administration shall, within ninety days after the grant of his letters, either return a new inventory in place of the collector's inventory or file a written acknowledgment of the receipt of the articles contained in the first inventory and consent to be answerable for the same.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (80); 1857, ch. 60, art. 76; 1871, § 1130; 1880, § 2021; 1892, § 1867; 1906, § 2042; Hemingway's 1917, § 1707; 1930, § 1646; 1942, § 542.

RESEARCH REFERENCES

Am. Jur.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Form 431.1 (Petition or application – For extension of time to file inventory and appraisement).

§ 91-7-99. All to join in returning inventory.

If there be more than one executor, administrator, or temporary administrator, they shall all join in returning the inventories. If one or more refuse to do so, the others may return them, and the power and authority of the person so refusing shall thereafter cease. Those who return the inventory shall proceed in the administration, unless the delinquent, within sixty days, assign a reasonable excuse which the court may deem satisfactory.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (86); 1857, ch. 60, art. 78; 1871, § 1132; 1880, § 2022; 1892, § 1869; 1906, § 2044; Hemingway's 1917, § 1709; 1930, § 1647; 1942, § 543.

§ 91-7-101. Debt from executor or administrator inventoried.

The naming of an executor in a will shall not operate to extinguish any claim which the deceased had against him, but it shall be the duty of every such executor accepting the trust to give in such claim in the list of debts. On his failure to give in such claim or any part thereof, any person interested in the estate may allege the facts by petition to the court, and the court shall decide on the validity of the claim, if it be denied. When the claim is established, the executor shall account for it as a debtor to the estate, and not otherwise; and in the same way and subject to all the foregoing provisions, an administrator shall give in a claim against himself.

HISTORY:

Codes, Hutchinson's 1848, ch. 49; art. 1 (88); 1857, ch. 60, art. 74; 1871, § 1128; 1880, § 2019; 1892, § 1865; 1906, § 2040; Hemingway's 1917, § 1705; 1930, § 1648; 1942, § 544.

Cross References —

Claim of executor or administrator against estate, see § 91-7-163.

JUDICIAL DECISIONS

1. In general.

"To give in" the claim does not operate as an estoppel on the executor or administrator to show that the same was invalid. Franks v. Wanzer, 25 Miss. 121, 1852 Miss. LEXIS 158 (Miss. 1852).

A failure by an administrator to make an inventory of the debt due by him to his intestate may be a breach of duty for which he is liable on his bond; yet it does not follow that the amount of the debt is to be treated as so much money in his hands. Kelsey v. Smith, 2 Miss. 68, 1834 Miss. LEXIS 14 (Miss. 1834).

§ 91-7-103. Summary proceeding for discovery of assets.

If the goods, chattels, and effects are improperly withheld from the executor or administrator, then he shall not be answerable for a failure to return the inventories herein required until the goods, chattels, and effects, or some part thereof, have been received. If the executor or administrator shall have cause to believe that any of the assets of the estate are concealed or have been or are wrongfully withheld from him, or that any person has in his possession or under his control any records, books, or documents containing evidence concerning such assets and the ownership thereof, or has knowledge or information thereof otherwise, then it shall be the duty of such executor or administrator to forthwith proceed by a summary petition before the court or chancellor against all persons suspected of having concealed or wrongfully withheld such assets, as well as all persons having books, records, documents, or information relating thereto, for a discovery of the assets of the estate and all adverse claim thereto, if any. All persons made parties to such petition may be compelled by attachment for contempt to discover under oath by answer filed or testimony given, either or both at such time and place as the court or chancellor may direct, all the facts known to them concerning the assets of the estate and of all adverse claims thereto, if any. If on the hearing it shall appear that any person has property or assets of the estate to which there is no adverse claim, the court or chancellor may direct it to be delivered to the executor or administrator, who shall forthwith account therefor in his inventory. No decree shall be rendered in such proceeding concerning any adverse claim set up by any person to any of the assets. The costs of such proceeding shall be borne by the estate.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (80); 1857, ch. 60, art. 76; 1871, § 1130; 1880, § 2021; 1892, § 1868; 1906, § 2043; Hemingway's 1917, § 1708; 1930, § 1649; 1942, § 545; Laws, 1936, ch. 241.

JUDICIAL DECISIONS

1. Accounting.

Because the trustee of an educational trust was not compelled to account to the chancery court, but submitted to the accounting on her own accord, it did not matter that the accounting was not under oath. Fuller v. Kelly (In re Fuller), 203 So. 3d 1147, 2016 Miss. App. LEXIS 733 (Miss. Ct. App. 2016).

§ 91-7-105. Failure to return inventory.

If any executor, administrator, or temporary administrator fail to return proper inventories within the time prescribed by law or by order of the court, a summons returnable in not less than five days may, on application of any person interested, be issued for such executor, administrator, or collector to show cause why such inventory hath not been returned. If the summons be returned executed and such party do not appear or, appearing, fail to show good cause, the court, or clerk in vacation, shall revoke the letters and grant administration anew.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (85); 1857, ch. 60, art. 77; 1871, § 1131; 1880, § 2023; 1892, § 1870; 1906, § 2045; Hemingway's 1917, § 1710; 1930, § 1650; 1942, § 546.

RESEARCH REFERENCES

ALR.

Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal. 33 A.L.R.4th 708.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 490.

§ 91-7-107. Perfect inventory may be compelled.

If any person interested discover that the inventory returned does not contain a full account of all the property, goods, chattels, and effects of the deceased, such person may, on petition to the court, have the executor, administrator, or temporary administrator cited to appear and show cause why an additional inventory should not be returned. If, on hearing, the court be satisfied that a true inventory was not originally returned, it may order the executor or administrator to return a new one; and on his failure to do so, his letters may be revoked. If the title to any property not inventoried be in dispute, it shall be sufficient for the executor, administrator, or collector so to report; and he shall not be required to return an additional inventory until the title be settled in his favor. It shall also be the duty of every executor and administrator to return additional inventories at least once in each year of the increase of the property of the estate, if there be any such increase.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (87); 1857, ch. 60, art. 79; 1871, § 1133; 1880, § 2024; 1892, § 1871; 1906, § 2046; Hemingway's 1917, § 1711; 1930, § 1651; 1942, § 547.

JUDICIAL DECISIONS

1. In general.

In a contest between residuary legatees of a will and beneficiaries of an alleged gift inter vivos of certain separate stock which was by the will directed to be sold by the executors along with other assets of the estate for the payment of numerous legacies, wherein the residuary legatee sought to compel a more complete inventory by including such corporate stock, the burden of proof was upon the surviving executor and those claiming the stock, not as purchasers for value, to prove that such stock was not a part of the assets of the estate being administered. Lindeman's Estate v. Herbert, 188 Miss. 842, 193 So. 790, 1940 Miss. LEXIS 13 (Miss. 1940).

RESEARCH REFERENCES

ALR.

Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal. 33 A.L.R.4th 708.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 490, 491.

CJS.

34 C.J.S., Executors and Administrators § 172.

§ 91-7-109. Inventory and appraisement by disinterested persons.

The goods, chattels, and personal estate of the decedent, other than money and choses in action, shall be inventoried and appraised unless the court or clerk, for good cause, order it dispensed with. On granting letters testamentary, or of administration, or of temporary administration, unless otherwise ordered, a warrant or warrants shall issue under the seal of the court, commanding three or more discreet persons not related to the deceased or interested in the estate to make the inventory and appraisement, any three or more of whom may act. The warrant shall command the appraisers to set apart to those entitled thereto the property exempt by law from execution, and to make the allowance for one year's support and tuition of those entitled to receive it.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (72); 1857, ch. 60, art. 70; 1871, § 1124; 1880, § 2014; 1892, § 1872; 1906, § 2047; Hemingway's 1917, § 1712; 1930, § 1652; 1942, § 548.

Cross References —

Compensation of appraisers, see § 25-7-67.

Inventory by temporary administrator, see § 91-7-55.

Report of appraisers, see § 91-7-137.

JUDICIAL DECISIONS

1. In general.

An administrator has nothing to do with the appointment of appraisers. O'Brian Bros. v. Wilson, 82 Miss. 93, 33 So. 946 (Miss. 1903).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 493.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 421 et seq. (appointment and qualification of appraisers).

§ 91-7-111. Warrants of appraisement to different counties.

If the personal estate be in different counties and cannot be conveniently collected together, a warrant of appraisement may be issued to three or more appraisers in each county in which such property may be, or the appraisers designated for the county in which administration was granted may make the appraisement in each county. The warrant to appraisers in any county other than that in which administration was granted need not command them to allot the exempt property or make the allowance for the year's support or tuition to those entitled thereto.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (71); 1857, ch. 60, art. 69; 1871, § 1123; 1880, § 2015; 1892, § 1873; 1906, § 2048; Hemingway's 1917, § 1713; 1930, § 1653; 1942, § 549.

§ 91-7-113. Form of warrant.

The warrant to the appraisers, except as otherwise provided, shall be to the following effect, viz.:

"The State of Mississippi.

"To ________, ________, and ________:

"This is to command you—

"First.–Before proceeding to act regarding the matters herein, to take the following oath, viz.: 'I do swear [or affirm] that I will well and truly, without partiality or prejudice, perform the duties of appraiser of the estate of ________, deceased, as commanded in the warrant of appraisement and according to law, to the best of my skill and judgment. So help me God.'

"Second.–To jointly inventory and appraise the goods, chattels, and personal estate, other than money and choses in action, of ________, deceased, late of the county of ________, so far as the same may be shown to you or may come to your knowledge, setting down in a column or columns opposite to each article the value thereof in figures, and at the bottom of each column the contents thereof.

"Third.–To jointly set apart to the widow and children, or to the widow if there be no children, or to the children if there be no widow, such of the estate as is exempt by law from execution.

"Fourth.–To jointly set apart for the widow and children who were being supported by the deceased, or for the widow if there be no such children, or for the children if there be no widow, or to the infant children if the deceased were their mother and they were being maintained by her, one year's provisions and necessary wearing apparel, including in such provisions so much thereof as is embraced in the exempt property set apart to them; or, if there be no provisions or wearing apparel or an insufficient amount thereof, to allow a sum of money necessary to supply the same for one year.

"Fifth.–To jointly ascertain and allow what sum of money will be necessary to pay tuition for the children for one year, in case there be any.

"Sixth.–To jointly report in writing to the chancery court of ________ county, within thirty days from the date hereof, your inventory and appraisement of said estate, and your allotment of the exempt property and the allowances made to the widow and children, if any, with your certificate attached that you took the oath herein as required.

"Witness my hand and official seal, this ________ day of ________, ________ Clerk."

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (72); 1857, ch. 60, art. 70; 1871, § 1124; 1880, § 2014; 1892, § 1874; 1906, § 2049; Hemingway's 1917, § 1714; 1930, § 1654; 1942, § 550.

JUDICIAL DECISIONS

1. In general.

Appraisement was no evidence against administrator in regard to accounts due estate, life insurance, and money on hand, because appraisement does not legally deal with money and choses in action, since such items are to be returned by inventory. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Homestead is not subject to sale to pay year's allowance to widow. Miers v. Miers, 160 Miss. 746, 133 So. 133, 1931 Miss. LEXIS 135 (Miss. 1931).

§ 91-7-115. Administration of oath and how vacancies filled.

The oath required to be taken by the appraisers may be administered by any officer authorized to administer oaths, or by the executor or administrator, or by either appraiser to the others. In case any appraiser die, or for any cause do not act, another warrant may forthwith be issued to some other person to act.

HISTORY:

Codes, 1892, § 1875; 1906, § 2050; Hemingway's 1917, § 1715; 1930, § 1655; 1942, § 551.

§ 91-7-117. Appraisers to set apart exempt property.

It shall be the duty of the appraisers to set apart to the widow and children, or to the widow if there be no children, or to the children if there be no widow, such personal property as is exempt by law from execution, and make report thereof and attach it to the appraisement, which shall be approved by the court if found correct, or may be referred back to them by the court with instructions as to what to allow. The action of the appraisers or the court shall not be necessary to the title of the widow and children to the exempt property, which shall vest in them by operation of law on the death of the husband and father.

HISTORY:

Codes, 1871, § 1290; 1880, § 1278; 1892, § 1876; 1906, § 2051; Hemingway's 1917, § 1716; 1930, § 1656; 1942, § 552.

Cross References —

Homestead exemption generally, see § 85-3-31 et seq.

Descent of exempt property, see § 91-1-19.

Designation of exempt property in appraisers' report, see § 91-7-137.

JUDICIAL DECISIONS

1. In general.

Title to household furniture vested in testator's children, and was not chargeable to administrator. Fidelity & Deposit Co. v. Doughtry, 181 Miss. 586, 179 So. 846, 1938 Miss. LEXIS 99 (Miss. 1938).

Where deceased share tenant left nothing except exempt property, administration was unnecessary; hence widow and children having unsuccessfully demanded tenant's share from landlord could recover in replevin. Williams v. Sykes, 170 Miss. 88, 154 So. 267, 154 So. 727, 1934 Miss. LEXIS 100 (Miss. 1934).

Widow, as administratrix de bonis non, could not be charged with entire personal property received, but only as to part not exempt, though appraisers did not set exempt property apart. Hayes v. National Surety Co., 169 Miss. 676, 153 So. 515, 1934 Miss. LEXIS 67 (Miss. 1934).

Exempt property descends freed not only from debts incurred by owner in lifetime, but also expenses of last illness and funeral, regardless of whether estate is solvent. De Baum v. Hulett Undertaking Co., 169 Miss. 488, 153 So. 513, 1934 Miss. LEXIS 66 (Miss. 1934).

Homestead is not subject to sale to pay year's allowance to widow. Miers v. Miers, 160 Miss. 746, 133 So. 133, 1931 Miss. LEXIS 135 (Miss. 1931).

RESEARCH REFERENCES

ALR.

Right of nonresident surviving spouse or minor children to allowance of property exempt from administration or to family allowance from local estate of nonresident decedent. 51 A.L.R.2d 1026.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 677-681.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 491 et seq. (exempt property).

CJS.

34 C.J.S., Executors and Administrators §§ 460-462, 466 et seq.

§§ 91-7-119 through 91-7-133. Repealed.

Repealed by Laws, 1976, ch. 407, § 44, eff from and after April 1, 1977.

§ 91-7-119. [Codes, 1942, § 553; Laws, 1936, ch. 237]

§ 91-7-121. [Codes, 1892, § 1909; 1906, § 2084; Hemingway's 1917, § 1751; 1930, § 1657; 1942, § 554]

§ 91-7-123. [Codes, 1892, § 1910; 1906, § 2085; Hemingway's 1917, § 1752; 1930, § 1658; 1942, § 555]

§ 91-7-125. [Codes, 1892, § 1911; 1906, § 2086; Hemingway's 1917, § 1753; 1930, § 1659; 1942, § 556]

§ 91-7-127. [Codes, 1892, § 1912; 1906, § 2087; Hemingway's 1917, § 1754; 1930, § 1660; 1942, § 557]

§ 91-7-129. [Codes, 1892, § 1913; 1906, § 2088; Hemingway's 1917, § 1755; 1930, § 1661; 1942, § 558]

§ 91-7-131. [Codes, 1892, § 1914; 1906, § 2089; Hemingway's 1917, § 1756; 1930, § 1662; 1942, § 559]

§ 91-7-133. [Codes, 1892, § 1915; 1906, § 2090; Hemingway's 1917, § 1757; 1930, § 1663; 1942, § 560]

Editor's Notes —

Former § 91-7-119 was entitled: Sale of partnership interest.

Former § 91-7-121 was entitled: Inventory of partnership estates.

Former § 91-7-123 was entitled: Property delivered to surviving partner.

Former § 91-7-125 was entitled: Condition of partner's bond.

Former § 91-7-127 was entitled: Status of surviving partner.

Former § 91-7-129 was entitled: Survivor refusing to act.

Former § 91-7-131 was entitled: Executor's further bond in such case.

Former § 91-7-133 was entitled: Duties of surviving partners.

§ 91-7-135. Appraisers to set apart one year's support for family.

It shall be the duty of the appraisers to set apart out of the effects of the decedent, for the spouse and children who were being supported by the decedent, or for the spouse if there be no such children, or for such children if there be no spouse, one (1) year's provision, including such provision as may be embraced in the exempt property set apart. If there be no provisions, or an insufficient amount, the appraiser shall allow money in lieu thereof or in addition thereto necessary for the comfortable support of the spouse and children, or spouse or children, as the case may be, for one (1) year. In addition to the provisions or money in lieu thereof, the appraisers shall ascertain and allow what sum of money will be needed to purchase necessary wearing apparel for the spouse and such children, or the spouse or children, as the case may be, and to pay tuition for the children for one (1) year. If a parent dies leaving children who are infants and were being maintained by the parent, the same provisions and allowance shall be set apart and made for them as above provided.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 17 (1); 1857, ch. 60, art. 172; 1871, §§ 1290, 1957; 1880, § 1279; 1892, § 1877; 1906, § 2052; Hemingway's 1917, § 1717; 1930, § 1664; 1942, § 561; Laws, 1992, ch. 321 § 1, eff from and after passage (approved April 20, 1992).

Cross References —

Exempt property generally, see § 85-3-1 et seq.

Descent of exempt property, see § 91-7-167.

Allowance for maintenance and education of ward, see § 93-13-35.

JUDICIAL DECISIONS

ANALYSIS

1. In general; nature of entitlement.
2. Who is entitled.
3. Effect of terms of, lack of, or renunciation of, will.
4. Authority, role of court.
5. Non-residents.
6. Spouse living apart from spouse; children living apart from parent.
7. Amount; payment.
8. Miscellaneous.

1. In general; nature of entitlement.

Real estate owned as tenants by the entirety vested exclusively in surviving wife upon husband's death, and thus did not become asset of husband's probate estate and was not available to be distributed in kind as widow's allowance. In re Osborne, 120 B.R. 64, 1990 Bankr. LEXIS 2184 (Bankr. N.D. Miss. 1990).

Right of widow to year's allowance is absolute, whatever may be condition of estate, and application therefor is matter with which administrator has no concern. Harwell v. Woody, 206 Miss. 863, 41 So. 2d 35, 1949 Miss. LEXIS 308 (Miss. 1949).

Administrator, as such, is without right to prosecute appeal from order of court decreeing year's allowance to widow of decedent, in absence of issue involving her status as widow entitled to allowance. Harwell v. Woody, 206 Miss. 863, 41 So. 2d 35, 1949 Miss. LEXIS 308 (Miss. 1949).

The right of a widow to an allowance for a year's support is absolute and cannot be conditioned on the payment by her to the administrator of her deceased husband's wages which she has collected. Westbrook v. Shotts, 200 Miss. 456, 27 So. 2d 683, 1946 Miss. LEXIS 309 (Miss. 1946).

Making a year's allowance for support of deceased's widow is part of jurisdiction of chancery court, which cannot be taken away nor impaired by legislature, so that authority in appraisers to set aside year's support does not deprive chancellor of authority. Prentiss v. Turner, 170 Miss. 496, 155 So. 214, 1934 Miss. LEXIS 158 (Miss. 1934).

Right of widow to year's support superior to lien of enrolled judgment. First Nat'l Bank v. Donald, 112 Miss. 681, 73 So. 723, 1916 Miss. LEXIS 162 (Miss. 1917).

Wife entitled to year's support under will of husband devising all his property to sisters to exclusion of wife. Whitehead v. Kirk, 106 Miss. 706, 64 So. 658, 1914 Miss. LEXIS 10 (Miss. 1914).

2. Who is entitled.

In order to be entitled to the widow's allowance, a widow need only show that she and decedent were living together as husband and wife at the time of his death. Waldrup v. United States, 499 F. Supp. 820, 1980 U.S. Dist. LEXIS 16059 (N.D. Miss. 1980).

A widow's allowance was properly denied where the widow did not make a motion for or in any other manner indicate that she wanted a widow's allowance set aside to her before the estate was finally closed, and where there was no suggestion of fraud. Thomas v. Bailey, 375 So. 2d 1049, 1979 Miss. LEXIS 2607 (Miss. 1979), overruled in part, Clark v. Neese, 131 So. 3d 556, 2013 Miss. LEXIS 643 (Miss. 2013).

Where widow and decedent were living together as husband and wife at time of decedent's death and he was under a duty to support her, widow's allowance was proper under Code 1942 § 561. Mills v. Mills, 279 So. 2d 917, 1973 Miss. LEXIS 1495 (Miss. 1973).

One claiming this allowance has the burden of showing that she was being supported by decedent. In re Will of Marshall, 243 Miss. 472, 138 So. 2d 482, 1962 Miss. LEXIS 364 (Miss. 1962).

A posthumous child has rights in the year's support. Womack v. Boyd, 31 Miss. 443, 1856 Miss. LEXIS 97 (Miss. 1856).

3. Effect of terms of, lack of, or renunciation of, will.

A widow is entitled to the statutory widow's allowance, regardless of a will, unless it clearly appears that the provisions of the will for the widow are in lieu of the year's support provided by statute. Rush v. Rush, 360 So. 2d 1240, 1978 Miss. LEXIS 2341 (Miss. 1978).

This section [Code 1942 § 561] applies to cases of testacy and intestacy alike except in the case of wills where it clearly appears that the provisions in the will for the widow and minor children of the decedent are in lieu of the 1 year's support provided for by the statute. Mills v. Mills, 279 So. 2d 917, 1973 Miss. LEXIS 1495 (Miss. 1973).

Allowance of a year's support to a widow renouncing her husband's will is within the chancellor's discretion. Sandifer v. Sandifer, 237 Miss. 464, 115 So. 2d 46, 1959 Miss. LEXIS 491 (Miss. 1959).

Widow's contract reciting that she waived right to renounce will of husband and take by inheritance held too indefinite to preclude widow from $3,000 as year's allowance provided by statute. Gidden v. Gidden, 176 Miss. 98, 167 So. 785, 1936 Miss. LEXIS 116 (Miss. 1936).

Will held not to show intention on part of testator that provisions therein for widow were to be in lieu of statutory allowance for support for year. Gilmer v. Gilmer, 151 Miss. 23, 117 So. 371, 1928 Miss. LEXIS 286 (Miss. 1928).

Widow and minor children entitled to year's support in case of will where provision of will not made in lieu of all other claim, or there is no inconsistency between will and provision for allowance. Stewart v. Stewart, 132 Miss. 515, 96 So. 694, 1923 Miss. LEXIS 74 (Miss. 1923).

4. Authority, role of court.

The fixing of the amount of the widow's allowance by the appraisers is not final, but is subject to approval or disapproval of the chancery court. Beckett v. Howorth, 237 Miss. 394, 115 So. 2d 48, 1959 Miss. LEXIS 483 (Miss. 1959).

Making a year's allowance for support of deceased's widow is part of jurisdiction of chancery court, which cannot be taken away nor impaired by legislature, so that authority in appraisers to set aside year's support does not deprive chancellor of authority. Prentiss v. Turner, 170 Miss. 496, 155 So. 214, 1934 Miss. LEXIS 158 (Miss. 1934).

Action of appraisers in making allowance for year's support to widow of decedent is not final, but only advisory to chancellor, and subject to his approval or disapproval. Prentiss v. Turner, 170 Miss. 496, 155 So. 214, 1934 Miss. LEXIS 158 (Miss. 1934).

If appraisers make no allowance for widow's support for a year, court or chancellor in vacation may, on proper petition therefor, make allowance. Gilmer v. Gilmer, 151 Miss. 23, 117 So. 371, 1928 Miss. LEXIS 286 (Miss. 1928).

5. Non-residents.

The statute has no application in favor of nonresidents. Barber v. Ellis, 68 Miss. 172, 8 So. 390, 1890 Miss. LEXIS 33 (Miss. 1890).

6. Spouse living apart from spouse; children living apart from parent.

Widow's allowance under Miss. Code Ann. §§ 91-7-135 and 91-7-141 was improper as the widow did not show that she was being supported by the decedent at the time of his death or that she was away from him without fault on her part since she had left the decedent's home by her own volition after his leg was amputated, and was living in her own home when he died. In re Estate of Estes, 111 So. 3d 1223, 2012 Miss. App. LEXIS 820 (Miss. Ct. App. 2012).

Where husband's obligation to support wife was terminated by a property settlement, the wife is not entitled to the statutory support allowance out of his estate. Will of Best v. Brewer, 236 Miss. 359, 111 So. 2d 262, 1959 Miss. LEXIS 325 (Miss. 1959).

A wife being supported by her husband at the time of his death in compliance with a decree for temporary alimony was entitled to an allowance for a year's support. Stringer v. Arrington, 202 Miss. 798, 32 So. 2d 879, 1947 Miss. LEXIS 342 (Miss. 1947).

Allowance to widow of support for one year was authorized where evidence warranted court in believing that separation of deceased and wife resulted from no fault of wife but was the fault of deceased and that his duty to support her continued. Vaughan v. Vaughan, 195 Miss. 463, 16 So. 2d 23, 1943 Miss. LEXIS 175 (Miss. 1943).

Wife living apart from husband without his fault, and not supported by him, is not entitled to a year's support from his estate. Byars v. Gholson, 147 Miss. 460, 112 So. 578, 1927 Miss. LEXIS 287 (Miss. 1927).

7. Amount; payment.

Where a decedent left an estate of an approximate value of $139,000, an allowance to the widow of $6,000 for one year's support was not excessive. Bryan v. Quinn, 233 Miss. 366, 102 So. 2d 124, 1958 Miss. LEXIS 392 (Miss. 1958).

Amount of widow's allowance is discretionary with chancellor where fees of administrator and counsel have been paid and award is $800 less than that recommended by appraisers. Harwell v. Woody, 206 Miss. 863, 41 So. 2d 35, 1949 Miss. LEXIS 308 (Miss. 1949).

The amount allowed by the appraisers to the widow for year's support is advisory to, but not binding upon, the chancellor. Moseley v.

Harper, 202 Miss. 442, 32 So. 2d 192, 1947 Miss. LEXIS 296 (Miss. 1947).

In determining the amount of the widow's allowance, the chancellor should consider the value of the estate, the rights of others having an interest therein, the manner of living to which the widow was accustomed during her husband's life, her station in life and the demands of that station. Moseley v. Harper, 202 Miss. 442, 32 So. 2d 192, 1947 Miss. LEXIS 296 (Miss. 1947).

Refusal of chancellor to increase appraiser's allowance for widow's support from $5,000 to $8,500 was not an abuse of discretion, where items presented by widow to substantiate her petition for increase included improper items such as expenses for repairs, taxes and insurance upon her separate property, lot and clothing for burial of decedent, and other excessive costs. Moseley v. Harper, 202 Miss. 442, 32 So. 2d 192, 1947 Miss. LEXIS 296 (Miss. 1947).

Executor must turn over money awarded widow for year's support to her in cash; he cannot withhold it on ground she has property which belongs to estate. Pratt v. Pratt, 155 Miss. 237, 124 So. 323, 1929 Miss. LEXIS 275 (Miss. 1929).

Amount of allowance for support of widow is within discretion of chancellor. Gilmer v. Gilmer, 151 Miss. 23, 117 So. 371, 1928 Miss. LEXIS 286 (Miss. 1928); Whitehead v. Kirk, 106 Miss. 706, 64 So. 658, 1914 Miss. LEXIS 10 (Miss. 1914); Bryan v. Quinn, 233 Miss. 366, 102 So. 2d 124, 1958 Miss. LEXIS 392 (Miss. 1958).

Allowance of $2,400 for support of widow during year following decedent's death held not excessive. Gilmer v. Gilmer, 151 Miss. 23, 117 So. 371, 1928 Miss. LEXIS 286 (Miss. 1928).

In proceeding to set aside decree granting widow allowance for year's support, evidence regarding her separate income and income from property bequeathed held properly excluded. Gilmer v. Gilmer, 151 Miss. 23, 117 So. 371, 1928 Miss. LEXIS 286 (Miss. 1928).

8. Miscellaneous.

Homestead is not subject to sale to pay year's allowance to widow. Miers v. Miers, 160 Miss. 746, 133 So. 133, 1931 Miss. LEXIS 135 (Miss. 1931).

Notice to executor or legatees of proceedings by widow for year's allowance for support is not required. Gilmer v. Gilmer, 151 Miss. 23, 117 So. 371, 1928 Miss. LEXIS 286 (Miss. 1928).

RESEARCH REFERENCES

ALR.

Right of nonresident surviving spouse or minor children to allowance of property exempt from administration or to family allowance from local estate of nonresident decedent. 51 A.L.R.2d 1026.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 677-681.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 451 et seq. (family allowance).

CJS.

34 C.J.S., Executors and Administrators §§ 460-462, 466 et seq.

§ 91-7-137. Appraisers to report.

When the inventory and appraisement shall be finished as required, the appraisers shall report the same in writing to the court from which the warrant of appraisement issued, with their certificate of having taken the proper oath thereto attached, within thirty days from the issuance of the warrant or within such additional time as may be granted. They shall annex thereto a statement showing such allowances as they may have made to the widow and children, or either of them, and designating the property which they may have set apart to them as exempt property.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (75); 1857, ch. 60, arts. 71, 72; 1871, §§ 1125, 1126; 1880, §§ 2016, 2017; 1892, § 1878; 1906, § 2053; Hemingway's 1917, § 1718; 1930, § 1665; 1942, § 562.

Cross References —

Homestead allotment, see § 85-3-35.

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. Proof of Facts 2d 1, Appraiser's Third-Party Liability for Negligent Appraisal of Real Property.

§ 91-7-139. Extension of time; defaulting appraiser fined.

The court or clerk may allow further time to the appraisers for the performance of their duties. For a failure to return the inventory and appraisement, an attachment may issue and, on the service of the same, the court may fine the parties in default, as for a contempt, not exceeding Fifty Dollars ($50.00) each.

HISTORY:

Codes, 1892, § 1879; 1906, § 2054; Hemingway's 1917, § 1719; 1930, § 1666; 1942, § 563.

§ 91-7-141. Court may apportion year's allowance.

The chancery court may apportion the one year's allowance, or any part of it, according to the situation, rights, and interests of any of the children or the widow, and may direct the payment of any portion of the allowance which may be found necessary or proper to any of them.

HISTORY:

Codes, 1871, § 1959; 1880, § 1281; 1892, § 1880; 1906, § 2055; Hemingway's 1917, § 1720; 1930, § 1667; 1942, § 564.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Allowance improper.

1. In general.

If the widow be not the mother of the children, and they live apart, the latter will be entitled to have a fair proportion of the year's allowance, and the court will apportion it. Womack v. Boyd, 31 Miss. 443, 1856 Miss. LEXIS 97 (Miss. 1856).

2. Allowance improper.

Widow's allowance under Miss. Code Ann. §§ 91-7-135 and 91-7-141 was improper as the widow did not show that she was being supported by the decedent at the time of his death or that she was away from him without fault on her part since she had left the decedent's home by her own volition after his leg was amputated, and was living in her own home when he died. In re Estate of Estes, 111 So. 3d 1223, 2012 Miss. App. LEXIS 820 (Miss. Ct. App. 2012).

RESEARCH REFERENCES

ALR.

Right of nonresident surviving spouse or minor children to allowance of property exempt from administration or to family allowance from local estate of nonresident decedent. 51 A.L.R.2d 1026.

§ 91-7-143. Minor distributee or legatee maintained.

An executor or administrator of a solvent estate may defray the necessary and reasonable expenses of the maintenance and education of legatees or distributees who are minors and have no guardian, and may be allowed a credit therefor against the shares of the estate to which such minors are entitled on distribution. Before making such expenditures, he shall obtain the order of the court, or of the chancellor in vacation, authorizing him to make them.

HISTORY:
Codes, 1880, § 2094; 1892, § 1954; 1906, § 2128; Hemingway's 1917, § 1796; 1930, § 1668; 1942, § 565.

Cross References —
Maintenance of child under guardianship, see § 93-13-35 et seq.

§ 91-7-145. Notice to creditors of estate.

(1) The executor or administrator shall make reasonably diligent efforts to identify persons having claims against the estate. Such executor or administrator shall mail a notice to persons so identified, at their last known address, informing them that a failure to have their claim probated and registered by the clerk of the court granting letters within ninety (90) days after the first publication of the notice to creditors will bar such claim as provided in Section 91-7-151.

(2) The executor or administrator shall file with the clerk of the court an affidavit stating that such executor or administrator has made reasonably diligent efforts to identify persons having claims against the estate and has given notice by mail as required in subsection (1) of this section to all persons so identified. Upon filing such affidavit, it shall be the duty of the executor or administrator to publish in some newspaper in the county a notice requiring all persons having claims against the estate to have the same probated and registered by the clerk of the court granting letters, which notice shall state the time when the letters were granted and that a failure to probate and register within ninety (90) days after the first publication of such notice will bar the claim. The notice shall be published for three (3) consecutive weeks, and proof of publication shall be filed with the clerk. If a paper be not published in the county, notice by posting at the courthouse door and three (3) other places of public resort in the county shall suffice, and the affidavit of such posting filed shall be evidence thereof in any controversy in which the fact of such posting shall be brought into question.

(3) The filing of proof of publication as provided in this section shall not be necessary to set the statute of limitation to running, but proof of publication shall be filed with the clerk of the court in which the cause is pending at any time before a decree of final discharge shall be rendered; and the time for filing proof of publication shall not be limited to the ninety-day period in which creditors may probate claims.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (115); 1857, ch. 60, art. 81; 1871, § 1135; 1880, § 2026; 1892, § 1929; 1906, § 2103; Hemingway's 1917, § 1771; 1930, § 1669; 1942, § 566; Laws, 1920, ch. 302; Laws, 1928, ch. 69; Laws, 1975, ch. 373, § 4; Laws, 1989, ch. 582, § 2; Laws, 1994, ch. 430 § 1, eff from and after passage (approved March 17, 1994).

Cross References —
Publication where estate is insolvent, see § 91-7-267.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sufficiency of notice.
3. Failure to give notice.

1. In general.

The role played by the chancery court in probate proceedings under § 91-7-143, upon which the statute's time bar is dependent in that notice may be published only after an affidavit is filed with the clerk of court, is sufficient state action to implicate the due process clause of the Fourteenth Amendment to the United States Constitution; thus, a creditor's claim against an estate was a property interest protected by the Fourteenth Amendment. Vann v. Mississippi Neurosurgery, P.A. (In re Estate of Petrick), 635 So. 2d 1389, 1994 Miss. LEXIS 205 (Miss. 1994).

The time bar of § 91-7-145 did not apply, and therefore a creditor's untimely claim against an estate was valid, where the creditor was "reasonably ascer-tainable" and the administratrix merely published notice rather than providing notice by mail as mandated by the statute; furthermore, the insufficient notice violated the due process clause of the Fourteenth Amendment to the United States Constitution. Vann v. Mississippi Neurosurgery, P.A. (In re Estate of Petrick), 635 So. 2d 1389, 1994 Miss. LEXIS 205 (Miss. 1994).

Notice to creditors of decedent's estate signed by the then duly appointed and qualified administrator was valid, notwithstanding that he was removed, on motion of decedent's widow, on the same date that notice to the creditors was first published, and a creditor's claim filed some 2 months after expiration of the 90 day period from first publication date was time barred. Estate of Myers v. Myers, 498 So. 2d 376, 1986 Miss. LEXIS 2844 (Miss. 1986).

Whether the publication of notice to creditors required by § 91-7-145 is made in an appropriate newspaper brings into bearing § 13-3-31, which sets forth the requirements a newspaper must meet in order to qualify as a valid publisher of legal notices. Estate of Myers v. Myers, 498 So. 2d 376, 1986 Miss. LEXIS 2844 (Miss. 1986).

Contention that notice to creditors was not published in a newspaper which qualified as a valid publisher of legal notices, which was not raised in the court below, would not be considered by the Supreme Court on appeal. Estate of Myers v. Myers, 498 So. 2d 376, 1986 Miss. LEXIS 2844 (Miss. 1986).

Where decedent's first wife failed to file a claim for unpaid alimony against his estate within the statutory period of 90 days, she was estopped under § 91-7-145 from bringing her claim. Medders v. Ryle, 458 So. 2d 685, 1984 Miss. LEXIS 1871 (Miss. 1984).

Administrator is required to speedily publish notice to creditors requiring probate of claims within six months. McDowell v. Minor, 158 Miss. 360, 130 So. 484, 1930 Miss. LEXIS 57 (Miss. 1930).

Administrator could not delay in his duty to make prompt publication of notice to creditors and thereafter take advantage of delay in his own behalf. McDowell v. Minor, 158 Miss. 360, 130 So. 484, 1930 Miss. LEXIS 57 (Miss. 1930).

A decedent's estate is not liable for an assessment against the decedent as stockholder in a failed national bank, made in the decedent's lifetime, where a claim therefor was not presented within the time limited by the Mississippi statute. Mann v. Kleisdorff, 16 F.2d 997, 1927 U.S. App. LEXIS 3682 (5th Cir. Miss. 1927).

Claim not presented within six months after publication is not barred where notice not published for three consecutive weeks and no proof of publication is made and filed with clerk. Boutwell v. Farmers' & Traders' Bank, 118 Miss. 50, 79 So. 1, 1918 Miss. LEXIS 48 (Miss. 1918).

Court cannot after publication make a second publication shortening time allowed in first publication for probating and registering claims. Geisenberger v. Progress Knitting Mills, 113 Miss. 495, 74 So. 331, 1917 Miss. LEXIS 126 (Miss. 1917).

2. Sufficiency of notice.

Chancellor erred in holding that a creditor's claim against the decedent's estate was time barred under Miss. Code Ann. § 91-7-145, as no determination was even made as to whether the creditor was a reasonably ascertainable creditor. Further, § 91-7-145 did not specifically allow for notice by publication as a substitute for actual notice by mail; rather, notice by publication was a requirement in addition to providing the creditor notice by mail. Holston v. Ladner (In re Estate of Ladner), 911 So. 2d 673, 2005 Miss. App. LEXIS 663 (Miss. Ct. App. 2005).

Notice to creditors of estate to have claims probated and registered before chancery court clerk of certain county within specified six-month period held sufficient as against contention that notice was fatally defective because it did not indicate to creditors what court had granted letters of executorship. Floyd v. Chatham, 178 Miss. 137, 172 So. 504, 1937 Miss. LEXIS 191 (Miss. 1937).

Executor's notice to creditors not void because date in notice not that on which letters granted. George T. Webb & Co. v. Fogg, 134 Miss. 605, 99 So. 504, 1924 Miss. LEXIS 317 (Miss. 1924).

"Notice is hereby given to all creditors having claims against said estate to present same to the clerk of said court for probate and registration according to law, within six months from this date, or they will be forever barred," dated and signed by administrator, is sufficient. Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 So. 160, 1914 Miss. LEXIS 260 (Miss. 1915).

Publication of notice dated May 26, 1910, in newspaper on June 3, 10 and 17, sufficient. Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 So. 160, 1914 Miss. LEXIS 260 (Miss. 1915).

Notice stating that person publishing it was appointed administrator and advising all persons having claims to deal as law directs was not sufficient. Marshall v. John Deere Plow Co., 99 Miss. 284, 54 So. 948, 1911 Miss. LEXIS 209 (Miss. 1911).

Administrator's notice not void for use of word "file" instead of "register." Stokes v. Lemon & Gale Co., 96 Miss. 868, 52 So. 457, 1910 Miss. LEXIS 210 (Miss. 1910).

3. Failure to give notice.

Because the executrix failed in the executrix's statutory duty to provide notice to any creditors regarding the probate of the decedent's estate, the filing period for probate claims did not expire as the executrix failed to provide the required statutory notice to trigger the running of the filing period. Avakian v. Wilmington Trust N.A. (In re Estate of Avakian), 231 So. 3d 208, 2017 Miss. App. LEXIS 201 (Miss. Ct. App.), cert. denied, 229 So. 3d 122, 2017 Miss. LEXIS 492 (Miss. 2017).

RESEARCH REFERENCES

ALR.

What constitutes rejection of claim against estate to commence running of statute of limitations applicable to rejected claims. 36 A.L.R.4th 684.

Validity of nonclaim statute or rule provision for notice by publication to claimants against estate – post-1950 cases. 56 A.L.R.4th 458.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 620, 623.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 641 et seq. (notice to creditors).

8 Am. Jur. Legal Forms 2d, Executors and Administrators § 104:157 et seq. (creditors' claims).

CJS.

34 C.J.S., Executors and Administrators § 561.

§ 91-7-147. Newspaper notices dispensed with in small estates.

Where the value of an estate shall not be more than Five Hundred Dollars ($500.00), the court shall dispense with newspaper notices; and notices in lieu thereof shall be posted for thirty (30) days at the courthouse door and two (2) other public places in the county. Failure of persons having claims against the estate to have their claims probated and registered by the clerk of the court granting letters within ninety (90) days after the date on which notice is posted will bar such claims as provided in Section 91-7-151.

HISTORY:

Codes, 1857, ch. 60, art. 97; 1871, § 1157; 1880, § 2066; 1892, § 1891; 1906, § 2066; Hemingway's 1917, § 1731; 1930, § 1670; 1942, § 567; Laws, 1994, ch. 430, § 2, eff from and after passage (approved March 17, 1994).

RESEARCH REFERENCES

ALR.

Validity of nonclaim statute or rule provision for notice by publication to claimants against estate-post-1950 cases. 56 A.L.R.4th 458.

§ 91-7-149. Probate of claims.

Any person desiring to probate his claim shall present to the clerk the written evidence thereof, if any, or if the claim be a judgment or decree, a duly certified copy thereof, or if there be no written evidence thereof, an itemized account or a statement of the claim in writing, signed by the creditor, and make affidavit, to be attached thereto, to the following effect, viz.: That the claim is just, correct, and owing from the deceased; that it is not usurious; that neither the affiant nor any other person has received payment in whole or in part thereof, except such as is credited thereon, if any; and that security has not been received therefor except as stated, if any. Thereupon, if the clerk shall approve, he shall indorse upon the claim the words following: "Probated and allowed for $________ and registered this ________ day of ________, A.D., ________," and shall sign his name officially thereto. Probate registration and allowance shall be sufficient presentation of the claim to the executor or administrator; provided, that should the clerk probate and allow and register the claim, but fail or neglect to indorse thereon the words, "Probated and allowed for $________ and registered the ________ day of ________, A.D., ________," and officially sign his name thereto, the court may, upon proper showing, allow the clerk to indorse on the claim, nunc pro tunc, the words, "Probated and allowed for $________ and registered, this the ________ day of ________, A.D., ________," and sign his name officially thereto. If the claim be based upon a demand of which there is no written evidence or upon an itemized account, the statement of said claim or the itemized account shall be retained and kept by the clerk among the official papers pertaining to the estate; and if the claim be based upon a promissory note or other instrument purporting to have been executed by the decedent, the creditor shall file with his claim either the original thereof or a duplicate of such original in the discretion of the creditor. If the original writing is presented to the clerk, it may be withdrawn by the creditor, and the clerk shall make a duplicate thereof. No specific writing or certificate shall be required to be made by the clerk on either the original writing or the duplicate retained by the clerk. In no instance shall an original writing be required to be presented to the clerk unless (a) a question is raised by the personal representative of the estate, or by any party in interest, as to the authenticity of the original or (b) in the circumstances it would be unfair to admit into evidence the duplicate in lieu of the original. In either of the above situations, the court or chancellor, upon good cause being shown, may require the creditor to produce the original before the court or clerk for the inspection of the personal representative or other party in interest, who may examine the original and who may make photographic copies thereof under the supervision of the clerk.

Notwithstanding the foregoing, any record, voucher, claim, check, draft, receipt, writing, account, statement, note or other evidence which may be furnished, filed, probated, presented or produced, or required to be produced, by a federally regulated bank, thrift or trust company shall be deemed to be an original admitted, furnished, filed, probated, presented, or produced for all purposes and with the same effect as the original, if such financial institution produces a copy of such evidence from a format of storage commonly used by financial institutions, whether electronic, imaged, magnetic, microphotographic or otherwise.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (90); 1857, ch. 60, art. 82; 1871, § 1137; 1880, § 2027; 1892, § 1932; 1906, § 2106; Hemingway's 1917, § 1774; 1930, § 1671; 1942, § 568; Laws, 1934, ch. 304; Laws, 1991, ch. 413, § 1; Laws, 1996, ch. 400, § 42, eff from and after passage (approved March 19, 1996).

Cross References —

Power of chancery clerk to allow and register claims against estate, see § 9-5-141.

Register of claims to be kept by chancery clerk, see § 9-5-173.

Notice of contest of claim, see § 91-7-165.

Proceedings in insolvent estates, see § 91-7-261 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Mandatory nature of statute.
3. Claims subject to probate.
4. —Claim of executor or trustee.
5. Statement of claims.
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1. In general.

The amendment to § 91-7-149 which deleted the requirement of filing the original promissory note when a creditor makes a claim against the estate, would be retroactively applied to a case which was before the court when the amendment was enacted. Bell v. Mitchell, 592 So. 2d 528, 1991 Miss. LEXIS 968 (Miss. 1991).

In order for a claimant to introduce evidence to support a claim against an estate for medical expenses upon contest, the claimant may proceed under § 41-9-119, but to do this, he or she must be allowed to go into court to present the bills incurred and to testify for what purpose they were incurred. Since a summary judgment, by its nature, disposes of a case before a trial is commenced, summary judgment practice under Rule 56, Miss. R. Civ. P. is inapplicable in contests of probated claims because it is inconsistent with the statutory procedure which necessitates that a claimant enter court to introduce evidence in support of his or her claim and permits a personal representative to rebut the claim. Thus, the procedure for summary judgment is not applicable to dispose of claims made under § 91-7-149. Biloxi Regional Medical Center, Inc. v. Estate of Ross, 546 So. 2d 667, 1989 Miss. LEXIS 297 (Miss. 1989).

A substantial compliance with the statute is sufficient. Central Optical Merchandising Co. v. Estate of Lowe, 249 Miss. 61, 160 So. 2d 673, 1964 Miss. LEXIS 376 (Miss. 1964).

The purposes of nonclaim statutes are to furnish the legal representative with evidence of the validity of the claim, give him an opportunity to contest the same, and enable him to justify the payment and be allowed credit therefor in his account. Whitaker v. Davenport, 193 Miss. 523, 10 So. 2d 202, 1942 Miss. LEXIS 135 (Miss. 1942).

Probating, allowing, and registering of claims against estate are not "judicial acts" on part of clerk. Poyner v. Gilmore, 171 Miss. 859, 158 So. 922, 1935 Miss. LEXIS 25 (Miss. 1935).

Purpose of additional provisions, incorporated into statute regulating manner of filing claims for probate was to require evidences of debt to remain on file in clerk's office, where heirs, or other creditors or parties in interest, could better examine into facts, so as to avoid collection of false claims. Jordan v. Love, 171 Miss. 523, 157 So. 877, 1934 Miss. LEXIS 262 (Miss. 1934).

Claim against estate of deceased stockholder in insolvent bank, for personal liability filed and marked "probated" by clerk, held not void because lost or mislaid by clerk. Carothers v. Love, 169 Miss. 250, 152 So. 483, 153 So. 389, 1934 Miss. LEXIS 8 (Miss. 1934).

Law providing manner for filing claims against estate of decedent should be strictly construed against creditors. Jennings v. Lowery & Berry, 147 Miss. 673, 112 So. 692, 1927 Miss. LEXIS 304 (Miss. 1927).

2. Mandatory nature of statute.

A claimant's pleadings were adequate under § 91-7-149 where she did all that the statute required with the limited exception of the label on her pleading, in that she set forth the nature of her claim and summarized its factual basis, and she complied with the important verification requirements of the statute. Williams v.

Mason, 556 So. 2d 1045, 1990 Miss. LEXIS 34 (Miss. 1990).

Whenever claim against estate of decedent, to which affidavit in compliance with statute is attached, is presented to clerk for probate, he has mandatory duty to admit it to probate by attaching his certificate thereto. Poyner v. Gilmore, 171 Miss. 859, 158 So. 922, 1935 Miss. LEXIS 25 (Miss. 1935).

Technical precision of form is not required to satisfy statute regulating manner of probating claims, although statute is mandatory as to its substance. Deposit Guaranty Bank & Trust Co. v. Jordan's Estate, 171 Miss. 332, 157 So. 876, 1934 Miss. LEXIS 260 (Miss. 1934); Fidelity Mut. Life Ins. Co. v. Goldstein, 187 Miss. 285, 192 So. 584, 1940 Miss. LEXIS 206 (Miss. 1939).

Substance of law on subject of probating claims against estate is mandatory. Merchants & Mfrs. Bank v. Fox, 165 Miss. 833, 147 So. 789, 1933 Miss. LEXIS 313 (Miss. 1933); Ellsworth v. Fox, 147 So. 790 (Miss. 1933); Jordan v. Love, 171 Miss. 523, 157 So. 877, 1934 Miss. LEXIS 262 (Miss. 1934); Strange v. Strange, 189 Miss. 349, 197 So. 830, 1940 Miss. LEXIS 126 (Miss. 1940).

Statute requiring endorsement of clerk is mandatory. Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 So. 160, 1914 Miss. LEXIS 260 (Miss. 1915).

The statute is mandatory and an affidavit which is not in effect a compliance with it will not give validity to the probation, allowance and registration of a claim. Cheairs v. Cheairs, 81 Miss. 662, 33 So. 414, 1902 Miss. LEXIS 180 (Miss. 1902).

3. Claims subject to probate.

A former wife proved a valid claim against her former husband's estate for $30,600, where there was a prior court judgment finding that the husband was $600 in arrears in alimony payments, and their divorce decree required the husband to carry a $30,000 life insurance policy on his own life naming the wife as the policy's primary beneficiary after payment of then existing pledged debts, but the husband had let the policy lapse. Raspilair v. Estate of Raspilair, 583 So. 2d 970, 1991 Miss. LEXIS 458 (Miss. 1991).

In an action seeking to compel a perfect inventory, void certain conveyances, partition property, and establish a claim against an estate, §§ 91-7-149, 91-7-251 had no application and petitioner's claim was improperly dismissed as untimely, where the claim was not for a specific money demand due or to become due but rather was an inchoate and contingent claim involving the ownership by co-tenancy of specific property. Maxwell v. Yuncker, 419 So. 2d 580, 1982 Miss. LEXIS 2165 (Miss. 1982).

Defaulted instalments of alimony can be recovered against the husband's personal representative and claim therefor may be probated as a decree. Schaffer v. Schaffer, 209 Miss. 220, 46 So. 2d 443, 1950 Miss. LEXIS 381 (Miss. 1950).

Purchaser's claim against decedent's estate for purchase price of royalty interest in oil and gas lease because of breach of warranty based on decedent's prior conveyance of his interest is a probatable claim against the estate of decedent, there having been no production of oil and gas under the lease prior to decedent's death. Dale v. Hickman, 207 Miss. 606, 42 So. 2d 810, 1949 Miss. LEXIS 373 (Miss. 1949).

A secured creditor is free to stand upon his security and is under no duty to probate his debt. Campbell v. Cason, 206 Miss. 420, 40 So. 2d 258, 1949 Miss. LEXIS 271 (Miss. 1949).

A claim that certain funds in a bank belong to one other than the decedent does not constitute a claim against the estate capable of being probated. Matthews v. Redmond, 202 Miss. 253, 32 So. 2d 123, 1947 Miss. LEXIS 268 (Miss. 1947).

Person who took paralytic into her home and continuously cared for him for a period of two and one-half years until his death, pursuant to an oral agreement that in return such paralytic would make will leaving her his entire estate consisting of realty and personalty, where paralytic did execute such a will but subsequently executed a new will leaving all his property to his nephew, at least had a right to establish her claim quantum meruit. Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730, 1946 Miss. LEXIS 202 (Miss. 1946).

A claim against a decedent's estate for maintenance, nursing and other care furnished by an old men's home upon the decedent's false and fraudulent representation that he was a pauper was not a claim for unliquidated damages for a tort, which under the statute could not be probated, but a claim for reasonable compensation for care and support. Old Men's Home, Inc. v. Lee's Estate, 191 Miss. 669, 2 So. 2d 791, 4 So. 2d 235, 1941 Miss. LEXIS 144 (Miss. 1941).

Judgments obtained against foreign administrator cannot be probated under statute and cannot be basis of claim against estate administered in state. Voyles v. Robinson, 151 Miss. 585, 118 So. 420, 1928 Miss. LEXIS 338 (Miss. 1928).

Physicians' and druggists' bills should be separately probated. Gaulden v. Ramsey, 123 Miss. 1, 85 So. 109, 1920 Miss. LEXIS 1 (Miss. 1920).

4. —Claim of executor or trustee.

Under law permitting executor to probate individual account, fact that trustee, acting with an executor and trustee in petitioning for sale of realty to pay debts, had a probated account did not show fraud and his good faith presumed. Brickell v. Lightcap, 115 Miss. 417, 76 So. 489, 1917 Miss. LEXIS 218 (Miss. 1917), overruled, Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

5. Statement of claims.

No fixed form of claim is ordinarily required, nor is the technical accuracy and certainty of description essential in pleading necessary, so long as it gives such information concerning the nature and amount of the demand as to enable the representative to act intelligently upon it. Central Optical Merchandising Co. v. Estate of Lowe, 249 Miss. 61, 160 So. 2d 673, 1964 Miss. LEXIS 376 (Miss. 1964).

Though a claim may satisfy minimum requirements the personal representative may require the creditor to make it more definite and certain where it does not sufficiently advise him of its essential details or nature. Central Optical Merchandising Co. v. Estate of Lowe, 249 Miss. 61, 160 So. 2d 673, 1964 Miss. LEXIS 376 (Miss. 1964).

Where a claimant presents in good faith a claim in substantial compliance with the statute, it is not equitable for the decedent's representation to wait until the time for filing claims has expired and then to assert that the itemized account is not technically sufficient and thereby to bar the claim. Central Optical Merchandising Co. v. Estate of Lowe, 249 Miss. 61, 160 So. 2d 673, 1964 Miss. LEXIS 376 (Miss. 1964).

A claim for premiums upon insurance policies is sufficiently itemized where it shows the kind of policy, the policy number, the period covered, the amount due on final audit, and the due date. Stewart v. Estate of Williamson, 243 Miss. 450, 138 So. 2d 742, 1962 Miss. LEXIS 361 (Miss. 1962).

The statute clearly contemplates that, in presenting claims against the estate of a decedent, the evidence or statement of same probated must on its face show a prima facie right in the claimant to recover from the estate the amount claimed, and that it must disclose the nature and amount of the claim with sufficient prevision to bar, when paid, an action therefor. Johnson v. Hannon, 211 Miss. 207, 51 So. 2d 283, 1951 Miss. LEXIS 350 (Miss. 1951).

Where a claim was for services rendered as a servant of deceased for washing, ironing, cooking, cleaning house and etc., for 842 days at a $1.00 per day and night totalling the sum of $842, the statement of claim was sufficient on its face to inform the administrator that the services were rendered under an implied, if not an express, promise to pay for the same and the claimant should be permitted to introduce her proof to establish either an express or implied promise to pay for the services. Johnson v. Hannon, 211 Miss. 207, 51 So. 2d 283, 1951 Miss. LEXIS 350 (Miss. 1951).

A claim for "personal services" is too broad and indefinite; the statement of such a claim must specify the nature and character of the services rendered and that they were rendered pursuant to a contract with the decedent during his lifetime, either express or implied, that the services were to be compensated for. Johnson v. Odom, 202 Miss. 213, 31 So. 2d 120, 1947 Miss. LEXIS 261 (Miss. 1947).

Omission of the middle name or initial of the decedent does not invalidate a claim presented for probate against an estate. Boggan v. Scruggs, 200 Miss. 747, 29 So. 2d 86, 1947 Miss. LEXIS 358 (Miss. 1947), overruled, Talbert v. Ellzey, 203 Miss. 612, 35 So. 2d 628, 1948 Miss. LEXIS 313 (Miss. 1948).

A form of claim merely stating that it is in account with the named decedent, setting forth the items and signed at the end is not defective as failing to disclose whether the debt claimed is due from or to the decedent's estate, and if from, to whom. Boggan v. Scruggs, 200 Miss. 747, 29 So. 2d 86, 1947 Miss. LEXIS 358 (Miss. 1947), overruled, Talbert v. Ellzey, 203 Miss. 612, 35 So. 2d 628, 1948 Miss. LEXIS 313 (Miss. 1948).

Certified copies of petitions in suit against foreign administrator in foreign state with statutory affidavits attached held sufficient statement of claim against estate. Voyles v. Robinson, 151 Miss. 585, 118 So. 420, 1928 Miss. LEXIS 338 (Miss. 1928).

Defective description of some of the several items of a claim does not render the probate of the claim void. Gaulden v. Ramsey, 123 Miss. 1, 85 So. 109, 1920 Miss. LEXIS 1 (Miss. 1920).

"To care and attention including board, lodging . . . and service for 3 years prior to the death of said Mrs. O. D. Graves, and being from April 20, 1913, to April 20, 1916," properly states claim. Gaulden v. Ramsey, 123 Miss. 1, 85 So. 109, 1920 Miss. LEXIS 1 (Miss. 1920).

Where purchaser of claims did not itemize them for probate, but listed each, giving amount and name of original creditor, this was not sufficient. Rogers v. Rosenstock, 117 Miss. 144, 77 So. 958, 1918 Miss. LEXIS 158 (Miss. 1918).

The itemized account need not show days of month of doctor's visits; due date of each item held to be first day of month in which charged. Duffy v. Kilroe, 116 Miss. 7, 76 So. 681, 1917 Miss. LEXIS 281 (Miss. 1917).

Statement of claim sufficiently signed where creditor signed affidavit attached thereto. Bankston v. Coopwood, 99 Miss. 511, 55 So. 48, 1911 Miss. LEXIS 221 (Miss. 1911).

A claim for professional services not based upon an itemized account is sufficiently stated for probate if in writing and if it specifies a definite sum as due "for legal advice and services rendered" to deceased. Foster v. Shaffer, 84 Miss. 197, 36 So. 243, 1904 Miss. LEXIS 24 (Miss. 1904).

6. Clerk's certificate.

Defendants' promissory notes were properly probated where the clerk's certificate showed that each note was a true and correct copy of the original note and that after each original note was filed and numbered it was withdrawn and the copy substituted; the fact that the clerk did not mark on any of the original notes the word "filed" and did not number the original notes did not invalidate the probation of the notes. Estate of Wilson v. National Bank of Commerce, 364 So. 2d 1117, 1978 Miss. LEXIS 2239 (Miss. 1978).

Where a creditor's claim against a decedent's estate is filed with the chancery clerk within the statutory six-month period, it is the purpose of the 1934 amendment to this section [Code 1942, § 568] to allow the clerk to enter a nunc pro tunc indorsement on the claim after the expiration of the statutory period. Ethridge v. Estate of Paul, 196 So. 2d 530, 1967 Miss. LEXIS 1492 (Miss. 1967).

Bill against chancery clerk and his surety for failure to attach certificate to claim showing it was probated, allowed, and registered, because of which failure claim was disallowed, held not demurrable since claimant would at least be entitled to nominal damages. Poyner v. Gilmore, 171 Miss. 859, 158 So. 922, 1935 Miss. LEXIS 25 (Miss. 1935).

Claim rendered invalid by failure of clerk to make any endorsement showing probate, registration and allowance. Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 So. 160, 1914 Miss. LEXIS 260 (Miss. 1915).

Statute requiring endorsement of clerk is mandatory, but court within time period before claim is barred, where clerk's failure was due to ignorance of duty, may enter order nunc pro tunc authorizing clerk to approve and allow claim. Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 So. 160, 1914 Miss. LEXIS 260 (Miss. 1915).

Clerk's certificate not invalidated by omission of word "probated" where shown statute complied with by claimant. Davis v. Blumenberg, 107 Miss. 432, 65 So. 503, 1914 Miss. LEXIS 102 (Miss. 1914).

7. Withdrawal of instruments.

Defendants' promissory notes were properly probated where the clerk's certificate showed that each note was a true and correct copy of the original note and that after each original note was filed and numbered it was withdrawn and the copy substituted; the fact that the clerk did not mark on any of the original notes the word "filed" and did not number the original notes did not invalidate the probation of the notes. Estate of Wilson v. National Bank of Commerce, 364 So. 2d 1117, 1978 Miss. LEXIS 2239 (Miss. 1978).

Clerk keeps original note probated against estate until creditor requests withdrawal thereof, and clerk's statutory obligation to make certified copy to be retained by him arises only on claimant's request to withdraw original and exists only while original yet remains in clerk's hands. Merchants' & Mfrs' Bank v. Busby, 172 Miss. 394, 160 So. 577, 1935 Miss. LEXIS 154 (Miss. 1935).

Clerk held not liable for failure to certify copies of notes filed against estate, resulting in disallowance of claim, in absence of allegations that he had assured creditor at time of withdrawal of originals that certified copies had been made and filed, or promised to make and file certified copies after withdrawal. Merchants' & Mfrs' Bank v. Busby, 172 Miss. 394, 160 So. 577, 1935 Miss. LEXIS 154 (Miss. 1935).

Probate of note withdrawn by claimant held void for absence of clerk's seal on certificate on copy of note, although certificate of probate was sealed. King v. Jones, 171 Miss. 886, 158 So. 457, 158 So. 796, 1935 Miss. LEXIS 19 (Miss. 1935).

Statute requires creditor probating claim against estate on deceased's note, in order to withdraw original note from clerk's office, to furnish for administrator, heirs, and other parties in interest full and true copy made or verified by clerk, accompanied by clerk's certificate, indorsed on copy or appended thereto, which certificate and copy must both remain on file among papers in clerk's office. Jordan v. Love, 171 Miss. 523, 157 So. 877, 1934 Miss. LEXIS 262 (Miss. 1934).

Where clerk certified copy of deceased's note filed for probate and sent certificate and original note back to claimant, who filed them away without observing irregularity until after period for probation had expired, claim was not allowable, since statute was not complied with. Jordan v. Love, 171 Miss. 523, 157 So. 877, 1934 Miss. LEXIS 262 (Miss. 1934).

Statute regulating probate of claims and authorizing withdrawal of original note where clerk retains copy, held to authorize withdrawal of original attached affidavit where clerk retained a certified copy. Deposit Guaranty Bank & Trust Co. v. Jordan's Estate, 171 Miss. 332, 157 So. 876, 1934 Miss. LEXIS 260 (Miss. 1934).

Statute requires clerk of court, when original instruments executed by decedent are withdrawn from files, to make and retain certified copies. Merchants & Mfrs. Bank v. Fox, 165 Miss. 833, 147 So. 789, 1933 Miss. LEXIS 313 (Miss. 1933).

Clerk's certificate on copies retained when original instruments executed by decedent are withdrawn from files, must be under hand and seal of clerk and must show clerk has had originals placed before him and that copies retained are true copies. Merchants & Mfrs. Bank v. Fox, 165 Miss. 833, 147 So. 789, 1933 Miss. LEXIS 313 (Miss. 1933).

It is sufficient for clerk to indorse on copy retained of instrument executed by decedent and withdrawn from files that same is "true copy of original this day exhibited to me," dating certificate, signing same, and affixing thereto his official seal. Merchants & Mfrs. Bank v. Fox, 165 Miss. 833, 147 So. 789, 1933 Miss. LEXIS 313 (Miss. 1933).

Where original note of decedent is withdrawn from files, all indorsements and credits must be shown by copy retained and certificate. Merchants & Mfrs. Bank v. Fox, 165 Miss. 833, 147 So. 789, 1933 Miss. LEXIS 313 (Miss. 1933).

8. Defective probate.

A claim upon a note is properly disallowed where the original is not filed. Stewart v. Estate of Williamson, 243 Miss. 450, 138 So. 2d 742, 1962 Miss. LEXIS 361 (Miss. 1962).

Claim by deceased's brother for a doctor's bill incurred by the decedent in his last illness, there being no evidence that the brother paid the claim at the request of the deceased, was properly refused since under the law such a claim should be separately probated on the affidavit of the original creditor. Martin v. De Jarnette, 185 Miss. 76, 187 So. 202, 1939 Miss. LEXIS 123 (Miss. 1939).

Holder of note against estate must probate original note or account for loss; claimant on open account must itemize as to dates and sums furnished. Levy v. Merchants' Bank & Trust Co., 124 Miss. 325, 86 So. 807, 1920 Miss. LEXIS 512 (Miss. 1921).

Decree disallowing claim not probated according to law affirmed where record does not contain note or account attempted to be probated. Horne v. McAlpin, 101 Miss. 129, 57 So. 420, 1911 Miss. LEXIS 107 (Miss. 1912).

In suit against executor for debt due by testator, proof of correctness of claim properly rejected where not signed by the creditor and no affidavit attached. Walker v. Nelson, 87 Miss. 268, 39 So. 809, 1905 Miss. LEXIS 139 (Miss. 1905).

9. Affidavit.

Where the timely affidavit filed by the creditor designated as the credit account the decedent's business rather than the decedent himself, and it neither presented written evidence of the claim nor an itemized account thereof, it provided no information to the administrator of the estate from which he could reasonably act in either allowing or disallowing the claim, and the trial court properly refused to allow the creditor to amend his complaint after the expiration of 6 months. Stuart C. Irby Co. v. Patton, 301 So. 2d 845, 1974 Miss. LEXIS 1665 (Miss. 1974).

Where statute of limitations would not run against claim of brother for services and necessaries furnished to his insane sister with expectation of repayment, until her death, it is not required that the affidavit state the time when decedent died, since the death is already established by the record giving jurisdiction of the case to the chancery court. Talbert v. Ellzey, 203 Miss. 612, 35 So. 2d 628, 1948 Miss. LEXIS 313 (Miss. 1948).

A claim based on a loan to the deceased to buy hotel bonds which were to be a gift to the creditor, evidenced by a check allegedly signed by the creditor, was not properly probated as required hereunder, where there was a variance in the initials of the name of the creditor as it appeared on the statement of accounts, check and affidavit in support of the accounts, with no showing that the various names described the same person. Strange v. Strange, 189 Miss. 349, 197 So. 830, 1940 Miss. LEXIS 126 (Miss. 1940).

Affidavit by creditor's agent amounts to no affidavit at all. Persons v. Griffin, 112 Miss. 643, 73 So. 624, 1916 Miss. LEXIS 159 (Miss. 1917).

Affidavit failing to allege that claim "is not usurious" is insufficient. Cudahy Packing Co. v. Miller's Estate, 103 Miss. 435, 60 So. 574, 1912 Miss. LEXIS 190 (Miss. 1912).

Affidavit by creditor's husband as her agent, fatally defective as statute requires that it be by creditor. Saunders v. Stephenson, 94 Miss. 676, 47 So. 783, 1909 Miss. LEXIS 328 (Miss. 1909).

The clerk had no jurisdiction to allow and register a claim where the probate failed to conform to the statute in the following particulars: The affidavit did not after the word "correct" incorporate the words "and owing from the deceased," and did not contain the words "that it is not usurious" nor the words "and that neither the affiant nor any person has received payment." Cheairs v. Cheairs, 81 Miss. 662, 33 So. 414, 1902 Miss. LEXIS 180 (Miss. 1902).

10. Payment of claims.

Will provision directing probate of claims against decedent's estate and excepting "secured debts not due" cannot defeat obligation of the estate to pay a probated secured claim.

Campbell v. Cason, 206 Miss. 420, 40 So. 2d 258, 1949 Miss. LEXIS 271 (Miss. 1949).

An administrator has no right to pay a probated claim for services rendered to the deceased in his lifetime, in the absence of either an express or implied promise on the part of the decedent to pay for the same. Johnson v. Odom, 202 Miss. 213, 31 So. 2d 120, 1947 Miss. LEXIS 261 (Miss. 1947).

Claims for services rendered by intestate's next of kin in looking after intestate, were properly disallowed where there was no promise, agreement or circumstances from which it could be reasonably inferred that the intestate expected to pay, or that such next of kin expected to receive pay, for such services. Wells v. Brooks, 199 Miss. 327, 24 So. 2d 533, 1946 Miss. LEXIS 201 (Miss. 1946).

Claim for services rendered by husband of daughter of intestate's nephew in assisting the nephew in managing the intestate's farm, was properly disallowed where there was no circumstances justifying any assent, express or implied, on the part of the intestate to pay the husband, and where he failed to show that he rendered any service of substantial benefit. Wells v. Brooks, 199 Miss. 327, 24 So. 2d 533, 1946 Miss. LEXIS 201 (Miss. 1946).

Husband of daughter of deceased's nephew by half blood was entitled to fair and adequate compensation on a quantum meruit basis for services rendered in managing deceased's farm, where such services were performed in expectation that deceased would carry out unenforceable promise to leave her property to the daughter if husband performed such services. Wells v. Brooks, 199 Miss. 327, 24 So. 2d 533, 1946 Miss. LEXIS 201 (Miss. 1946).

Claim against testator's estate, which purported to be itemized account or statement of claim in writing, which charged estate with purchase of note on which there was balance due, would be disallowed, where evidence clearly disclosed that there was no sale of note by claimant to testator, but that testator agreed to collect note for claimant, pay certain amount on debt of testator's son to testator and turn over balance to claimant, and that testator merely became claimant's agent or trustee for collection of note. First Columbus Nat'l Bank v. Holesapple-Dillman, 174 Miss. 234, 164 So. 232, 1935 Miss. LEXIS 73 (Miss. 1935).

Administrator is without authority to pay claim not presented as provided by this section [Code 1942, § 568].A. A. Lehman & Co. v. Powe, 95 Miss. 446, 49 So. 622, 1909 Miss. LEXIS 286 (Miss. 1909).

Decree directing distribution among heirs does not affect right to payment of probated claim; fact that claimant is also administrator who has filed its final account is immaterial. Oliver v. Smith, 94 Miss. 879, 49 So. 1, 1909 Miss. LEXIS 364 (Miss. 1909).

11. Unprobated claims.

Services rendered under an oral agreement between a father and daughter whereby the former agreed to leave the daughter her home in consideration of her living with him and taking care of him, constituted an unliquidated claim which could not be probated as required by this section [Code 1942, § 568], and being a liability in the strictest sense of the word, the daughter was not barred because the claim was not probated but was entitled to recover the reasonable value of her services. Stephens v. Duckworth, 188 Miss. 626, 196 So. 219, 1940 Miss. LEXIS 66 (Miss. 1940).

The court has no power upon ex parte petitions to authorize a payment of an unprobated claim. Townsend v. Beavers, 185 Miss. 312, 188 So. 1, 1939 Miss. LEXIS 154 (Miss. 1939).

While heirs and distributees, so far as they are each concerned, may consent to the payment by the administrator of unprobated debts against the estate, and after such consent and the payment in pursuance thereof will, in the absence of fraud or misrepresentation, be precluded from any attempt on their part to charge the administrator therewith, this does not bind or affect the interests of those who did not so consent. Townsend v. Beavers, 185 Miss. 312, 188 So. 1, 1939 Miss. LEXIS 154 (Miss. 1939).

Payment of promissory notes which were not probated as required by this section [Code 1942, § 568] could not be surcharged against the administrator as to those distributees of the estate who consented thereto, although such consent was not binding on heirs and devisees who did not consent to such payment. Townsend v. Beavers, 185 Miss. 312, 188 So. 1, 1939 Miss. LEXIS 154 (Miss. 1939).

Court cannot assume justice or correctness of claim not duly probated. Persons v. Griffin, 112 Miss. 643, 73 So. 624, 1916 Miss. LEXIS 159 (Miss. 1917).

Refusal to permit administrator to file plea, after close of evidence, setting up failure to probate within time fixed by statute, was erroneous. Johnson v. Success Brick Machinery Co., 93 Miss. 169, 46 So. 957, 1908 Miss. LEXIS 117 (Miss. 1908).

Setoff cannot be based on unprobated claim. Cohn v. Carter, 92 Miss. 627, 46 So. 60, 1908 Miss. LEXIS 202 (Miss. 1908).

12. Limitations.

The rule that facts which prevented the running of the statute of limitations against a probated claim should appear in some form on probate thereof and cannot be made to appear for the first time by evidence offered when the claim is under consideration in administration of deceased's estate, does not apply to services and necessaries furnished by a brother to his insane sister, since limitations in such case does not begin to run until her death. Talbert v. Ellzey, 203 Miss. 612, 35 So. 2d 628, 1948 Miss. LEXIS 313 (Miss. 1948).

Motion of claimant, who after expiration of six months for probate, moved that clerk be allowed to make proper certificates of true copies of notes withdrawn and to sign probate and allowance, held properly overruled. Merchants & Mfrs. Bank v. Fox, 165 Miss. 833, 147 So. 789, 1933 Miss. LEXIS 313 (Miss. 1933).

Estate of nonresident within state administered as though there were no other administration, and creditor may probate claim barred in other state but not in this state. Buckingham Hotel Co. v. Kimberly, 138 Miss. 445, 103 So. 213, 1925 Miss. LEXIS 62 (Miss. 1925).

Full faith and credit clause held not to require treating order of dismissal in another state of probate claim for late filing as bar to claim in this state. Buckingham Hotel Co. v. Kimberly, 138 Miss. 445, 103 So. 213, 1925 Miss. LEXIS 62 (Miss. 1925).

No action can be maintained on note not probated within time fixed. Johnson v. Success Brick Machinery Co., 93 Miss. 169, 46 So. 957, 1908 Miss. LEXIS 117 (Miss. 1908).

13. Written evidence.

In a case in which appellant, along with her children, filed claims against her ex-husband's estate for child support arrears, other unpaid support obligations, and for life insurance proceeds, appellant's presentation of the divorce decree, the property settlement agreement, and other various documents was sufficient to satisfy the requirements of Miss. Code Ann. § 91-7-14. To the extent the chancellor dismissed appellant's claims on the merits, such action was improper, as the merits were not before the chancellor to decide. Strickland v. Estate of Broome, 179 So. 3d 1088, 2015 Miss. LEXIS 604 (Miss. 2015).

In a probate proceeding involving a claim based upon an oral contract between the claimant and the decedent whereby the claimant would lend the decedent $11,000 and the decedent would leave a bequest of certain real property to the claimant, the chancellor properly admitted into evidence the claimant's cancelled check and the document reporting to be the defective holographic will of the decedent, neither of which had been attached as exhibits to the claim, where the claim itself was based upon the oral contract and the exhibits were merely introduced as evidence in support of the claim. Estate of McKellar v. Brown, 404 So. 2d 550, 1981 Miss. LEXIS 2229 (Miss. 1981).

The chancellor properly dismissed an amended probate of claim where the alleged written contract between the decedent and the claimant did not in and of itself sufficiently state a claim against the estate and where the claimant failed to allege and prove compliance with the various conditions of the agreement. French v. Druetta, 399 So. 2d 1327, 1981 Miss. LEXIS 1966 (Miss. 1981).

Where the timely affidavit filed by the creditor designated as the credit account the decedent's business rather than the decedent himself, and it neither presented written evidence of the claim nor an itemized account thereof, it provided no information to the administrator of the estate from which he could reasonably act in either allowing or disallowing the claim, and the trial court properly refused to allow the creditor to amend his complaint after the expiration of 6 months. Stuart C. Irby Co. v. Patton, 301 So. 2d 845, 1974 Miss. LEXIS 1665 (Miss. 1974).

Where the respective proofs of two notes presented as claim against an estate recited that the claim was "annexed" and that the original was presented therewith, and described the claim with great particularity and with such accuracy that there could be no mistake as to what claims were referred to, there was a sufficient compliance with this section [Code 1942, § 568], notwithstanding that the proofs were not physically attached to the claims, this section being mandatory as to substance but not as to letter. Fidelity Mut. Life Ins. Co. v. Goldstein, 187 Miss. 285, 192 So. 584, 1940 Miss. LEXIS 206 (Miss. 1939).

Claims, giving claimant's name and stating that specified amount is due for clearing land, should be allowed where correctness proved by evidence of amount of work and price per acre is shown by written agreement signed by deceased. Fairley v. Fairley, 120 Miss. 400, 82 So. 267 (Miss. 1919).

Joint and several note of claimant and deceased husband with attached receipt of payment in full by claimant, was written evidence on its face of her claim for one-half the payment. Wells v. McCollough, 113 Miss. 401, 74 So. 289, 1917 Miss. LEXIS 115 (Miss. 1917).

It was error to disallow claim of creditor who lost original of his claim after probate, but filed copies thereof on day set for filing. Keiffer Bros. Co. v. Bank of Commerce, 105 Miss. 662, 63 So. 189, 1913 Miss. LEXIS 246 (Miss. 1913).

Claim properly disallowed where claimant filed only copy of receipt signed by decedent, evidencing his claim. McMahon v. Foy, 104 Miss. 309, 61 So. 421, 1913 Miss. LEXIS 38 (Miss. 1913).

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§ 91-7-151. Claims to be registered in ninety days or barred; amendment of affidavits.

All claims against the estate of deceased persons, whether due or not, shall be registered, probated and allowed in the court in which the letters testamentary or of administration were granted within ninety (90) days after the first publication of notice to creditors to present their claim. Otherwise, the same shall be barred and a suit shall not be maintained thereon in any court, even though the existence of the claim may have been known to the executor or administrator. Where the affidavit is made in good faith and the claim is registered, probated and allowed by the clerk but the affidavit is defective or insufficient, the court may allow the affidavit to be amended so as to conform to the requirements of the statute, at any time before the estate is finally settled; whereupon the probate shall be as effective and the claim as valid against the estate as if the affidavit had been correct and sufficient in the first instance.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 20 (5); 1857, ch. 60, art. 83; 1871, § 1141; 1880, § 2028; 1892, § 1933; 1906, § 2107; Hemingway's 1917, § 1775; 1930, § 1672; 1942, § 569; Laws, 1926, ch. 157; Laws, 1975, ch. 373, § 5, eff from and after January 1, 1976.

JUDICIAL DECISIONS

ANALYSIS

1. In general; applicability.
2. —Applicability to particular circumstances.
3. Timeliness.
4. Waiver of bar.
5. Accrual of claim before or after death.
6. Claims on suits brought before or after death.
7. Defective notice.
8. Amendment of claim or affidavit.

1. In general; applicability.

Section 91-7-151 applies only to monetary claims against an estate. Allen v. Mayer, 587 So. 2d 255, 1991 Miss. LEXIS 673 (Miss. 1991).

Executrix was properly surcharged for payment of decedent's debts which had not been probated, registered, or allowed. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

The statute is not applicable to a situation where a party denies that it is indebted to an estate and raises no claim against the estate. Bible Ministry Asso. v. Merritt, 391 So. 2d 641, 1980 Miss. LEXIS 2166 (Miss. 1980).

The six months statute of limitations as to claims of creditors is irrelevant to an action against the personal representative and heirs of a decedent seeking adjudication of the existence of a partnership and an accounting of the partnership property. Kelly v. Windham, 204 So. 2d 477, 1967 Miss. LEXIS 1206 (Miss. 1967).

An unliquidated claim is not probatable. Powell v. Buchanan, 245 Miss. 4, 147 So. 2d 110, 1962 Miss. LEXIS 526 (Miss. 1962).

This section [Code 1942, § 569] operates to bar a claim for services, notwithstanding a dispute as to rate of compensation. Love v. Estate of Strong, 234 Miss. 869, 108 So. 2d 215, 1959 Miss. LEXIS 561 (Miss. 1959).

This section [Code 1942, § 569] applies only to contractual claims and not to those in tort. Mossler Acceptance Co. v. Moore, 218 Miss. 757, 67 So. 2d 868, 1953 Miss. LEXIS 601 (Miss. 1953); Hancock v. Pyle, 191 Miss. 546, 3 So. 2d 851, 1941 Miss. LEXIS 175 (Miss. 1941).

The term "claim" in statutes relating to claims against estates includes not only debts already due, but unmatured debts, but it applies only to specific money demands due or to become due and not to inchoate and contingent claims. Reedy v. Alexander, 202 Miss. 80, 30 So. 2d 599, 1947 Miss. LEXIS 244 (Miss. 1947).

A claim against the estate of a deceased person is a demand of a pecuniary nature, which could have been enforced against the decedent during his lifetime; the term does not include a claim to the proceeds of the sale of personal property of an estate. Reedy v. Alexander, 202 Miss. 80, 30 So. 2d 599, 1947 Miss. LEXIS 244 (Miss. 1947).

That widow's petition, claiming the proceeds of certain personalty sold by order of the court as her own rather than that of the estate, had the oath of probate attached to it, and the clerk certified it had been probated, registered and allowed, did not convert it to a probatable or probated claim. Reedy v. Alexander, 202 Miss. 80, 30 So. 2d 599, 1947 Miss. LEXIS 244 (Miss. 1947).

The statute of limitations does not bar the claim of an administrator against the estate for an individual debt duly probated and not barred at the time of his appointment. Oliver v. Smith, 94 Miss. 879, 49 So. 1, 1909 Miss. LEXIS 364 (Miss. 1909).

Claim for damages is not within this section [Code 1942, § 569]; the section refers to contractual claims only. Feld v. Borodofski, 87 Miss. 727, 40 So. 816, 1905 Miss. LEXIS 216 (Miss. 1905).

This section [Code 1942, § 569] has no application to a surviving partner administering partnership assets. Lance v. Calhoun, 85 Miss. 375, 37 So. 1014, 1904 Miss. LEXIS 171 (Miss. 1904).

2. —Applicability to particular circumstances.

Claim for reimbursement of funeral expenses was not untimely under this section because the expenses were not required to be probated; such claims were considered to be a part of the cost of the administration of the estate, and the requirement to probate a claim applied to obligations incurred by a decedent during his lifetime. In re Estate of Whitley v. Love, 129 So. 3d 260, 2013 Miss. App. LEXIS 789 (Miss. Ct. App. 2013).

Clearly, more than 90 days after the first notice to creditors had elapsed when plaintiff (a surviving child), filed his claim against the estate, claiming he was entitled to all the insurance proceeds per the decedent's property settlement with a former wife. However, when the decedent died, plaintiff was a minor, and according to the terms of the decedent's will, the decedent's second and surviving spouse had been appointed testamentary guardian of plaintiff's person and estate; defendant was in a fiduciary relationship with plaintiff, and in that capacity, she not only had an obligation to initiate any and all claims which plaintiff may have had, but she had an obligation to initiate them timely, and therefore, the chancery court erred in granting defendant's Miss. R. Civ. P. 12(b) motion since a constructive trust was possibly at issue. Thornhill v. Thornhill, 905 So. 2d 747, 2004 Miss. App. LEXIS 1083 (Miss. Ct. App. 2004).

Statute was inapplicable to a claim for furniture, since the claim was not pecuniary in nature and was therefore not a probatable claim within the meaning of the statute. Allen v. Mayer, 587 So. 2d 255, 1991 Miss. LEXIS 673 (Miss. 1991).

Since the liability of the deceased guarantor of a promissory note was contingent, and would possibly never occur, § 91-7-151 did not require that it be filed for probate within a period of 90 days following first notice to creditors, and thus the trial court erred in dismissing the lender bank's suit against the guarantor's estate. Peoples Bank of Mendenhall v. Wyatt, 441 So. 2d 117, 1983 Miss. LEXIS 3018 (Miss. 1983).

In an action seeking to compel a perfect inventory, void certain conveyances, partition property, and establish a claim against an estate, §§ 91-7-149, 91-7-251 had no application and petitioner's claim was improperly dismissed as untimely, where the claim was not for a specific money demand due or to become due but rather was an inchoate and contingent claim involving the ownership by co-tenancy of specific property. Maxwell v. Yuncker, 419 So. 2d 580, 1982 Miss. LEXIS 2165 (Miss. 1982).

A creditor's claim against decedent's estate for default on an unsecured note assumed by decedent was barred by this section's 90 day statute of limitations, where the balance due under the note was not an inchoate or contingent claim excepted from the statute, but was a claim enforceable against decedent during his lifetime. Barrett v. Moffitt, 381 So. 2d 624, 1980 Miss. LEXIS 1924 (Miss. 1980).

The claim of a bank, based on an agreement between the decedent and the managing director of the bank for services to be rendered the decedent in consideration of an assignment of 30 percent of the decedent's interest in another's estate, was not a joint, undivided and inchoate interest or a contingent unliquidated claim not subject to probate provisions and the time limitation with which to file the claim against an estate, but was instead a claim for personal services which was barred by the bank's failure to file its claim until 6 months had elapsed from the first publication notice to creditors by the administrator. Vacek v. Hoerner-Bank of West Berlin, 258 So. 2d 793, 1972 Miss. LEXIS 1513 (Miss. 1972).

Where payee failed to timely probate a claim on a note of deceased, and was barred from asserting claim on the note as an unsecured creditor, he was entitled to recovery of the salvage value of the destroyed automobile which had been mortgaged to secure the note. Mossler Acceptance Co. v. Moore, 218 Miss. 757, 67 So. 2d 868, 1953 Miss. LEXIS 601 (Miss. 1953).

Purchaser's claim against decedent's estate for purchase price of royalty interest in oil and gas lease because of breach of warranty based on decedent's prior conveyance of his interest, there having been no production of oil and gas under the lease prior to decedent's death, was a probatable claim against decedent's estate which was barred for failure to probate same within the period prescribed by this section [Code 1942, § 569]. Dale v. Hickman, 207 Miss. 606, 42 So. 2d 810, 1949 Miss. LEXIS 373 (Miss. 1949).

Claims for the proceeds of timber sold from land purchased at an invalid foreclosure sale, and rents received by the purchaser, are not required to be probated within six months, the claims coming within the purview of such requirement being such as, if paid by the executor or administrator, would prima facie entitle him to credit therefor. Hancock v. Pyle, 191 Miss. 546, 3 So. 2d 851, 1941 Miss. LEXIS 175 (Miss. 1941).

Where executor failed to probate claim against estate secured by mortgage, devisee was not entitled to have land exonerated and claim paid out of general assets. Howell v. Ott, 182 Miss. 252, 180 So. 52, 181 So. 740, 1938 Miss. LEXIS 139 (Miss. 1938), limited, Kent v. McCaslin, 238 Miss. 129, 117 So. 2d 804, 1960 Miss. LEXIS 387 (Miss. 1960).

Unliquidated claim against negligent bank director is not a claim for probate against his estate. Boyd v. Applewhite, 121 Miss. 879, 84 So. 16, 1920 Miss. LEXIS 128 (Miss. 1920).

The limitation provided under this section [Code 1942, § 569] does not apply where a will creates an express trust for the payment of debts and the executor follows the directions of the will as provided in Code 1942, § 518. Gordon v. McDougall, 84 Miss. 715, 37 So. 298, 1904 Miss. LEXIS 96 (Miss. 1904).

The liability of a surety on a guardian's bond is not a probatable claim against the estate of a deceased surety and is not barred by any statute of limitations relating to the probate of claims. Savings Bldg. & Loan Ass'n v. Tart, 81 Miss. 276, 32 So. 115, 1902 Miss. LEXIS 103 (Miss. 1902).

3. Timeliness.

Because the executrix failed in the executrix's statutory duty to provide notice to any creditors regarding the probate of the decedent's estate, the filing period for probate claims did not expire as the executrix failed to provide the required statutory notice to trigger the running of the filing period. Avakian v. Wilmington Trust N.A. (In re Estate of Avakian), 231 So. 3d 208, 2017 Miss. App. LEXIS 201 (Miss. Ct. App.), cert. denied, 229 So. 3d 122, 2017 Miss. LEXIS 492 (Miss. 2017).

A claim presented for probate on December 27, 1946, was not presented within the six-months period where the first notice to creditors was published June 26, 1946. Paine Plumbing & Supply Co. v. McMurtray's Estate, 203 Miss. 334, 34 So. 2d 676, 1948 Miss. LEXIS 274 (Miss. 1948).

Where it appeared that on the death of one partner, the surviving partner had agreed to hold the shares of two of the decedent's heirs as an active trust for their benefit until demand was made by them for payment of the principal, that all of the parties to the agreement had died and the estate of the surviving partner had been administered, with due notice given to creditors, a bill filed by heirs of the first deceased partner, more than three and one-half years after the death of the surviving partner and after the estate had been administered and the personal property distributed, and without a claim having been presented to the administratrix of his estate, to fix and impose a money decree upon the administratrix and the heirs at law of the surviving partner, was barred by the nonclaim statute, and also by the statute relating to limitation of actions on unwritten contracts. Whitaker v. Davenport, 193 Miss. 523, 10 So. 2d 202, 1942 Miss. LEXIS 135 (Miss. 1942).

4. Waiver of bar.

The bar of the statute cannot be waived by the conduct of the administrator, however misleading or designing. Harkness v. Kansas C., M. & B. R. Co., 33 So. 77 (Miss. 1902).

5. Accrual of claim before or after death.

Executrix would be surcharged for the amount the testamentary trust property was damaged or put in jeopardy due to her mortgaging of estate's unencumbered real property as security for debt incurred by testator which was never probated. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

A vendor's election to probate and register a promissory note executed in conjunction with a deed of trust against the purchaser's estate, which was not pursued, was lost at the end of the 90 day limitation period of § 91-7-151; however, that section, as qualified by § 91-7-167, did not bar the vendor's election to pursue the trust or lien establishment against the specific real estate, which arose at the time the deed of trust was mistakenly cancelled by the bank. First Nat'l Bank v. Huff, 441 So. 2d 1317, 1983 Miss. LEXIS 3003 (Miss. 1983).

Where statutory liability of bank stockholder had accrued prior to stockholder's death but claim had not been probated, suit to recover such statutory liability instituted after expiration of statutory period for presenting claims held barred. Gray v. Love, 173 Miss. 390, 161 So. 679, 1935 Miss. LEXIS 222 (Miss. 1935).

Claim against bank stockholder for statutory liability having accrued prior to stockholder's death, which occurred after bank became insolvent and closed, was required to be probated the same as other unsecured debts. Gray v. Love, 173 Miss. 390, 161 So. 679, 1935 Miss. LEXIS 222 (Miss. 1935).

Compliance with statute providing that all claims against estate of deceased persons, whether due or not shall be registered, probated, and allowed in court in which letters testamentary or of administration were granted within six months after first publication of notice to creditors, is mandatory. Gray v. Love, 173 Miss. 390, 161 So. 679, 1935 Miss. LEXIS 222 (Miss. 1935).

A decedent's estate is not liable for an assessment against the decedent as a stockholder in a failed national bank, made in the decedent's lifetime, where a claim therefor was not presented within the time limited by statute. Mann v. Kleisdorff, 16 F.2d 997, 1927 U.S. App. LEXIS 3682 (5th Cir. Miss. 1927).

Liability of endorser of note as collateral security for another, not having matured at endorser's death, need not be probated as claim. Sledge & Norfleet Co. v. Dye, 140 Miss. 779, 106 So. 519, 1926 Miss. LEXIS 482 (Miss. 1926).

Claim against estate of deceased stockholder in bank, for double liability, is barred unless probated, where stockholder died after liability accrued. Board of Bank Examiners v. Grenada Bank, 135 Miss. 242, 99 So. 903, 1924 Miss. LEXIS 38 (Miss. 1924).

Claims maturing before decedent's death are barred, notwithstanding probate, by failure to sue thereon within four years and six months from grant of letters. Rogers v. Rosenstock, 117 Miss. 144, 77 So. 958, 1918 Miss. LEXIS 158 (Miss. 1918).

6. Claims on suits brought before or after death.

Law requiring claims to be probated within six months applies only to claims on which suit was not brought during decedent's lifetime. Henry v. W. T. Rawleigh Co., 152 Miss. 320, 120 So. 188, 1929 Miss. LEXIS 214 (Miss. 1929); Dillard & Coffin Co. v. Woollard, 124 Miss. 677, 87 So. 148, 1920 Miss. LEXIS 554 (Miss. 1921).

7. Defective notice.

The failure of the illegitimate children of a decedent to assert any claim in the decedent's estate until after the expiration of 90 days from the date of the first publication of notice to creditors did not bar their claim of heirship or wrongful action where the petition for letters of administration specifically named the illegitimate children as the natural children of the decedent and the administratrix failed to give them notice of the letters' issuance. Leflore v. Coleman, 521 So. 2d 863, 1988 Miss. LEXIS 170 (Miss. 1988).

Note executed by deceased held not barred by limitations, though over six months had elapsed since probate proceedings, where proceedings were had without proper notice because of omission of word "claims" in notice to creditors, and having no equivalent word since, though creditors may file and prove claims, whether statutory notice was given or not, they are not barred from right to probate unless notice conforms to statute. Bankston v. First Nat'l Bank & Trust Co., 177 Miss. 719, 171 So. 18, 1936 Miss. LEXIS 271 (Miss. 1936).

Administrator who invoked strict doctrine that probate of note was invalid because clerk's name and seal of court were not on copy of note held required to conform to strict compliance with statutory notice for probate proceedings. Bankston v. First Nat'l Bank & Trust Co., 177 Miss. 719, 171 So. 18, 1936 Miss. LEXIS 271 (Miss. 1936).

Where notice given to creditors is insufficient to set six months' statute in motion, creditors may amend probate of claims at any time before estate is closed, without court's leave. Bell v. Union & Planters' Bank & Trust Co., 158 Miss. 486, 130 So. 486, 1930 Miss. LEXIS 58 (Miss. 1930).

Claim not barred by failure to probate where notice not published for three consecutive weeks and no proof of publication made and filed with clerk. Boutwell v. Farmers' & Traders' Bank, 118 Miss. 50, 79 So. 1, 1918 Miss. LEXIS 48 (Miss. 1918).

8. Amendment of claim or affidavit.

The chancellor properly dismissed an amended probate of claim where the alleged written contract between the decedent and the claimant did not in and of itself sufficiently state a claim against the estate and where the claimant failed to allege and prove compliance with the various conditions of the agreement. French v. Druetta, 399 So. 2d 1327, 1981 Miss. LEXIS 1966 (Miss. 1981).

Where the timely affidavit filed by the creditor designated as the credit account the decedent's business rather than the decedent himself, and it neither presented written evidence of the claim nor an itemized account thereof, it provided no information to the administrator of the estate from which he could reasonably act in either allowing or disallowing the claim, and the trial court properly refused to allow the creditor to amend his complaint after the expiration of 6 months. Stuart C. Irby Co. v. Patton, 301 So. 2d 845, 1974 Miss. LEXIS 1665 (Miss. 1974).

Amendment of a claim after the time for filing is permissible unless it increases the amount of the claim, sets up a new cause of action, and materially changes the basis for the claim. Central Optical Merchandising Co. v. Estate of Lowe, 249 Miss. 61, 160 So. 2d 673, 1964 Miss. LEXIS 376 (Miss. 1964).

A claim for the unpaid balance on an open account for merchandise sold is a sufficient "itemized account" to be amended after the period for filing and to be applified by evidence where contested. Central Optical Merchandising Co. v. Estate of Lowe, 249 Miss. 61, 160 So. 2d 673, 1964 Miss. LEXIS 376 (Miss. 1964).

A claim for a balance due on account for merchandise sold is susceptible of amendment after expiration of the time for filing where it revealed debits and credits, alleged the balance, and was accompanied by photostats of invoices. Central Optical Merchandising Co. v. Estate of Lowe, 249 Miss. 61, 160 So. 2d 673, 1964 Miss. LEXIS 376 (Miss. 1964).

Where certain accounts against an estate were supported by affidavits which did not show the authority of the person signing, amended affidavits could be filed in each of the claims under this section [Code 1942, § 569]. Hughes v. Box, 224 Miss. 513, 81 So. 2d 242, 1955 Miss. LEXIS 516 (Miss. 1955).

Statute requiring court order authorizing amendment of affidavit to probated claims applies to amendments after expiration of six months' period. Bell v. Union & Planters' Bank & Trust Co., 158 Miss. 486, 130 So. 486, 1930 Miss. LEXIS 58 (Miss. 1930).

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What constitutes rejection of claim against estate to commence running of statute of limitations applicable to rejected claims. 36 A.L.R.4th 684.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 1188, 1190, 1194.

CJS.

34 C.J.S., Executors and Administrators §§ 897-915.

§ 91-7-153. Registration of claim stops limitation.

The presentation of a claim, and having it probated and registered as required by law, shall stop the running of the general statute of limitations as to such claim, whether the estate be solvent or insolvent.

HISTORY:

Codes, 1880, § 2062; 1892, § 1936; 1906, § 2110; Hemingway's 1917, § 1778; 1930, § 1673; 1942, § 570.

JUDICIAL DECISIONS

1. In general.

In a probate proceeding based upon an oral contract whereby the decedent promised to bequeath to the claimant a parcel of real property in return for a loan of $11,000, the cause of action for breach of the oral contract arising out of the failure of the will to be admitted to probate did not arise until the death of the decedent; therefore, where the claim for probate was filed within three months of the decedent's death, it was not barred by the three-year statute of limitations for all contracts set forth in § 15-1-29. Estate of McKellar v. Brown, 404 So. 2d 550, 1981 Miss. LEXIS 2229 (Miss. 1981).

Probated claim maturing before decedent's death barred, notwithstanding probate, by failure to sue thereon within four years and six months. Rogers v. Rosenstock, 117 Miss. 144, 77 So. 958, 1918 Miss. LEXIS 158 (Miss. 1918).

Presentation, probating, and registering claim stops running of general statute of limitations. Duffy v. Kilroe, 116 Miss. 7, 76 So. 681, 1917 Miss. LEXIS 281 (Miss. 1917).

Claim for medical services during deceased's last illness not barred until after 4 years and 6 months. Hardenstein v. Brien, 96 Miss. 493, 50 So. 979, 1910 Miss. LEXIS 152 (Miss. 1910).

RESEARCH REFERENCES

ALR.

What constitutes rejection of claim against estate to commence running of statute of limitations applicable to rejected claims. 36 A.L.R.4th 684.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 1188, 1190, 1194.

§ 91-7-155. Executor to pay probated, registered debts.

It shall be the duty of an executor or administrator to speedily pay the debts due by the estate out of the assets, if the estate be solvent; but he shall not pay any claim against the deceased unless the same has been probated, allowed, and registered.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (90); 1857, ch. 60, art. 81; 1871, §§ 1135, 1137; 1880, §§ 2026, 2027; 1892, § 1931; 1906, § 2105; Hemingway's 1917, § 1773; 1930, § 1674; 1942, § 571.

Cross References —

Duty of legal representative of public officer who dies having public money in his hands to pay over the same, see § 25-1-67.

Payment of debts from escheated property, see §§ 89-11-17, 89-11-19.

Duty of administrator with the will annexed in regard to the payment of debts, see § 91-7-47.

Directions of will regarding payment of debts, see § 91-7-49.

Payment of debts by temporary administrator, see § 91-7-57.

Payment of debts prior to adjudication of insolvency of estate, see § 91-7-269.

JUDICIAL DECISIONS

1. In general.

Executrix would be surcharged for the amount the testamentary trust property was damaged or put in jeopardy due to her mortgaging of estate's unencumbered real property as security for debt incurred by testator which was never probated. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Executrix was properly surcharged for payment of decedent's debts which had not been probated, registered, or allowed. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

This provision, being in derogation of the common-law rule, must be construed strictly. Riegelhaupt v. Ostroffsky, 237 Miss. 521, 115 So. 2d 331, 1959 Miss. LEXIS 499 (Miss. 1959).

Executor should be surcharged in his final account with sum which he paid out of funds of estate in settlement of just claims against estate which were required by law to be duly probated but which were not probated within six-month period after publication of first notice by executor to creditors of estate, as such expenditures are without authority of law unless claims had been probated. Oberst v. Mullens, 43 So. 2d 560 (Miss. 1949).

The court has no power upon ex parte petitions to authorize a payment of an unprobated debt or claim. Townsend v. Beavers, 185 Miss. 312, 188 So. 1, 1939 Miss. LEXIS 154 (Miss. 1939).

Administrator may pay claim for funeral expenses without probate. Gaulden v. Ramsey, 123 Miss. 1, 85 So. 109, 1920 Miss. LEXIS 1 (Miss. 1920).

Administrator without authority to pay claim not presented according to law. A. Lehman & Co. v. Powe, 95 Miss. 446, 49 So. 622, 1909 Miss. LEXIS 286 (Miss. 1909).

Setoff cannot be based on unprobated claim. Cohn v. Carter, 92 Miss. 627, 46 So. 60, 1908 Miss. LEXIS 202 (Miss. 1908).

RESEARCH REFERENCES

ALR.

Necessity of presenting spouse's claim under separation agreement to personal representative of other spouse's estate. 58 A.L.R.2d 1283.

Power and responsibility of executor or administrator to compromise claim against estate. 72 A.L.R.2d 243.

Garnishment against executor or administrator by creditor of estate. 60 A.L.R.3d 1301.

Appealability of probate orders allowing or disallowing claims against estate. 84 A.L.R.4th 269.

§ 91-7-157. Executor to pay taxes.

An executor or administrator shall pay all taxes that may be due on real and personal property belonging to the estate.

HISTORY:

Codes, 1892, § 1930; 1906, § 2104; Hemingway's 1917, § 1772; 1930, § 1675; 1942, § 572.

Cross References —

Income tax returns by fiduciaries, see § 27-7-35.

Time for filing income tax return, see § 27-7-41.

Tax upon settlement of fiduciary's account, see § 27-7-69.

Inheritance tax generally, see § 27-9-1 et seq.

Inheritance tax returns by executor, see § 27-9-23.

When inheritance tax shall be due, see § 27-9-27.

Lien for payment of estate taxes, see § 27-9-35.

Executor's personal liability for estate taxes, see § 27-9-37.

Tax upon settlement of executor's account, see § 27-9-41.

Payment of estate taxes as prerequisite to approval of final account, see § 27-9-41.

Enforcement of payment of taxes by tax collector, see § 27-41-11.

JUDICIAL DECISIONS

1. In general.

Executrix was properly surcharged with amount of interest and penalties paid from decedent's estate funds for the late filing of federal and state estate tax returns. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Unpaid taxes did not constitute valid defense to executrix's suit for specific performance against purchaser of realty sold under power of sale in will, since executrix has duty under this section [Code 1942, § 572] to pay the taxes and such obligation can be readily accounted for under the decree for specific performance. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

In compliance with decree for specific performance of realty sold by executrix under power of sale in will, purchaser is entitled to deed free from lien for unpaid taxes. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499, 1944 Miss. LEXIS 284 (Miss. 1944).

Decision of umpire designated by will to settle disputes between executors, determining that taxes on real estate devised subject to the mortgage debt thereon were not payable by the estate but by the devisee, was not binding on the devisee, where the provision for action by such umpire was designed to bring about harmony between the executors, and such decision was contrary to the manifest intention of the testatrix. Eatherly v. Winn, 185 Miss. 742, 189 So. 99, 1939 Miss. LEXIS 184 (Miss. 1939).

Where the testatrix provided for the payment by her executors of all her just and legal debts, taxes on real estate accruing and due for the year prior to her death, were to be paid by her executors and were not chargeable against the devisee of such real estate devised to him subject to one-half of the mortgage debt thereon. Eatherly v. Winn, 185 Miss. 742, 189 So. 99, 1939 Miss. LEXIS 184 (Miss. 1939).

Administrator was properly permitted to take credit for payment of taxes on realty and merchandise. Crescent Furniture & Mattress Co. v. Morgan, 178 Miss. 824, 173 So. 290, 1937 Miss. LEXIS 211 (Miss. 1937).

Legatees and distributees not required to pay taxes. Tonnar v. Wade, 153 Miss. 722, 121 So. 156, 1929 Miss. LEXIS 56 (Miss. 1929).

Administrator on accounting was entitled to allowance for taxes paid on land of the estate. Davis v. Blumenberg, 107 Miss. 432, 65 So. 503, 1914 Miss. LEXIS 102 (Miss. 1914).

RESEARCH REFERENCES

ALR.

Liability of executor, administrator, trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations. 47 A.L.R.3d 507.

Liability of executor or administrator to estate because of overpaying or unnecessarily paying tax. 55 A.L.R.3d 785.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 581, 582.

CJS.

34 C.J.S., Executors and Administrators § 526.

§ 91-7-159. Agreement with commissioner of internal revenue to exercise discretion in distributing assets of estate or trust.

The executor, trustee, or other fiduciary having discretionary powers under a last will and testament or transfer in trust shall be authorized to enter into agreements with the commissioner of internal revenue of the United States of America and other taxing authorities to exercise the fiduciary's discretion so that the assets to be distributed in satisfaction of a bequest or transfer in trust will be selected in such a manner that cash and other properties distributed will have an aggregate fair market value representative of the pecuniary legatee's or transferee's proportionate share of the appreciation or depreciation in value to the date, or dates, of distribution of all property then available for distribution in satisfaction of such bequest or transfer. It is the purpose of this section to authorize such fiduciary to enter into any agreement that may be necessary or advisable in order to secure for federal estate tax purposes the maximum marital deduction available under the Internal Revenue Laws of the United States of America, and to do and perform all acts incident to such purpose.

HISTORY:

Codes, 1942, § 572.5; Laws, 1964, ch. 295, eff from and after passage (approved June 6, 1964).

§ 91-7-161. Creditors whose claims are not due must accept payment.

The executor or administrator may pay any debt, duly probated, allowed and registered, which is not due. After ninety (90) days from the grant of letters, the creditor shall accept payment thereof and give a full discharge therefor, upon the payment or tender to him of an amount equal to what the debt would have been had it been made payable on the day the payment or tender is made.

HISTORY:

Codes, 1892, § 1938; 1906, § 2112; Hemingway's 1917, § 1780; 1930, § 1676; 1942, § 573; Laws, 1975, ch. 373, § 6, eff from and after January 1, 1976.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 573] is indicative of a public policy favoring the early closing of estates of decedents as against delays on account of unmatured claims. In re Estate of Kennington, 204 So. 2d 444, 1967 Miss. LEXIS 1194 (Miss. 1967).

Where a marital settlement agreement provided for monthly payments to the divorced wife throughout her lifetime or until she remarried, and the agreement bound her divorced husband and his heirs, executors, and assigns even after his death, future and unmatured payments under the agreement constituted a valid claim against the deceased husband's estate, which this section [Code 1942, § 573] and the principles of equity required to be commuted to a lump sum equal to its fair cash value. In re Estate of Kennington, 204 So. 2d 444, 1967 Miss. LEXIS 1194 (Miss. 1967).

RESEARCH REFERENCES

ALR.

Power and responsibility of executor or administrator to compromise claim against estate. 72 A.L.R.2d 243.

§ 91-7-163. Claim of executor or administrator to be treated same as other claims.

An executor or administrator shall not be allowed to retain any part of the assets in payment of his own claim against the deceased, unless the same be probated and registered as other claims and passed by the court. Every such claim shall stand upon an equal footing with other claims of the same nature.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (108); 1857, ch. 60, art. 85; 1871, § 1143; 1880, § 2030; 1892, § 1935; 1906, § 2109; Hemingway's 1917, § 1777; 1930, § 1677; 1942, § 574.

Cross References —

Disposal of debt owing from executor or administrator to deceased, see § 91-7-101.

JUDICIAL DECISIONS

1. In general.

Where testatrix, after executing will devising her right, title and interest in land gave deed of trust to executor covering same land and clothed him with full discretion, executor was entitled to stand on his security and not probate claim. Howell v. Ott, 182 Miss. 252, 180 So. 52, 181 So. 740, 1938 Miss. LEXIS 139 (Miss. 1938), limited, Kent v. McCaslin, 238 Miss. 129, 117 So. 2d 804, 1960 Miss. LEXIS 387 (Miss. 1960).

Administrator, whose individual claims were barred because not timely filed, could not have claims for items accruing before decedent's death allowed under guise of accounting. McDowell v. Minor, 169 Miss. 339, 142 So. 491, 1932 Miss. LEXIS 5 (Miss. 1932).

Where administrator did not file his individual claim within six months after notice to creditors should have been given, probate of claim was nullity. McDowell v. Minor, 158 Miss. 360, 130 So. 484, 1930 Miss. LEXIS 57 (Miss. 1930).

Claim of administrator against estate for individual debt not barred by limitations where duly probated and not barred at time of appointment. Oliver v. Smith, 94 Miss. 879, 49 So. 1, 1909 Miss. LEXIS 364 (Miss. 1909).

RESEARCH REFERENCES

ALR.

Appealability of probate orders allowing or disallowing claims against estate. 84 A.L.R.4th 269.

§ 91-7-165. Claims may be contested.

The executor or administrator, legatee, heir, or any creditor may contest a claim presented against the estate. The court or clerk may refer the same to auditors, who shall hear and reduce to writing the evidence on both sides, if any be offered, and report their findings with the evidence to the court. Thereupon the court may allow or disallow the claim, but such proceeding shall not be had without notice to the claimant.

HISTORY:

Codes, 1857, ch. 60, art. 84; 1871, § 1142; 1880, § 2029; 1892, § 1934; 1906, § 2108; Hemingway's 1917, § 1776; 1930, § 1678; 1942, § 575.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Burden of proof of claims.
3. Evidence.
4. Decree.

1. In general.

A former wife proved a valid claim against her former husband's estate for $30,600, where there was a prior court judgment finding that the husband was $600 in arrears in alimony payments, and their divorce decree required the husband to carry a $30,000 life insurance policy on his own life naming the wife as the policy's primary beneficiary after payment of then existing pledged debts, but the husband had let the policy lapse. Raspilair v. Estate of Raspilair, 583 So. 2d 970, 1991 Miss. LEXIS 458 (Miss. 1991).

In order for a claimant to introduce evidence to support a claim against an estate for medical expenses upon contest, the claimant may proceed under § 41-9-119, but to do this, he or she must be allowed to go into court to present the bills incurred and to testify for what purpose they were incurred. Since a summary judgment, by its nature, disposes of a case before a trial is commenced, summary judgment practice under Rule 56, Miss. R. Civ. P. is inapplicable in contests of probated claims because it is inconsistent with the statutory procedure which necessitates that a claimant enter court to introduce evidence in support of his or her claim and permits a personal representative to rebut the claim. Thus, the procedure for summary judgment is not applicable to dispose of claims made under § 91-7-149. Biloxi Regional Medical Center, Inc. v. Estate of Ross, 546 So. 2d 667, 1989 Miss. LEXIS 297 (Miss. 1989).

There is no conflict between § 91-7-165 and the discovery rules and, therefore, in a proceeding to contest a claim probated against an estate, the estate had the right under Rules 26 and 33, Miss. R. Civ. P. to propound interrogatories and secure all relief appropriate for failure to answer. Biloxi Regional Medical Center, Inc. v. Estate of Ross, 546 So. 2d 667, 1989 Miss. LEXIS 297 (Miss. 1989).

Time for taking appeal by administrator or executor unhappy with decree allowing contested claim runs from date of decree on claim, not from date of decree finally closing estate; efficient and orderly administration of estates and payment of all just debts without unjustified delay compels this result. Braxton v. Johnson, 514 So. 2d 1232 (1987).

On filing of contest of probated claim, claimant need file no pleading in absence of demand or necessity for bill of particulars. Ellis v. Berry, 145 Miss. 652, 110 So. 211, 1926 Miss. LEXIS 1 (Miss. 1926).

2. Burden of proof of claims.

One filing claim for services rendered deceased has burden to establish by clear and convincing evidence that the services were rendered pursuant to an understanding, express or implied. Wells v. Brooks, 199 Miss. 327, 24 So. 2d 533, 1946 Miss. LEXIS 201 (Miss. 1946).

The burden of establishing a claim if contested, is upon the claimant although the claim has been admitted to probate by the clerk. Wooley v. Wooley, 194 Miss. 751, 12 So. 2d 539, 1943 Miss. LEXIS 82 (Miss. 1943).

Where it appeared that in a hearing on contested claims against an estate, the administratrix proceeded first with her testimony, claimant's contention that she thereby assumed the burden of proof and adopted the legal effect of a probated claim announced in the chancellor's opinion, and that she was estopped to take a different position on appeal, was untenable in view of the effect and weight the chancellor erroneously attached to the mere fact that the claim had been admitted to probate. Wooley v. Wooley, 194 Miss. 751, 12 So. 2d 539, 1943 Miss. LEXIS 82 (Miss. 1943).

3. Evidence.

Where a claim meets certain minimum requirements, both the person asserting the claim and the personal representative, on a contest, have the right to introduce evidence to support their positions. Central Optical Merchandising Co. v. Estate of Lowe, 249 Miss. 61, 160 So. 2d 673, 1964 Miss. LEXIS 376 (Miss. 1964).

Decision of chancellor that admission to probate of claims against an estate established a presumption of its correctness was erroneous as being a misconception of the effect of a probated claim, since a claim against an estate, although duly probated and registered, must be established by clear and reasonably positive evidence, if contested by the administratrix. Wooley v. Wooley, 194 Miss. 751, 12 So. 2d 539, 1943 Miss. LEXIS 82 (Miss. 1943).

A claim against the estate of a decedent, although duly probated and registered, must be established by clear and reasonably positive evidence, if objected to by the administrator, or by any legatee, heir, or any creditor, and contested by such party in interest. Nicholson v. Dent, Robinson & Ward, 189 Miss. 658, 198 So. 552, 1940 Miss. LEXIS 148 (Miss. 1940).

Claim against testator's estate, which purported to be itemized account or statement of claim in writing, which charged estate with purchase of note on which there was a balance due, would be disallowed where evidence clearly disclosed that there was no sale of note by claimant to testator, but that testator agreed to collect note for claimant, pay certain amount on debt of testator's son to testator and turn over balance to claimant, and that testator merely became claimant's agent or trustee for collection of note. First Columbus Nat'l Bank v. Holesapple-Dillman, 174 Miss. 234, 164 So. 232, 1935 Miss. LEXIS 73 (Miss. 1935).

Under contract for services between claimant and intestate, at a fixed compensation, declarations of intestate to third person indicating willingness to pay claimant for services then being rendered, not sufficient to establish agreement to pay extra compensation therefor. Bell v. Oates, 97 Miss. 790, 53 So. 491, 1910 Miss. LEXIS 308 (Miss. 1910).

4. Decree.

In contest of claim against decedent's estate, only decree allowing or disallowing claim can be rendered, and monetary judgment against administrator for sum for which claim is allowed, if allowed, would be erroneous. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

RESEARCH REFERENCES

ALR.

Power and responsibility of executor or administrator to compromise claim due estate. 72 A.L.R.2d 191.

Power and responsibility of executor or administrator to compromise claim against estate. 72 A.L.R.2d 243.

Validity of nonclaim statute or rule provision for notice by publication to claimants against estate – post-1950 cases. 56 A.L.R.4th 458.

Appealability of probate orders allowing or disallowing claims against estate. 84 A.L.R.4th 269.

§ 91-7-167. Creditor having lien failing to present claim.

A creditor of a decedent who has a lien of any kind on property of the decedent shall not be barred of his right to enforce the lien against the property by a failure to present his claim and have it probated and registered, but shall be barred of all claim to be satisfied out of the assets not affected by such lien. A person claiming to have a lien on any property of the decedent may be made a party to any proper proceeding by the executor or administrator or a creditor to test the validity of such claim to a lien, and to determine upon the right of such claim. This may be in a proceeding to sell property, which may be ordered to be sold free from such lien, or subject to it; and the decree may be made as to a sale and disposition of the proceeds of the sale of the property, as may be according to the rights of parties before the court.

HISTORY:
Codes, 1880, § 2031; 1892, § 1937; 1906, § 2111; Hemingway's 1917, § 1779; 1930, § 1679; 1942, § 576.

Cross References —
Enforcement of lien by representative of lienor, see § 85-7-261.

Renewal of lien by executors and administrators, see § 91-7-227.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction.

1. In general.
A vendor's election to probate and register a promissory note executed in conjunction with a deed of trust against the purchaser's estate, which was not pursued, was lost at the end of the 90 day limitation period of § 91-7-151; however, that section, as qualified by § 91-7-167, did not bar the vendor's election to pursue the trust or lien establishment against the specific real estate, which arose at the time the deed of trust was mistakenly cancelled by the bank. First Nat'l Bank v. Huff, 441 So. 2d 1317, 1983 Miss. LEXIS 3003 (Miss. 1983).

There payee failed to timely probate claim on note of deceased, and was barred from asserting claim on the note as an unsecured creditor, he was entitled to recovery of the salvage value of the destroyed automobile which had been mortgaged to secure the note. Mossler Acceptance Co. v. Moore, 218 Miss. 757, 67 So. 2d 868, 1953 Miss. LEXIS 601 (Miss. 1953).

The widow and adopted daughter of an intestate were not necessary parties to a proceeding against the administratrix to foreclose a deed of trust on realty constituting a part of the estate, where the estate had been declared insolvent, the realty was in the possession of the administratrix, who was also the widow of the decedent but was made a party only as administratrix, and the daughter advised her regarding the foreclosure matters. Hubbard v. Massey, 192 Miss. 95, 4 So. 2d 230, 4 So. 2d 494, 1941 Miss. LEXIS 3 (Miss. 1941).

Where testatrix, after executing will devising her right, title and interest in land, gave deed of trust to executor covering same land and clothed him with full discretion, executor was entitled to stand on his security and not probate claim. Howell v. Ott, 182 Miss. 252, 180 So. 52, 181 So. 740, 1938 Miss. LEXIS 139 (Miss. 1938), limited, Kent v. McCaslin, 238 Miss. 129, 117 So. 2d 804, 1960 Miss. LEXIS 387 (Miss. 1960).

Lien of trust held to exist from misapplication of funds, making probate of same unnecessary to enforce it as against all but bona fide purchaser. Sandy v. Crump, 139 Miss. 163, 103 So. 804, 1925 Miss. LEXIS 122 (Miss. 1925).

An ex parte petition of an administrator erroneously stating that a lien exists on certain assets and asking permission to apply the assets to the satisfaction of the alleged lien is not a proceeding to test the validity of a claim within the meaning of this section [Code 1942, § 576]. O'Brien Bros. v. Wilson, 86 Miss. 540, 38 So. 509, 1905 Miss. LEXIS 58 (Miss. 1905).

2. Jurisdiction.
Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open, because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371, 2008 Miss. App. LEXIS 360 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators §§ 585, 586.

CJS.
34 C.J.S., Executors and Administrators § 555.

§ 91-7-169. Growing crop.

The court or chancellor may, on the application of an executor or administrator, decree the sale of the crop growing at the time of the death of the testator or intestate, upon such terms and in such manner as may be deemed best. If the interest of the estate would be promoted by the cultivation and completion of the crop, on application therefor by the executor or administrator, it shall be so ordered by the court or chancellor; and in such case the executor or administrator shall take charge of the farm and manage the same until the crop be completed and gathered, retaining for that purpose so much of the property thereon as may be necessary. The proceeds shall be assets in his hands, the necessary expenses being first deducted; and, in either case, the executor or administrator shall render a true account of the crop. In case of the sale of the growing crop, the purchaser thereof may at all reasonable times enter upon the lands to cultivate and gather the same.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (84); 1857, ch. 60, art. 96; 1871, § 1156; 1880, § 2063; 1892, § 1882; 1906, § 2057; Hemingway's 1917, § 1722; 1930, § 1680; 1942, § 577.

Cross References —

Growing crop not subject to judgment lien, see § 11-7-199.

Treatment of growing crops in event of forfeiture under mortgage or deed of trust, see §§ 11-25-25, 11-25-115.

Growing crop not subject to levy for execution or attachment, see § 13-3-137.

JUDICIAL DECISIONS

1. In general.

Crops growing on devised land at time of death of testatrix which are not needed by executor for payment of debts or cost of administration of estate pass to devisee of land rather than into estate for benefit of residuary legatees, where will devised land and all trucks, farm implements, tractors and equipment thereon and directed that immediately after death of devisor devisee should be vested with entire control over her part of property. Oberst v. Mullens, 43 So. 2d 560 (Miss. 1949).

Under this section [Code 1942, § 577], crops remaining on the lands at the date of his death, whether gathered or still in the field, and whether they are matured or not, are assets of decedent, whether testate or intestate, and as such pass into the hands of the personal representative for the payment of the debts and expenses of administration. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

Crops remaining on land are assets of estate passing to personal representative. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

A contract by a farmer to obtain supplies for making crops, under which he mortgages his personalty and crops to secure payment, does not terminate with his death, but can be enforced by and against his administrator, and such mortgage secures advances made to an administrator empowered to complete the crop. Cox v. Martin, 75 Miss. 229, 21 So. 611, 1897 Miss. LEXIS 82 (Miss. 1897).

The proceeds of crops growing on exempted property are assets in the hands of the personal representative of the deceased owner. Dickey v. Wilkins, 17 So. 374 (Miss. 1895).

Debts incurred by the administrator in cultivating the crop are privileged claims thereon, and limited thereto. Emanuel v. Norcum, 8 Miss. 150, 1843 Miss. LEXIS 69 (Miss. 1843); Hagan v. Barksdale, 44 Miss. 186, 1870 Miss. LEXIS 99 (Miss. 1870); Farley, Jurey & Co. v. Hord, 45 Miss. 96, 1871 Miss. LEXIS 55 (Miss. 1871); Hardee v. Cheatham, 52 Miss. 41, 1876 Miss. LEXIS 161 (Miss. 1876).

RESEARCH REFERENCES

Am. Jur.

21A Am. Jur. 2d, Crops §§ 29-31.

§ 91-7-171. Farm may be cultivated or rented.

The court or chancellor, upon the application of executor or administrator, may allow him to cultivate or lease the farm or lands of the decedent for a period of not exceeding fifteen months from the grant of letters testamentary or of administration, if the interest of the estate, in the opinion of the court or chancellor, would be promoted thereby; or the court or chancellor, upon the application of the executor or administrator, may allow him to cultivate or lease the farm or lands of the decedent from year to year for the purpose of paying the debts of the decedent.

HISTORY:
Codes, 1892, § 1883; 1906, § 2058; Hemingway's 1917, § 1723; 1930, § 1681; 1942, § 578; Laws, 1918, ch. 125.

Cross References —
Lease of lands to pay debts, see § 91-7-225.

JUDICIAL DECISIONS

1. In general.
An administrator, by consent of the heirs, may lease decedent's lands for the purpose of paying his debts. Ashley v. Young, 79 Miss. 129, 29 So. 822, 1901 Miss. LEXIS 16 (Miss. 1901).

§ 91-7-173. Executor or administrator may continue business for limited time.

The chancery court or the chancellor in vacation shall have the power to authorize the executor or administrator of a decedent, when not contrary to the provisions of a will, to continue as a going concern for a period of not exceeding three (3) years after the grant of letters, the business in which the decedent was engaged at the time of his death and, where such business is a mercantile or other business of like nature, to allow the purchase of goods in small quantities necessary to replenish the stock and promote the sale thereof, and to permit the sale of the stock of goods at retail in the regular course of business. Said stock of goods, however, shall not be sold at less than cost thereof, except by a previous order of the court or chancellor.

HISTORY:
Codes, 1930, § 1682; 1942, § 579; Laws, 1926, ch. 142; Laws, 1964, ch. 298; Laws, 1966, ch. 323, § 1, eff from and after passage (approved February 8, 1966).

Cross References —
Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

1. In general.
Surcharge upon executrix based upon her per se failure to secure court authority to operate a closely held corporation, which sustained losses both before and after testator's death, was not proper where the estate owned only stock in the corporation, not the business itself; further the proof failed to show that losses were caused by the failure of the executrix to act prudently in the administration of the estate. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

The management of a corporation is vested in its board of directors and not the stockholders. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Court authority is not per se necessary to authorize an executrix with will annexed to exercise the estate's stock voting rights in a closely held corporation. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Mississippi Code § 91-7-173 refers to unincorporated businesses and not incorporated ones in which the decedent owns a stock interest, even if it is a controlling stock interest. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Chancery court has power to authorize an executor to continue the business of the testator. Barry v. Barry, 198 Miss. 677, 21 So. 2d 922, 1945 Miss. LEXIS 239 (Miss. 1945).

Administrator held unauthorized to operate intestate's business without an order of court being filed with clerk, which order was not effective until it reached hands of clerk. Crescent Furniture & Mattress Co. v. Morgan, 178 Miss. 824, 173 So. 290, 1937 Miss. LEXIS 211 (Miss. 1937).

Administrator was properly allowed sums for purchase of new goods and supplies, clerks' salaries and other expenses in operating intestate's business notwithstanding order of court had not been obtained where master found that during period business was so operated nothing was lost to estate. Crescent Furniture & Mattress Co. v. Morgan, 178 Miss. 824, 173 So. 290, 1937 Miss. LEXIS 211 (Miss. 1937).

RESEARCH REFERENCES

ALR.

Liability of personal representative for losses incurred in carrying on, without testamentary authorization, decedent's nonpartnership mercantile or manufacturing business. 58 A.L.R.2d 365.

Preference or priority of claims arising out of continuation of decedent's business by personal representative. 83 A.L.R.2d 1406.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 525, 527, 533.

CJS.

34 C.J.S., Executors and Administrators § 213 et seq.

§ 91-7-175. Sale of perishable property.

The court or clerk may order the sale of perishable property on such notice as may be prescribed, whether required for the payment of debts or not.

HISTORY:

Codes, 1857, ch. 60, art. 87; 1871, § 1145; 1880, § 2034; 1892, § 1885; 1906, § 2060; Hemingway's 1917, § 1725; 1930, § 1683; 1942, § 580.

Cross References —

Sale of perishable goods levied on generally, see § 13-3-167.

§ 91-7-177. Private sale of personal property.

The court, or the chancellor in vacation, may authorize the executor or administrator to sell personal property at a private sale.

HISTORY:

Codes, 1857, ch. 60, art. 87; 1871, § 1146; 1880, § 2035; 1892, § 1886; 1906, § 2061; Hemingway's 1917, § 1726; 1930, § 1684; 1942, § 581.

Cross References —

Authority of chancellor or chancery court to order private sales, see § 11-5-117.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 581] allows private sale of personal property by an administrator for less than its appraised value, but in making such sale without a prior court order the administrator runs the risk of the court's subsequent disapproval. Dabbs v. Fisher, 27 So. 2d 342 (Miss. 1946).

§ 91-7-179. Sale for appraised value without order.

The executor or administrator, without an order therefor, may sell for cash, either at public or private sale, perishable goods or chattels or livestock of the decedent, whether it be necessary for the payment of debts and expenses of administration or not. He may likewise sell any personal property of the decedent necessary for the payment of the debts and expenses, but he shall realize therefor at least the appraised value of such property.

HISTORY:
Codes, 1880, § 2038; 1892, § 1888; 1906, § 2063; Hemingway's 1917, § 1728; 1930, § 1685; 1942, § 582.

§ 91-7-181. Certain property may be sold without being present.

An executor or administrator may sell the interest of his testator or intestate in a ship, vessel, steamboat, other water craft, or other property which he cannot produce, without the same being present at the time and place of sale.

HISTORY:
Codes, 1857, ch. 60, art. 87; 1871, § 1146; 1880, § 2036; 1892, § 1887; 1906, § 2062; Hemingway's 1917, § 1727; 1930, § 1686; 1942, § 583.

§ 91-7-183. Public sale of personal property.

If it be necessary to sell personal property for the payment of debts, or in case there are no debts and it is to the best interest of all parties concerned, the executor or administrator shall file a petition for an order of sale in which the reasons for the same shall be made known. In case there are no debts, five days' notice to the parties in interest who have not joined in said petition shall be given of the time and place of hearing said petition, or publication made, as provided by law, for nonresident or unknown defendants in chancery. If the court or chancellor in vacation be satisfied that a sale is necessary or proper, an order may be made for the sale of part or the whole of the personal estate; and if a part be ordered sold, the court or chancellor in vacation in selecting such part shall have in view the best interest of the creditors and distributees. The executor or administrator shall advertise in three or more public places in the county ten days before the sale, and shall sell the property designated in the order at public sale to the highest bidder, either for cash or credit, as the order of sale may direct. The executor or administrator shall not become the purchaser of any property which he may sell, either directly or indirectly, nor shall any executor or administrator take the estate or any part thereof at the appraised value.

HISTORY:
Codes, 1857, ch. 60. art. 86; 1871, § 1144; 1880, § 2032; 1892, § 1884; 1906, § 2059; Hemingway's 1917, § 1724; 1930, § 1687; 1942, § 584.

Cross References —
Sales under decree by chancery court, see § 11-5-93 et seq.

Where property under execution or other process shall be sold, see § 13-3-161 et seq.

JUDICIAL DECISIONS

1. In general.
Sale of decedent's property without legal citation to beneficiaries in will is valid where will relieves executor from legal citation to inter-

ested parties. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

Objection to executor's sale of wholesale grocery business on ground that it was not sufficiently advertised is not well taken when, under the terms of will under which sale was made, no public notice of proposed sale was required to be given. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

Objection to executor's sale of wholesale grocery business on ground that it was not sufficiently advertised is not well taken where publication containing elements of sale was made in three newspapers for period of approximately a week, prospective bidders were notified by telephone and letters, many people inspected property, successful bid exceeded appraised value, and objectors produced no proof more than possibility or speculation that had sale been postponed for ten or twenty days there would have been higher, or more numerous, bids on the later date. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

RESEARCH REFERENCES

ALR.

Right of an administrator with the will annexed, or trustee other than the person named in the will as such, to execute power of sale conferred by will. 9 A.L.R.2d 1324.

Power of sale conferred on executor by testator as authorizing private sale. 11 A.L.R.2d 955.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 725, 728.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 741 et seq. (sale of personal property).

CJS.

34 C.J.S., Executors and Administrators § 700 et seq.

§ 91-7-185. Report of sale and proceedings.

Whenever personal property shall be sold by an executor or administrator, he shall make report thereof in writing to the next term of the court, stating the time and place of sale, the name of the purchaser, and the amount of the purchase-money, and shall satisfy the court that the directions prescribed in the order for sale, if the sale be under an order, were followed. Thereupon the court shall confirm the sale, unless cause be shown to the contrary. If such sale be not reported at the next term, the court may compel the making of such report at a subsequent term, and may confirm or set aside the same. Any executor or administrator failing to make report in due time may be fined for a contempt, not exceeding One Hundred Dollars ($100.00).

HISTORY:

Codes, 1857, ch. 60, art. 87; 1871, § 1147; 1880, § 2037; 1892, § 1889; 1906, § 2064; Hemingway's 1917, § 1729; 1930, § 1688; 1942, § 585.

JUDICIAL DECISIONS

1. In general.

Supreme court will not say that confirmation of sale of wholesale grocery business by executor, acting under authority of will, was manifestly wrong, when it is not pointed out by what means or manner a higher price could have been obtained for the assets of the estate nor in what respect beneficiaries in will suffered any loss. Walker v. First Nat'l Bank, 204 Miss. 696, 38 So. 2d 98, 1948 Miss. LEXIS 398 (Miss. 1948).

§ 91-7-187. Sale of land in preference to personalty.

When the estate of any deceased person consists of real and personal property and it shall be necessary to sell a portion thereof, the chancery court, on petition of the executor, administrator, legatees or distributees, being satisfied that it would be to the interest of the distributees or legatees, may decree a sale of the real estate in preference to the personal estate.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 8 (2); 1857, ch. 60, art. 93; 1871, § 1153; 1880, § 2042; 1892, § 1900; 1906, § 2075; Hemingway's 1917, § 1742; 1930, § 1689; 1942, § 586.

JUDICIAL DECISIONS

1. In general.

Sale of real estate made by heir was in his individual capacity as owner of property, as sole surviving heir at law of his father, and suit for commission by real estate agent, who alleged she procured purchaser for home, could not be maintained against estate, because conditions for sale of real estate by administrator of estate established in §§ 91-7-187 and 91-7-191 had not been shown to exist. Estate of Manscoe v. Simmons, 512 So. 2d 682, 1987 Miss. LEXIS 2781 (Miss. 1987).

Sale under execution of land of decedent pursuant to decree recovered against administrator held void for noncompliance with statutes regulating proceedings for sale of decedent's land for payment of debts. Dolan v. Tate, 161 Miss. 615, 137 So. 515, 1931 Miss. LEXIS 291 (Miss. 1931).

Heirs of decedent suing to remove, as cloud on title, claim asserted through purchase at execution sale under judgment against ancestor's representative, need not offer to pay judgment or amount for which land was sold. Dolan v. Tate, 161 Miss. 615, 137 So. 515, 1931 Miss. LEXIS 291 (Miss. 1931).

Under this section [Code 1942, § 586] and other sections providing for the sale of property by the personal representative for the payment of debts, it is the legal duty of such representative to pay the taxes on lands for the purpose of preserving them for the benefit of creditors. Tonnar v. Wade, 153 Miss. 722, 121 So. 156, 1929 Miss. LEXIS 56 (Miss. 1929).

This section [Code 1942, § 586] applies whether the property is devised by will or descends by operation of law. Brickell v. Lightcap, 115 Miss. 417, 76 So. 489, 1917 Miss. LEXIS 218 (Miss. 1917), overruled, Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

RESEARCH REFERENCES

ALR.

Right of an administrator with the will annexed, or trustee other than the person named in the will as such, to execute power of sale conferred by will. 9 A.L.R.2d 1324.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 725, 730 et seq.

§ 91-7-189. Sale to pay the purchase-money of land.

If a person purchase land and die before paying therefor, the court may order the sale of personal property for the payment of the debt due for the land. If the personal property will not be sufficient, if sold, to pay the debt, or if it be advisable that the land be sold in preference to personal property to make payment therefor, the court may order the sale of such land on such terms as may be proper. In such case the vendor of the deceased and his assignee of the debt, if any, shall be made defendants to the petition for the sale of the land.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (96); 1857, ch. 60, art. 138; 1871, § 1196; 1880, § 2043; 1892, § 1901; 1906, § 2076; Hemingway's 1917, § 1743; 1930, § 1690; 1942, § 587.

Cross References —
Preference of purchase money mortgage, see § 89-1-45.

JUDICIAL DECISIONS

1. In general.
A sale made under this section [Code 1942, § 587] is not for the benefit of creditors at large, nor is the fund subject to pro rata distribution. Wells v. Smith, 44 Miss. 296, 1870 Miss. LEXIS 110 (Miss. 1870).

§ 91-7-191. Sale of land upon insufficiency of personalty.

When an executor or administrator shall discover that the personal property will not be sufficient to pay the debts and expenses, he may file a petition in the chancery court for the sale of the land of the deceased, or so much of it as may be necessary, and exhibit to the court a true account of the personal estate and debts due from the deceased, and the expenses and a description of the land to be sold.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (98); 1857, ch. 60, art. 88; 1871, § 1148; 1880, § 2039; 1892, § 1893; 1906, § 2068; Hemingway's 1917, § 1735; 1930, § 1691; 1942, § 588.

Cross References —
When exempt property shall be liable for debts, see § 91-1-21.

JUDICIAL DECISIONS

1. In general.
Sale of real estate made by heir was in his individual capacity as owner of property, as sole surviving heir at law of his father, and suit for commission by real estate agent, who alleged she procured purchaser for home, could not be maintained against estate, because conditions for sale of real estate by administrator of estate established in §§ 91-7-187 and 91-7-191 had not been shown to exist. Estate of Manscoe v. Simmons, 512 So. 2d 682, 1987 Miss. LEXIS 2781 (Miss. 1987).

A will manifests the testator's intention that the property transferred to his wife be free of estate taxes where "Item IV" exempts from the payment of estate taxes and administration costs those bequests made earlier in the will to his wife and "Item III" specifically states that his wife is to receive $4,800 a year "free of any debts" and therefore this property cannot bear the burden of estate taxes. Waldrup v. United States, 499 F. Supp. 820, 1980 U.S. Dist. LEXIS 16059 (N.D. Miss. 1980).

In the absence of a direction to the contrary by the testator, estate taxes must be paid first from personal property not specifically devised by will, secondly from other personalty of the estate, and thirdly, if necessary, from the real estate. Stovall v. Stovall, 360 So. 2d 679, 1978 Miss. LEXIS 2295 (Miss. 1978).

No court other than chancery court in which letters of administration have been granted has jurisdiction over petition for sale of decedent's nonexempt lands for payment of decedent's debts. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

Petition for sale of nonexempt lands of estate for payment of decedent's debts when personalty is insufficient should be filed by executor or administrator, but may be filed by creditor of decedent whose claim against estate is registered. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

Petition for sale of decedent's lands in one county to pay debts may be heard by chancellor in second county within same chancery district. Whitley v. Towle, 163 Miss. 418, 141 So. 571, 1932 Miss. LEXIS 57 (Miss. 1932).

Under this section [Code 1942, § 588] and Code 1942, § 539, the personal estate must be exhausted before the lands may be resorted to for the payment of debts, unless a contrary intent be manifested in the will of the decedent. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

Personal estate must be exhausted before resort to land whether decedent died testate or intestate, unless contrary intent manifested by will, and specific bequest must be exhausted before specific devises can be compelled to contribute. Gordon v. James, 86 Miss. 719, 39 So. 18, 1905 Miss. LEXIS 93 (Miss. 1905).

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators §§ 725, 730 et seq.

CJS.
34 C.J.S., Executors and Administrators § 704 et seq.

Law Reviews.
1978 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 165, March, 1979.

§ 91-7-193. Waste of personal estate no bar.

The fact that the insufficiency of the personal estate arose from the waste of the executor or administrator shall not be a defense to an application to sell land to pay debts, if such executor or administrator and sureties on his bond as such, if any, are insolvent or nonresidents of this state.

HISTORY:
Codes, 1880, § 2041; 1892, § 1899; 1906, § 2074; Hemingway's 1917, § 1741; 1930, § 1692; 1942, § 589.

§ 91-7-195. Creditors may apply for sale of property.

Any creditor of the decedent whose claim against the estate is registered shall have the right to file a petition, as the executor or administrator may, for the sale of land or personal property of the decedent for the payment of debts. The court shall hear and decide upon such petition, and decree as if the application had been made by the executor or administrator, and may order the executor or administrator to make the sale.

HISTORY:
Codes, 1880, § 2047; 1892, § 1895; 1906, § 2070; Hemingway's 1917, § 1737; 1930, § 1693; 1942, § 590.

JUDICIAL DECISIONS

1. In general.

Dismissal of an action alleging waste due to the cutting of timber was improperly dismissed on the basis that an estate lacked standing to bring the action since it had no interest therein and no power to bring such an action; the trial court should have allowed a substitution of the heirs as parties to the action. Tolbert v. Southgate Timber Co., 943 So. 2d 90, 2006 Miss. App. LEXIS 868 (Miss. Ct. App. 2006).

In a suit by a devisee to remove and cancel clouds on her title to an undivided ½ interest in minerals in land which was sold at an execution sale, the 2-year statute of limitations on actions to recover property sold by an order of the chancery court [Code 1972, § 15-1-37] was inapplicable since "order of a chancery court" contemplates an order entered after compliance with Code 1972, § 91-7-195, providing that a petition be filed with the court by creditors of a decedent having registered claims against an estate for the sale of land or personal property for payment of debts, and Code 1972, § 91-7-197, providing that all interested parties shall be cited by summons or publication specifying the time and place of the hearing on the petition. Simmons v. Abney, 292 So. 2d 168, 1974 Miss. LEXIS 1762 (Miss. 1974).

Petition for sale of nonexempt lands of estate for payment of decedent's debts when personalty is insufficient should be filed by executor or administrator, but may be filed by creditor of decedent whose claim against estate is registered. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

No court other than chancery court in which letters of administration have been granted has jurisdiction over petition for sale of decedent's nonexempt lands for payment of decedent's debts. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

Sale under execution of land of decedent pursuant to decree recovered against administrator held void for noncompliance with statutes regulating proceedings for sale of decedent's land for payment of debts. Dolan v. Tate, 161 Miss. 615, 137 So. 515, 1931 Miss. LEXIS 291 (Miss. 1931).

Heirs of decedent suing to remove, as cloud on title, claim asserted through purchase at execution sale under judgment against ancestor's representative, need not offer to pay judgment or amount for which land was sold. Dolan v. Tate, 161 Miss. 615, 137 So. 515, 1931 Miss. LEXIS 291 (Miss. 1931).

Creditor who had properly registered claim may file bill in chancery for sale of lands of estate to pay debts. Halliburton v. Crichton, 147 Miss. 621, 111 So. 743, 1927 Miss. LEXIS 276 (Miss. 1927).

This section [Code 1942, § 590] authorizes a petition by a creditor only when his claim is properly registered, after being probated and allowed. Cheairs v. Cheairs, 81 Miss. 662, 33 So. 414, 1902 Miss. LEXIS 180 (Miss. 1902).

Where the probate fails to conform to the requirements of Code 1942, § 568, a creditor cannot file a petition to sell land or personalty. Cheairs v. Cheairs, 81 Miss. 662, 33 So. 414, 1902 Miss. LEXIS 180 (Miss. 1902).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 797.

CJS.

34 C.J.S., Executors and Administrators §§ 711-713.

§ 91-7-197. Interested parties to be cited upon petition to sell property.

When a petition shall be filed to sell or lease land to pay debts or otherwise affecting the real estate of a deceased person, all parties interested shall be cited by summons or publication, which shall specify the time and place of hearing the petition. If the petition be filed by a creditor or by a purchaser to correct a mistake in the description of the land, the executor or administrator shall be cited.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (98); 1857, ch. 60, art. 117; 1871, § 1148; 1880, §§ 2039, 2042, 2043, 2047; 1892, § 1904; 1906, § 2079; Hemingway's 1917, § 1746; 1930, § 1694; 1942, § 591.

JUDICIAL DECISIONS

1. In general.

Beneficiaries under residual testamentary trusts are "parties interested" so as to be entitled to the notice required under Mississippi Code § 91-7-197; Brickell v. Lightcap (1917) 115 Miss 417, 76 So 489 is thus overruled; however, this new rule of law will apply prospectively only. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Petitioner, who had entered into a contract whereby an executrix agreed to sell and convey certain property to petitioner after the probate of a will, was not a "party interested" within the meaning of § 91-7-197, but was rather one with a contingent interest, and therefore lacked standing to file a direct action in the estate proceeding to change and modify a previous order thereto, since the executrix' title to the property was the will itself and petitioner's interest in the property was merely contingent and depended solely on the outcome of the suit to contest the will. Turner v. Estate of Hightower, 417 So. 2d 919, 1982 Miss. LEXIS 2091 (Miss. 1982).

In a suit by a devisee to remove and cancel clouds on her title to an undivided ½ interest in minerals in land which was sold at an execution sale, the 2-year statute of limitations on actions to recover property sold by an order of the chancery court [Code 1972, § 15-1-37] was inapplicable since "order of a chancery court" contemplates an order entered after compliance with Code 1972, § 91-7-195, providing that a petition be filed with the court by creditors of a decedent having registered claims against an estate for the sale of land or personal property for payment of debts, and Code 1972, § 91-7-197, providing that all interested parties shall be cited by summons or publication specifying the time and place of the hearing on the petition. Simmons v. Abney, 292 So. 2d 168, 1974 Miss. LEXIS 1762 (Miss. 1974).

Judgment creditors, solely as such, of the heirs or devisees, or of some of them, are not necessary or interested parties with respect to the question of notice under this section [Code 1942, § 591]. Townsend v. Beavers, 185 Miss. 312, 188 So. 1, 1939 Miss. LEXIS 154 (Miss. 1939).

Failure of creditors instituting proceedings against widow as administratrix to have deceased's land sold to pay debts to make widow in individual capacity and adult children parties held to require reversal and remandment, although decree adjudged that land was exempt. Eastman Gardiner Lumber Co. v. Carr, 175 Miss. 36, 166 So. 401, 1936 Miss. LEXIS 28 (Miss. 1936).

Decree for sale of land to pay debts of deceased which affects rights of heirs at law or devisees and which is rendered without process upon them is void. Eastman Gardiner Lumber Co. v. Carr, 175 Miss. 36, 166 So. 401, 1936 Miss. LEXIS 28 (Miss. 1936).

Where chancellor had jurisdiction of minor heirs and subject-matter in administratrix's petition for leave to sell, any defects in process and insufficiency of time held not to prevent application of two years' limitations. Neely v. Craig, 162 Miss. 712, 139 So. 835, 1932 Miss. LEXIS 147 (Miss. 1932).

Sale under execution of land of decedent pursuant to decree recovered against administrator held void for noncompliance with statutes regulating proceedings for sale of decedent's land for payment of debts. Dolan v. Tate, 161 Miss. 615, 137 So. 515, 1931 Miss. LEXIS 291 (Miss. 1931).

Where heirs at law, after the death of their intestate, conveyed his land, and then attempted to have it subjected to the payment of debts, thereby relieving the personal estate, the grantee of the land was a vitally interested party. Blum v. Planters' Bank & Trust Co., 154 Miss. 800, 122 So. 784, 1929 Miss. LEXIS 177 (Miss. 1929).

Contingent remaindermen not necessary parties to proceeding for sale of real estate to discharge accumulated annuities without affirmative showing of existence of persons with vested interest. Swayze v. Powell, 153 Miss. 829, 121 So. 852, 1929 Miss. LEXIS 92 (Miss. 1929).

Heirs and devisees entitled to notice and hearing on proceeding by executor to obtain possession of real estate, where specific control not conferred by will and there was sufficient cash to pay debts. Miles v. Fink, 119 Miss. 147, 80 So. 532, 1918 Miss. LEXIS 24 (Miss. 1918).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 799 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 831 et seq. (notice).

CJS.

34 C.J.S., Executors and Administrators §§ 732-735.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-7-199. Hearing and decree.

The court, after service of summons or proof of publication, shall hear and examine the allegations and evidence in support of the petition and the objections to and evidence against it, if any. If on such hearing the court be satisfied that the personal estate is insufficient to pay the debts of the deceased and that the land ought to be sold for that purpose, it may make a decree for the sale of a part or the whole of the land; and when a part only is decreed to be sold, the decree shall specify what part. If the real estate be so situated that a part cannot be sold without manifest prejudice to the heirs or devisees, the court may decree that the whole shall be sold; and the overplus arising from such sale, after the payment of debts and expenses, shall be distributed amongst the heirs according to the law of descents, or amongst the devisees according to the will. The heir or devisee whose lands shall be sold may compel all others holding or claiming under such intestate or testator to contribute in proportion to their respective interests, so as to equalize the burden of the loss.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (98); 1857, ch. 60, art. 89; 1871, § 1149; 1880, § 2040; 1892, § 1894; 1906, § 2069; Hemingway's 1917, § 1736; 1930, § 1695; 1942, § 592.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Decree, and its effect.

1. In general.

A chancellor improperly ordered a sale of the property in an estate to satisfy debts thereof, where there was no proof as to the debts due and expenses of the estate. Brown v. McAfee, 421 So. 2d 1061, 1982 Miss. LEXIS 2279 (Miss. 1982).

Upon denial of parties in interest, summoned on petition of creditor to sell land to pay debts, that the personalty was insufficient therefor, it was the duty of the court to hear evidence on the issue made. Blum v. Planters' Bank & Trust Co., 154 Miss. 800, 122 So. 784, 1929 Miss. LEXIS 177 (Miss. 1929).

Creditor filing petition to sell land to pay debts had burden of proving personalty was insufficient therefor. Blum v. Planters' Bank & Trust Co., 154 Miss. 800, 122 So. 784, 1929 Miss. LEXIS 177 (Miss. 1929).

Court had duty of hearing evidence on issue made by pleadings in proceeding by creditor to sell land to pay debts. Blum v. Planters' Bank & Trust Co., 154 Miss. 800, 122 So. 784, 1929 Miss. LEXIS 177 (Miss. 1929).

Court, on petition of creditor to sell land to pay debts, had duty of adjudicating asserted vendor's lien on cross-petition of party in interest. Blum v. Planters' Bank & Trust Co., 154 Miss. 800, 122 So. 784, 1929 Miss. LEXIS 177 (Miss. 1929).

Executor cannot purchase at chancery sale to pay debts, and his vendees do not acquire title. Belt v. Adams, 124 Miss. 194, 86 So. 584, 1920 Miss. LEXIS 485 (Miss. 1920).

2. Decree, and its effect.

In proceedings divesting title to lands out of the legatees or heirs and vesting the same in the executor or administrator the statutes must necessarily be complied with to effect such a divestiture, and where the decree of court ordering sale did not adjudicate that the personal estate was insufficient to pay debts and that land ought to be sold for that purpose, did not decree the sale of a part or the whole of the land, and described no land, it was wholly insufficient to order a judicial sale. McWilliams v. Estate of Brown, 183 So. 2d 820, 1966 Miss. LEXIS 1443 (Miss. 1966).

Where sale of land to pay debts is shown to have been made under a solemn decree of chancery court, with proper notice and appearance by all parties in interest, and that decree of confirmation was unappealed from, the presumption is that chancery court had acted in good faith in ordering the sale and that administratrix was guilty of no bad faith in conducting the sale and conveying the property to the purchaser, the court necessarily adjudicating that the property had brought a fair price in confirming the sale. Gill v. Johnson, 206 Miss. 707, 40 So. 2d 600, 1949 Miss. LEXIS 295 (Miss. 1949).

Decree for sale of land to pay debts of deceased which affects rights of heirs at law or devisees and which is rendered without process upon them is void. Eastman Gardiner Lumber Co. v. Carr, 175 Miss. 36, 166 So. 401, 1936 Miss. LEXIS 28 (Miss. 1936).

Sale under execution of land of decedent pursuant to decree recovered against administrator held void for noncompliance with statutes regulating proceedings for sale of decedent's land for payment of debts. Dolan v. Tate, 161 Miss. 615, 137 So. 515, 1931 Miss. LEXIS 291 (Miss. 1931).

Heirs of decedent suing to remove, as cloud on title, claim asserted through purchase at execution sale under judgment against ancestor's representative, need not offer to pay judgment or amount for which land was sold. Dolan v. Tate, 161 Miss. 615, 137 So. 515, 1931 Miss. LEXIS 291 (Miss. 1931).

Decree ordering sale of land to pay debts was final decree as regards appeal. Blum v. Planters' Bank & Trust Co., 154 Miss. 800, 122 So. 784, 1929 Miss. LEXIS 177 (Miss. 1929).

A sale decreed to be made for cash is void if part of the purchase money is not paid, but credited on a debt due from the purchaser to the executor individually; and a confirmation upon a report concealing the facts is fraudulent and does not validate the sale. Sharpley v. Plant, 79 Miss. 175, 28 So. 799, 1901 Miss. LEXIS 3 (Miss. 1901).

A decree ordering lands sold for the payment of debts, without notice to the parties in interest, is void. United States v. Curry, 47 U.S. 106, 12 L. Ed. 363, 1848 U.S. LEXIS 302 (U.S. 1848).

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators § 804 et seq.

CJS.
34 C.J.S., Executors and Administrators § 738 et seq.

§ 91-7-201. Mistake in description of land may be corrected.

If any mistake shall be made in the description of any land of a decedent sold or leased, either in the petition, decree, or other part of the proceedings, the same may be corrected by the court on petition of the creditor or purchaser or his assigns, and on citation to the executor or administrator.

HISTORY:
Codes, 1892, § 1897; 1906, § 2072; Hemingway's 1917, § 1739; 1930, § 1696; 1942, § 593.

JUDICIAL DECISIONS

1. In general.
Sale of land not included in petition, nor in decree of confirmation, not "mistake in description." Pearson v. Caldwell, 93 Miss. 637, 47 So. 436, 1908 Miss. LEXIS 141 (Miss. 1908).

§ 91-7-203. Bond to pay debts may be given and decree for sale not made.

A decree for the sale or lease of land shall not be made if any person interested will give bond, describing therein the land sought to be sold, payable to the executor or administrator in a sum to be fixed and with sureties approved by the court, conditioned to pay all the debts duly registered against the estate and the expenses of the administration, so far as the personal estate of the deceased shall be insufficient to pay the same. Such bond shall be filed among the papers of administration and entered on the minutes of the court, and shall have the force and effect of a judgment, upon which execution and other necessary process may be issued in the name of the executor or administrator, after the expiration of six months from the date it shall have been given, against the obligors therein from time to time, until such debts and expenses of administration be paid or the penalty of the bond exhausted. The same may be levied on the lands described in the bond, and the entire interest of the deceased therein may be sold as if the court had decreed the sale in the first instance; and the property of the sureties on said bond may be sold for whatever the land may be insufficient to pay. Instead of enforcing said bond, the executor or administrator or any creditor may petition anew for the sale of the land, as if such bond had not been given; and after the sale under such proceedings, the bond may be enforced, in the manner provided, for whatever the land may be insufficient to pay, and no other bond shall be allowed to prevent a decree for a sale or lease of the land.

HISTORY:

Codes, 1892, § 1898; 1906, § 2073; Hemingway's 1917, § 1740; 1930, § 1697; 1942, § 594.

§ 91-7-205. Bond required in decree for sale of lands; waiver of bond.

(1) Except as otherwise provided in subsection (2) of this section, whenever an executor or administrator sells land pursuant to a decree of the court or chancellor in vacation, said executor or administrator shall execute bond with sufficient sureties in an amount equal to the proceeds of the sale of the land. Said bond shall be executed any time before confirmation of sale, either by the court or chancellor in vacation, and may be approved by the court, chancellor in vacation, or the clerk of the chancery court. Such bond shall be payable to the state and shall be conditioned for the faithful application of the proceeds of the sale. When, however, decree ordering the sale of land shall fix an amount or estimated amount to be paid in cash before confirmation, the executor or administrator shall, before sale, execute bond with sufficient sureties to cover such amount or estimated amount to be paid in cash, conditioned for the faithful application of the same which bond may be approved by the court, the chancellor in vacation, or the clerk of the chancery court.

After the expiration of the time in which all claims against the estate of deceased persons must be registered, probated and allowed as provided in Section 91-7-151, Mississippi Code of 1972, the chancellor may waive all or any part of the bond when all the beneficiaries to the proceeds of the sale petition the court to authorize the sale and waive the necessity of a bond.

(2) At the discretion of the court or chancellor, all or any part of the bond described in subsection (1) of this section may be waived but, in such case, the chancellor shall make adequate and sufficient provision for the maintenance and safety of the assets of the estate. Upon waiver of such bond, the court or chancellor may require the proceeds from the sale of land to be held in trust by an executor, administrator or other qualified person and may require such proceeds to be maintained as otherwise ordered by the court in such manner as the court may direct, consistent with the provisions of this subsection.

HISTORY:

Codes, 1880, § 2045; 1892, § 1905; 1906, § 2080; Hemingway's 1917, § 1747; 1930, § 1698; 1942, § 595; Laws, 1914, ch. 210; Laws, 1975, ch. 405; Laws, 2015, ch. 324, § 1, eff from and after July 1, 2015.

JUDICIAL DECISIONS

1. In general.

Administratrix de bonis non entitled to allowance for premium on special bond executed to collect money for land sold by her predecessor under order of court. Davis v. Blumenberg, 107 Miss. 432, 65 So. 503, 1914 Miss. LEXIS 102 (Miss. 1914).

Parol testimony by an administrator that he executed the statutory bond is incompetent in the absence of a showing that search had been made for the bond itself by the person charged with its custody in the place where by law it should be kept. Shannon v. Summers, 86 Miss. 619, 38 So. 345, 1905 Miss. LEXIS 41 (Miss. 1905).

An executor must give the bond required for the faithful application of the proceeds, although the will authorizes him to administer the estate without bond, and if he fails to do so the sale will be void. Sharpley v. Plant, 79 Miss.

175, 28 So. 799, 1901 Miss. LEXIS 3 (Miss. 1901).

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators § 811.
10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 871 et seq. (posting of bond).

CJS.
34 C.J.S., Executors and Administrators §§ 758, 759.

§ 91-7-207. Failure to give bond.

If an executor or administrator who has been ordered to sell land of a decedent fail to give the bond required, the court may, after five days' notice to the executor or administrator, direct a master or special commissioner to make the sale, who shall give bond with sureties, as the executor or administrator was required to do, and make sale and report it and, after a confirmation of the sale, convey the land as the executor or administrator might have done under the decree. The master or commissioner shall be allowed by the court such commissions as would accrue from the sale to the executor or administrator, or such compensation as the court may order.

HISTORY:
Codes, 1880, § 2046; 1892, § 1906; 1906, § 2081; Hemingway's 1917, § 1748; 1930, § 1699; 1942, § 596.

§ 91-7-209. Purchase-money a charge on property.

Where the property of a decedent shall be sold by order of the court in which the estate is being administered, and the price paid at such sale for the property has been applied to the payment of debts for which the property might lawfully have been sold, or has been distributed to the heirs, legatees, or distributees, or to the guardians of such as have guardians, the property, if such sale were illegal, shall be charged in favor of the purchaser and his assigns with a lien for the purchase-money paid for it at such sale, and interest thereon. Such lien may be enforced in chancery or may be availed of in defense of any action for the land, in the same manner in which a claim for valuable improvements may be allowed in equity. In case of personal property, the possessor having such lien shall be entitled to retain possession until his claim be paid or tendered, unless the party having the title shall resort to the chancery court to adjust the rights of the parties and to sell said property.

HISTORY:
Codes, 1880, § 2052; 1892, § 1907; 1906, § 2082; Hemingway's 1917, § 1749; 1930, § 1700; 1942, § 597.

Cross References —
Preference of purchase money mortgages, see § 89-1-45.

JUDICIAL DECISIONS

1. In general.
But if the money in such cases were paid by the administrator to the creditors of the estate, the purchaser has only a lien on the land, and

his injunction should be limited accordingly. Hill v. Billingsly, 53 Miss. 111, 1876 Miss. LEXIS 43 (Miss. 1876).

If the heir, after majority, receive or retain the purchase money of a void sale of land, he will be estopped from executing a judgment in ejectment therefor, and may be restrained by any party claiming under the purchaser. Gaines v. Kennedy, 53 Miss. 103, 1876 Miss. LEXIS 42 (Miss. 1876).

One who, through an illegal sale of decedent's land, paid money into the hands of an administrator, which was used to pay debts of the decedent, is entitled, in equity, to be reimbursed out of the proceeds of a subsequent valid sale. Short v. Porter, 44 Miss. 533, 1871 Miss. LEXIS 11 (Miss. 1870); Cole v. Johnson, 53 Miss. 94, 1876 Miss. LEXIS 41 (Miss. 1876); Gaines v. Kennedy, 53 Miss. 103, 1876 Miss. LEXIS 42 (Miss. 1876).

The purchaser of the lands at a void sale by an administrator can claim no equity with respect to the land purchased, as against the heirs, except so far as the purchase money has been paid and applied to their benefit. Jayne v. Boisgerard, 39 Miss. 796, 1861 Miss. LEXIS 16 (Miss. 1861).

§ 91-7-211. Estoppel from receipt of purchase-money.

Nothing in Section 91-7-209 shall hinder the application of the doctrine of estoppel to assert title to adult heirs who received a share of the purchase-money of land as heretofore announced and applied in this state. The same rule may be applied to minors, persons of unsound mind, convicts of felony, and other wards whose guardians received for them a share of the purchase-money, whether it were actually applied to the benefit of or received by such person under disability or not.

HISTORY:

Codes, 1880, § 2053; 1892, § 1908; 1906, § 2083; Hemingway's 1917, § 1750; 1930, § 1701; 1942, § 598.

JUDICIAL DECISIONS

1. In general.

If a ward, after majority, receive from the guardian the proceeds of a void sale, it will be an affirmance of the sale. Handy v. Noonan, 51 Miss. 166, 1875 Miss. LEXIS 29 (Miss. 1875); Gaines v. Kennedy, 53 Miss. 103, 1876 Miss. LEXIS 42 (Miss. 1876); Hill v. Billingsly, 53 Miss. 111, 1876 Miss. LEXIS 43 (Miss. 1876).

Under doctrine referred to in the section [Code 1942, § 598], if the heir, after majority, receive from the administrator the proceeds of a void sale, it will be an affirmance of the sale. Lee v. Gardiner, 26 Miss. 521, 1853 Miss. LEXIS 135 (Miss. 1853); Kempe v. Pintard, 32 Miss. 324, 1856 Miss. LEXIS 212 (Miss. 1856); Wilie v. Brooks, 45 Miss. 542, 1871 Miss. LEXIS 99 (Miss. 1871).

§ 91-7-213. Borrowing money to pay claims.

When an executor or administrator shall discover that the personal property will not be sufficient to pay the debts of the decedent and the expenses of the administration of the estate, he may file a petition in the chancery court in which the estate is being administered, for the purpose of borrowing money to be secured by a deed of trust, mortgage, or other encumbrance on the lands of the decedent, except the exempt property or homestead which shall not be so encumbered save to pay an indebtedness which constitutes a lien on such exempt property or homestead, and then not without the consent of the exemptionist. The money, when so borrowed, shall be used to pay said claims and expenses.

HISTORY:
Codes, 1930, § 1702; 1942, § 599; Laws, 1930, ch. 14.

§ 91-7-215. Procedure for borrowing.

With such petition the executor or administrator shall file and exhibit to the court a true account of the personal estate, debts due from the deceased, the expenses, and a description of the land to be used as security for the money so borrowed. The court, after service of summons or proof of publication of summons, shall hear and examine the allegations and evidence in support of the petition and the objections to and the evidence against it, if any. If on the hearing, the court be satisfied that the personal estate is insufficient to pay the debts of the deceased and said expenses, and that the land ought to be encumbered for such purposes, it may make a decree for the encumbrance of a part or the whole of the land; and when a part only is decreed to be so encumbered, the decree shall specify what part.

HISTORY:
Codes, 1930, § 1703; 1942, § 600; Laws, 1930, ch. 14.

§ 91-7-217. Overplus and contribution.

In the event the land so encumbered should be thereafter sold by foreclosure or otherwise to satisfy the said debt, interest, attorney's fee, trustee's fees, or expenses of such sale, and there shall exist an overplus of money above the debt, interest, attorney's fees, trustee's fees, and expenses of such sale, the overplus shall be distributed among the heirs according to the law of descent, or among the devisees according to the will. The heir or devisee whose land shall be sold may compel all others holding or claiming under such intestate or testator to contribute in proportion to their respective interests, so as to equalize the burden of loss.

HISTORY:
Codes, 1930, § 1704; 1942, § 601; Laws, 1930, ch. 14.

§ 91-7-219. Procedure in vacation.

Such decree may be rendered by the presiding chancellor of the court in vacation at any time or place within his district, provided summons has been served on the heirs of the decedent, or devisees under the will of the testator, in the manner provided by law for the service of summons on defendants in chancery for at least ten days before the hearing. In such summons, the time and place of the hearing and the purpose of the proceeding shall be definitely stated; and should the summons be published, such publication shall be completed at least ten days before the hearing.

HISTORY:
Codes, 1940, § 1705; 1942, § 602; 1930, ch. 14.

Cross References —
Additional powers of chancellor in vacation, see § 9-5-97.

§ 91-7-221. Executor or administrator to make title to land.

If any person sell lands, enter into contract to make title, and die before the title be made, then the person to whom the title was to be made, his heirs or assigns, may petition the court which granted the letters on the estate of the vendor, for an order on the executor or administrator to make title agreeably to the contract. After the parties interested have been cited by summons or by publication, the court shall hear the petition and evidence, and may decree that the executor or administrator make title according to the contract.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (114); 1857, ch. 60, art. 137; 1871, § 1195; 1880, § 2092; 1892, § 1902; 1906, § 2077; Hemingway's 1917, § 1744; 1930, § 1706; 1942, § 603.

Cross References —
Form of conveyance by executor or administrator, see § 89-1-67.

JUDICIAL DECISIONS

1. In general.
Contract for sale was not rendered void by the seller's death, though the fact of her death did render her attorney in fact legally incapable of proceeding to carry out the remaining terms of the contract; however, the contract remained a binding agreement that could be enforced against the seller's estate in a probate proceeding. Van Etten v. Johnson (In re Estate of Pickett), 879 So. 2d 467, 2004 Miss. App. LEXIS 67 (Miss. Ct. App. 2004), cert. denied, 2004 Miss. LEXIS 994 (Miss. Aug. 5, 2004).

A deed will not be ordered where it appears that the deceased made a valid sale of the land to another prior to the contract with the petitioner, and of which the petitioner had notice. White v. Gilbert, 39 Miss. 802, 1861 Miss. LEXIS 18 (Miss. 1861).

§ 91-7-223. Executors and administrators may make deeds of conveyance.

The administrator, executor, or testamentary trustee may at any time, by and with the consent of the chancery court or the chancellor in vacation, when the chancellor deems it to the best interests of the estate, execute a deed of conveyance conveying any real property formerly owned by the decedent, where said decedent during his lifetime had executed any bond for title, optional contract, or other instrument conferring upon any party the right to purchase and secure title to said real property, where the execution of such conveyance is necessary in order to carry out the terms, provisions, or stipulation of the said bond for title, optional contract, or other instrument.

HISTORY:
Codes, Hemingway's 1917, § 1733; 1930, § 1707; 1942, § 604; Laws, 1912, ch. 143.

§ 91-7-225. Lands may be leased to pay debts.

In case it shall be made to appear to the court that a lease of the lands of the deceased can be made to raise the money necessary for the payment of the debts of the deceased, and that the leasing thereof will be to the interest of the devisees, legatees, heirs, or distributees, the court may, in its discretion, decree the same to be leased. If a lease of the lands, or any part thereof, be decreed, the executor or administrator shall, upon giving the notice as in like case of sale, lease the same at public outcry or privately, as directed by the decree, to the person who will take the lands for the fewest number of years, not exceeding fifteen, and pay, either in cash or at such time as shall be fixed by the decree, the specific sum to be stated therein, equal to the amount of the debts of the deceased to be paid and the expenses of administration. If the lease be on credit, the lessee shall give security for the payment of the sum, to be approved by the executor or administrator.

HISTORY:

Codes, 1892, § 1896; 1906, § 2071; Hemingway's 1917, § 1738; 1930, § 1708; 1942, § 605.

Cross References —

Action by administrator or executor for rent due deceased, see § 89-7-13.

Lease of farm lands, see § 91-7-171.

JUDICIAL DECISIONS

1. In general.

Under this section [Code 1942, § 605] and sections providing for the sale of lands by a personal representative for the payment of debts in case the personal property is insufficient, it was the duty of a personal representative to pay the taxes on the lands of the estate for the purpose of preserving the lands for the benefit of creditors, as well as for the legatees and distributees. Tonnar v. Wade, 153 Miss. 722, 121 So. 156, 1929 Miss. LEXIS 56 (Miss. 1929).

Approved sale of lease by administrator valid, though administrator a minor. Giglio v. Woollard, 126 Miss. 6, 88 So. 401, 1921 Miss. LEXIS 5 (Miss. 1921).

The lease of a decedent's lands by the administrator, with the consent of the heirs, for the purpose of paying the debts of the estate is valid. Ashley v. Young, 79 Miss. 129, 29 So. 822, 1901 Miss. LEXIS 16 (Miss. 1901).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 540 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 922 et seq. (lease of property).

CJS.

34 C.J.S., Executors and Administrators §§ 426-429.

§ 91-7-227. Executors and administrators to renew obligation and encumbrances of estate.

The chancery court or the chancellor in vacation, when he deems it to the best interest of the estate, may authorize the administrator, executor, or testamentary trustee to renew for a specified time any obligation of the deceased and, if such obligation be secured by encumbrance on any property, to renew such encumbrance upon such property. If it be shown to the interest of the estate, such chancery court or chancellor in vacation may direct said administrator, executor, or testamentary trustee to obtain money to pay off said obligation or encumbrance and to execute a new obligation or encumbrance to secure said money; and such obligation or encumbrance extended, renewed, or made shall be a valid charge on the estate or the property included in said encumbrance. Such encumbrance, whether renewed, extended, or made, shall not include any other property not embraced in the pre-existing encumbrance.

HISTORY:

Codes, Hemingway's 1917, § 1732; 1930, § 1709; 1942, § 606; Laws, 1912, ch. 143.

JUDICIAL DECISIONS

1. In general.

Where note sued on purported to have been executed by defendant as administratrix, it devolved on plaintiff suing her personally to aver in declaration whether note was executed without authority. Orgill Bros. v. Perry, 157 Miss. 543, 128 So. 755, 1930 Miss. LEXIS 340 (Miss. 1930).

Executors and trustees of residue of estate not authorized to borrow money for estate and pledge stock therefor, could not do so under decree of chancery court. Luckett v. Brickell, 115 Miss. 457, 76 So. 502, 1917 Miss. LEXIS 219 (Miss. 1917).

§ 91-7-229. Claims may be sold or compromised.

The court or chancellor in vacation, on petition for that purpose, may authorize the executor or administrator to sell or compromise any claim belonging to the estate which cannot be readily collected; but an order authorizing a sale of any claim shall not be made until after six months from the grant of the letters. The court or chancellor shall specify the terms, conditions, and notice of such sale. In compromising any claim, the executor or administrator may receive property, real or personal, in his name as such, and he shall account for the same as assets of the estate. The executor or administrator shall report, in writing, all sales and compromises to the next term of the court.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 20 (6); 1857, ch. 60, art. 95; 1871, § 1155; 1880, § 2065; 1892, § 1890; 1906, § 2065; Hemingway's 1917, § 1730; 1930, § 1710; 1942, § 607; Laws, 1936, ch. 238.

Cross References —

Petitions for authority to compromise claims for wrongful death or injury, see Miss. Uniform Chancery Court Rule 6.11.

RESEARCH REFERENCES

ALR.

Power and responsibility of executor or administrator to compromise claim due estate. 72 A.L.R.2d 191.

Power and responsibility of executor or administrator to compromise claim against estate. 72 A.L.R.2d 243.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death. 72 A.L.R.2d 285.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 616 et seq.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 581 et seq. (compromise, release, and settlement of claims due estate).

8 Am. Jur. Legal Forms 2d, Executors and Administrators, §§ 104:160, 104:161, 104:163 (will provision granting authority to settle claims and obligations).

§ 91-7-231. Actions which accrue in administration.

An executor, administrator, or temporary administrator may maintain any action or suit which shall accrue to him in the due course of administration, on any contract which he is authorized to make as such, or for the recovery of personal property, or for injuries thereto.

HISTORY:

Codes, 1857, ch. 60, art. 119; 1871, § 1176; 1880, § 2081; 1892, § 1920; 1906, § 2095; Hemingway's 1917, § 1762; 1930, § 1711; 1942, § 608.

Cross References —

Suits for rent by executor or administrator, see § 89-7-13.

Institution of suit by administrator, see § 91-7-61.

Actions between corepresentatives, see § 91-7-247.

Suits by foreign executor or administrator, see § 91-7-259.

Requirement that, unless he is licensed to practice law, executor or administrator must retain solicitor, see Miss. Uniform Chancery Court Rules 6.01.

JUDICIAL DECISIONS

1. In general.

Dismissal of an action alleging waste due to the cutting of timber was improperly dismissed on the basis that an estate lacked standing to bring the action since it had no interest therein and no power to bring such an action; the trial court should have allowed a substitution of the heirs as parties to the action. Tolbert v. Southgate Timber Co., 943 So. 2d 90, 2006 Miss. App. LEXIS 868 (Miss. Ct. App. 2006).

An administrator has the right to bring an action to protect the assets of the estate. Estate of Jackson v. Mississippi Life Ins. Co., 755 So. 2d 15, 1999 Miss. App. LEXIS 278 (Miss. Ct. App. 1999).

In an accountant negligence action arising from the accountant's alleged negligence in performing accounting services for an estate, the trial court did not err in allowing plaintiffs other than the executrix to remain in the suit as nominal parties only; by naming the residuary beneficiaries plaintiffs, the executrix was protecting herself against any possible future lawsuits. Wirtz v. Switzer, 586 So. 2d 775, 1991 Miss. LEXIS 597 (Miss. 1991), overruled in part, Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, 964 So. 2d 1100, 2007 Miss. LEXIS 495 (Miss. 2007).

Code 1972 § 11-7-13 must be considered in pari materia with Code 1972 §§ 91-7-231, 91-7-233, which authorize only a personal representative to sue to recover the assets of the deceased. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 1124 et seq.

CJS.

34 C.J.S., Executors and Administrators § 847 et seq.

Law Reviews.

Arnold, Damages Recoverable in Mississippi for the Wrongful Death of an Adult. 53 Miss. L. J. 637, December, 1983.

Brady, Hedonic damages. 59 Miss. L. J. 495, Fall, 1989.

§ 91-7-233. What actions survive to executor or administrator.

Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. They shall also be liable to be sued in any court in any personal action which might have been maintained against the deceased.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (111); 1857, ch. 60, art. 119; 1871, § 1176; 1880, § 2078; 1892, § 1916; 1906, § 2091; Hemingway's 1917, § 1758; 1930, § 1712; 1942, § 609.

Cross References —

Requirement that, unless he is licensed to practice law, executor or administrator must retain solicitor, see Miss. Uniform Chancery Court Rule 6.01.

Petition for authority to compromise claims for wrongful death or injury, see Miss. Uniform Chancery Court Rule 6.11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Actions on behalf of estate or beneficiaries.
3. Actions against estate.
4. Limitation of actions.

1. In general.

Code 1972 § 11-7-13 must be considered in pari materia with Code 1972 §§ 91-7-231, 91-7-233, which authorize only a personal representative to sue to recover the assets of the deceased. Thornton v. Insurance Co. of North America, 287 So. 2d 262, 1973 Miss. LEXIS 1329 (Miss. 1973).

This section [Code 1942, § 609] does not operate to authorize an administrator to exercise his decedent's right of election against a spouse's will. Estate of Mullins v. Estate of Mullins, 239 Miss. 751, 125 So. 2d 93, 1960 Miss. LEXIS 350 (Miss. 1960).

This section [Code 1942, § 609] is in derogation of the common law. Southern Package Corp. v. Walton, 196 Miss. 786, 18 So. 2d 458, 1944 Miss. LEXIS 257 (Miss.), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609, 1944 U.S. LEXIS 247 (U.S. 1944).

This section [Code 1942, § 609] being in derogation of common law must be strictly construed. McNeely v. Natchez, 148 Miss. 268, 114 So. 484, 1927 Miss. LEXIS 55 (Miss. 1927).

Administrator's failure to file letters testamentary waived by failure to object before verdict. Linton v. Skinner, 122 Miss. 613, 84 So. 800, 1920 Miss. LEXIS 460 (Miss. 1920).

2. Actions on behalf of estate or beneficiaries.

Power of attorney prohibited the decedent's attorneys-in-fact from profiting from their role, commingling their funds with hers, or taking ownership of her assets, and during the decedent's lifetime, she could have commenced an action to set aside relatives' joint ownership of certain certificates of deposit; thus, upon her death, her estate became the proper party to commence such an action, and thus the estate had standing to challenge actions taken by a relative that violated the terms of the power of attorney. Swank v. Covington (In re Estate of Hemphill), 186 So. 3d 920, 2016 Miss. App. LEXIS 60 (Miss. Ct. App. 2016).

Survival action provided in the wrongful death statute is an extension of Mississippi's survival statute, Miss. Code Ann. § 91-7-233, which allows personal actions of a decedent to be pursued after his or her death. Caves v. Yarbrough, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

Where summary judgment was granted in a daughter, wrongful death complaint, and upon remand the complaint was amended to allege a survival action under Miss. Code Ann. § 91-7-233 with the estate added as a party, the real party in interest joined the suit within a reasonable time after objection pursuant to Miss. R. Civ. P. 17. Methodist Hosp. of Hattiesburg, Inc. v. Richardson, 909 So. 2d 1066, 2005 Miss. LEXIS 74 (Miss. 2005).

Dismissal of an action alleging waste due to the cutting of timber was improperly dismissed on the basis that an estate lacked standing to bring the action since it had no interest therein and no power to bring such an action; the trial court should have allowed a substitution of the heirs as parties to the action. Tolbert v. Southgate Timber Co., 943 So. 2d 90, 2006 Miss. App. LEXIS 868 (Miss. Ct. App. 2006).

Where a decedent was allegedly injured by medication during her life, and allegedly died from it, the estate administrator was to assert both a wrongful death action and a survival action against the drug manufacturer; if the jury found that the drug caused the decedent's death, then the recovery belonged to the wrongful death heirs. If the jury found that the drug did not cause the death, the estate could recover for any personal injuries caused by the drug, and the decedent's ex-husband could recover from the estate amounts he was entitled to under the decedent's holographic instrument. England v. England (In re Estate of England), 846 So. 2d 1060, 2003 Miss. App. LEXIS 473 (Miss. Ct. App. 2003).

Heirs of deceased smoker could not recover damages for injuries suffered by smoker during his lifetime in wrongful death action where jury found that cause of death was unrelated to smoker's lung cancer or chronic obstructive pulmonary disease, but rather was pulmonary embolism caused by complications resulting from treatment for gonorrhea in 1940's, and heirs did not also assert claim under survival statute. Wilks v. American Tobacco Co., 680 So. 2d 839, 1996 Miss. LEXIS 493 (Miss. 1996).

An action for loss of consortium survives the death of the party asserting it, and may be brought as any other action by the executor or administrator or personal representative of the deceased party. Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1992 Miss. LEXIS 447 (Miss. 1992).

Nonpossessory equitable claim of intervenor in replevin action survives death of intervenor, whose executor is permitted to revive claim by intervention. Hall v. Corbin, 478 So. 2d 253, 1985 Miss. LEXIS 2274 (Miss. 1985).

Decedent's mother had no standing to bring a wrongful death action under § 11-7-13, even though decedent's will named her as executrix of his estate and sole primary beneficiary, where decedent left surviving him his wife, who was injured in the same accident and died approximately 30 minutes after her husband; a cause of action accrued to the wife even though she survived decedent for only a few minutes, and this cause of action was an asset in her estate, upon which it was entitled to sue pursuant to § 91-7-233; furthermore, decedent's will could not circumvent the wrongful death statute, which created a new and independent cause of action in favor of those named in the statute, and recovery under the statute would become an asset of decedent's estate only if none of the statutory heirs had survived him. Partyka v. Yazoo Development Corp., 376 So. 2d 646, 1979 Miss. LEXIS 2374 (Miss. 1979).

Action under the Federal Fair Labor Standards Act for overtime compensation, liquidated damages, and attorney's fees, survives the death of the employee. Southern Package Corp. v. Walton, 196 Miss. 786, 18 So. 2d 458, 1944 Miss. LEXIS 257 (Miss.), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609, 1944 U.S. LEXIS 247 (U.S. 1944).

Recovery for pain and suffering of deceased probably caused by alleged negligence of doctor in treating deceased between time of gunshot wound and deceased's death could be had only in suit by personal representative and not by next of kin or heirs at law. Berryhill v. Nichols, 171 Miss. 769, 158 So. 470, 1935 Miss. LEXIS 6 (Miss. 1934).

Action to recover personal property, or to enforce contract, or recover damages for breach of contract, or for injury to person or property survives; pure penalty intended as punishment for misconduct does not survive. J. H. Leavenworth & Son, Inc. v. Hunter, 150 Miss. 245, 116 So. 593, 1928 Miss. LEXIS 127 (Miss. 1928).

Term "personal action" in this section [Code 1942, § 609] means action for recovery of personal property, for breach of contract, or for injury to person or property. Hamel v. Southern R. Co., 108 Miss. 172, 66 So. 426, 1914 Miss. LEXIS 188 (Miss. 1914).

Administratrix may revive suit for personal injuries to decedent and may thereafter sue for his negligent death. Hamel v. Southern R. Co., 108 Miss. 172, 66 So. 426, 1914 Miss. LEXIS 188 (Miss. 1914).

Action for penalty imposed by ordinance for failure to observe regulations in operating ferry did not survive. Hamel v. Southern R. Co., 108 Miss. 172, 66 So. 426, 1914 Miss. LEXIS 188 (Miss. 1914).

The right to sue for trespass to lands upon the death of the owner survives to the executor or administrator, and his heirs cannot sue. Conklin v. Alabama & V. R. Co., 81 Miss. 152, 32 So. 920, 1902 Miss. LEXIS 127 (Miss. 1902).

In a proper case, the administrator may recover exemplary damages of the defendant for assaulting and beating his intestate. Wagner v. Gibbs, 80 Miss. 53, 31 So. 434, 1902 Miss. LEXIS 217 (Miss. 1902).

3. Actions against estate.

The liability of a decedent's widow in a personal action which survived his death is derivative only to her husband's estate, and to the maximum extent only of the amount of her inheritance from that estate, and this section [Code 1942, § 609] does not authorize a suit against the widow in her individual capacity, in an action to establish liability of the estate. State ex rel. Patterson v. Warren, 254 Miss. 314, 182 So. 2d 234, 1966 Miss. LEXIS 1543 (Miss. 1966).

An action to recover misappropriated county funds from members of the board of supervisors is a personal action and upon their deaths survives against their personal representatives. State ex rel. Patterson v. Warren, 254 Miss. 314, 182 So. 2d 234, 1966 Miss. LEXIS 1543 (Miss. 1966).

This statute controls a claim against a decedent's estate for personal injuries sustained in an automobile accident. Powell v. Buchanan, 245 Miss. 4, 147 So. 2d 110, 1962 Miss. LEXIS 526 (Miss. 1962).

A personal representative is liable to suit on a claim arising from the alleged negligence of his decedent, notwithstanding the estate has been declared insolvent. Bullock v. Young, 243 Miss. 146, 137 So. 2d 777, 1962 Miss. LEXIS 326 (Miss. 1962).

Claim against estate to recover amount paid on usurious contract may be probated, and action on such claim is "personal action," which survives death. Chandlee v. Tharp, 161 Miss. 623, 137 So. 540, 1931 Miss. LEXIS 296 (Miss. 1931).

4. Limitation of actions.

Mississippi wrongful death statute, Miss. Code Ann. § 11-7-13, despite the Mississippi Legislature's assigned nomenclature, encompasses all claims, including survival claims, which could have been brought by a decedent, wrongful-death claims, estate claims, and other claims resulting from a tort which proximately caused a death. And where death is not an immediate result of the tort, the limitation periods for the various kinds of claims may not begin to run at the same time. Caves v. Yarbrough, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

RESEARCH REFERENCES

ALR.

Validity of exception for specific kind of tort action in survival statute. 77 A.L.R.3d 1349.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 435 et seq.

CJS.

34 C.J.S., Executors and Administrators § 847 et seq.

Law Reviews.

Damages Recoverable in Mississippi for the Wrongful Death of an Adult. 53 Miss. L. J. 637, December, 1983.

Brady, Hedonic damages. 59 Miss. L. J. 495, Fall, 1989.

§ 91-7-235. What actions survive against executor or administrator.

When any decedent shall in his lifetime have committed any trespass, the person injured, or his executor or administrator, shall have the same action against the executor or administrator of the decedent as he might have had or maintained against the testator or intestate, and shall have like remedy as in other actions against executors and administrators. Vindictive damages shall not be allowed, and such action shall be commenced within one year after publication of notice to creditors to probate and register their claims.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (119); 1857, ch. 60, art. 119; 1871, § 1176; 1880, § 2080; 1892, § 1917; 1906, § 2092; Hemingway's 1917, § 1759; 1930, § 1713; 1942, § 610.

Cross References —

Service of process on one of several executors or administrators, see § 13-3-53.

Service of process on executor or administrator of nonresident motorist, see § 13-3-63.

Statute of limitations for actions against executors or administrators, see § 15-1-25.

JUDICIAL DECISIONS

1. In general.

The statute does not allow the recovery of punitive damages against an estate because of a prior tort committed by the decedent. Wilbanks v. Gray, 795 So. 2d 541, 2001 Miss. App. LEXIS 103 (Miss. Ct. App. 2001).

This section [Code 1942, § 610] prohibits the award of vindictive damages against an estate of a decedent. Mervis v. Wolverton, 211 So. 2d 847, 1968 Miss. LEXIS 1285 (Miss. 1968).

This section [Code 1942, § 610] does not limit the bringing of action against the estate for decedent's negligence. Jones v. Evans, 247 Miss. 285, 156 So. 2d 742, 1963 Miss. LEXIS 299 (Miss. 1963).

This statute is inapplicable to a claim against a decedent's estate for damages for personal injuries sustained in an automobile accident. Powell v. Buchanan, 245 Miss. 4, 147 So. 2d 110, 1962 Miss. LEXIS 526 (Miss. 1962).

This section [Code 1942, § 610] is in derogation of the common law. Southern Package Corp. v. Walton, 196 Miss. 786, 18 So. 2d 458, 1944 Miss. LEXIS 257 (Miss.), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609, 1944 U.S. LEXIS 247 (U.S. 1944).

The provision against the allowance of vindictive damages is not applicable to an action by an administrator against a defendant for assaulting and beating his intestate. Wagner v. Gibbs, 80 Miss. 53, 31 So. 434, 1902 Miss. LEXIS 217 (Miss. 1902).

RESEARCH REFERENCES

ALR.

Validity of exception for specific kind of tort action in survival statute. 77 A.L.R.3d 1349.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged. 30 A.L.R.4th 707.

§ 91-7-237. Death of party not to abate suit in certain cases.

When either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action, and the court shall render judgment for or against the executor or administrator. If such executor or administrator, having been duly served with a scire facias or summons five days before the meeting of the court, shall neglect or refuse to prosecute or defend the suit, the court may render judgment in the same manner as if such executor or administrator had voluntarily made himself a party to the suit. The executor or administrator who shall become a party shall be entitled to a continuance of the cause until the next term of the court.

HISTORY:

Codes, Hutchinson's 1848, ch. 58, art. 1 (47); 1857, ch. 61, art. 49; 1871, § 677; 1880, § 1513; 1892, § 1918; 1906, § 2093; Hemingway's 1917, § 1760; 1930, § 1714; 1942, § 611.

Cross References —

Effect of death of party before expiration of statute of limitations, see § 15-1-55.

Non-abatement of suits upon insolvency of estate, see § 91-7-273.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Suits brought by decedent.
3. Suits brought against decedent.

1. In general.

Pursuant to Miss. Code Ann. § 91-7-237, the estate executor stepped into the decedent's shoes in prosecuting an action against the decedent's nephew for unlawfully withdrawing funds; thus, the executor was entitled to the same remedy due the decedent had he been alive at judgment, and the proceeds of suit should have been returned to the estate. Estate of Beckley v. Beckley, 961 So. 2d 707, 2007 Miss. LEXIS 342 (Miss. 2007).

An action for loss of consortium survives the death of the party asserting it, and may be brought as any other action by the executor or administrator or personal representative of the deceased party. Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1992 Miss. LEXIS 447 (Miss. 1992).

Where statute was re-enacted by legislature without change after decision holding that term "personal action" is one brought for recovery of personalty, for enforcement of some contract or to recover damages for its breach, or for recovery of damages for commission of injury to person or property, interpretation became part of statute, and could not be changed or modified except by legislature. Catchings v. Hartman, 178 Miss. 672, 174 So. 553, 1937 Miss. LEXIS 259 (Miss. 1937).

Term "personal action" as used in statute providing that, where either of parties to "personal action" shall die before final judgment, executor or administrator may prosecute or defend such action, does not include an action of slander, so as to entitle administratrix to continue the action, since statute, being in derogation of common law, must be strictly construed. Catchings v. Hartman, 178 Miss. 672, 174 So. 553, 1937 Miss. LEXIS 259 (Miss. 1937).

This section [Code 1942, § 611] being in derogation of common law must be strictly construed. McNeely v. Natchez, 148 Miss. 268, 114 So. 484, 1927 Miss. LEXIS 55 (Miss. 1927).

Term "personal action" in this section [Code 1942, § 611] means action for recovery of personal property for breach of contract, or for injury to person or property. McNeely v. Natchez, 148 Miss. 268, 114 So. 484, 1927 Miss. LEXIS 55 (Miss. 1927).

Action for penalty imposed by ordinance for failure to observe regulations in operating ferry did not survive. McNeely v. Natchez, 148 Miss. 268, 114 So. 484, 1927 Miss. LEXIS 55 (Miss. 1927).

2. Suits brought by decedent.

According to established precedent and Miss. Code Ann. § 91-7-237, an executrix's medical malpractice action against a doctor and a medical practice survived a decedent's death and did not have to be recommenced because the executrix complied with Miss. R. Civ. P. 25 as the doctor and medical practice made no suggestion of death upon the record to trigger the ninety-day time requirement set out by the rule; nowhere does Rule 25 state that the substitution of parties is a commencement of a new action, but instead, it is the continuation of a prior action. Harris v. Darby, 17 So. 3d 1076, 2009 Miss. LEXIS 447 (Miss. 2009).

Where a cancer patient died while a medical malpractice suit he filed was pending, and his daughter was substituted as plaintiff and was appointed executrix of his estate, the trial court erred in dismissing the suit for failing to state a claim, because the amended complaint filed by the daughter on behalf of the estate sought recovery for injuries the patient suffered during his lifetime. Necaise v. Sacks, 841 So. 2d 1098, 2003 Miss. LEXIS 137 (Miss. 2003).

In an action to recover for damage to a life estate, the life tenant's sole heir could not be substituted as the plaintiff following the life tenant's death where no estate had been opened for the deceased life tenant and no administrator had been appointed, since the life tenant's sole heir did not automatically become her legal representative on her death (§ 91-7-237). Madison v. Vintage Petroleum, 872 F. Supp. 340, 1994 U.S. Dist. LEXIS 18918 (S.D. Miss. 1994), dismissed, 85 F.3d 625, 1996 U.S. App. LEXIS 12907 (5th Cir. Miss. 1996), aff'd, 87 F.3d 1311, 1996 U.S. App. LEXIS 16949 (5th Cir. Miss. 1996).

Actions for defamation are not personal actions for purposes of survival statute. Caine v. Hardy, 943 F.2d 1406, 1991 U.S. App. LEXIS 22455 (5th Cir. Miss. 1991), cert. denied, 503 U.S. 936, 112 S. Ct. 1474, 117 L. Ed. 2d 618, 1992 U.S. LEXIS 1727 (U.S. 1992).

Action by anesthesiologist against hospital challenging suspension of his privileges was not rendered moot by plaintiff's death, as such parts of claim which alleged wrongful discharge were preserved under state survival statute. Caine v. Hardy, 943 F.2d 1406, 1991 U.S. App. LEXIS 22455 (5th Cir. Miss. 1991), cert. denied, 503 U.S. 936, 112 S. Ct. 1474, 117 L. Ed. 2d 618, 1992 U.S. LEXIS 1727 (U.S. 1992).

Action under the Federal Fair Labor Standards Act for overtime compensation, liquidated damages, and attorney's fees, survives the death of the employee. Southern Package Corp. v. Walton, 196 Miss. 786, 18 So. 2d 458, 1944 Miss. LEXIS 257 (Miss.), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609, 1944 U.S. LEXIS 247 (U.S. 1944).

Judgment in action for injuries revived in name of wife as executrix held res judicata in her subsequent action for damages sustained by herself and children. Edward Hines Yellow Pine Trustees v. Stewart, 135 Miss. 331, 100 So. 12, 1924 Miss. LEXIS 85 (Miss. 1924).

Dismissal of suit brought by two parties upon death of one of them without motion or other preliminary proceeding will be set aside on proper application and cause reinstated. Merchants' Bank & Trust Co. v. Mississippi Nat'l Bank, 108 Miss. 356, 66 So. 537, 1914 Miss. LEXIS 194 (Miss. 1914).

Administratrix may revive action for personal injuries, and may thereafter sue for negligent death of decedent. Hamel v. Southern R. Co., 108 Miss. 172, 66 So. 426, 1914 Miss. LEXIS 188 (Miss. 1914).

Railroad defendant in suit for personal injury not entitled to move for revocation of letters of administration granted for purpose of bringing suit. Yazoo & M. V. R. Co. v. Jeffries, 99 Miss. 534, 55 So. 354, 1911 Miss. LEXIS 224 (Miss. 1911).

3. Suits brought against decedent.

An action against a member of a board of supervisors for the illegal appropriation of money survives against his estate. State ex rel. Patterson v. Warren, 254 Miss. 314, 182 So. 2d 234, 1966 Miss. LEXIS 1543 (Miss. 1966).

Provision for revival of pending action against deceased defendant's representative does not permit collection by execution of judgment rendered against representative. Dolan v. Tate, 161 Miss. 615, 137 So. 515, 1931 Miss. LEXIS 291 (Miss. 1931).

Suit against deceased defendant may proceed to judgment without probating claim against estate. Dillard & Coffin Co. v. Woollard, 124 Miss. 677, 87 So. 148, 1920 Miss. LEXIS 554 (Miss. 1921).

RESEARCH REFERENCES

ALR.

Death of party to arbitration agreement before award as revocation or termination of submission. 63 A.L.R.2d 754.

Validity of exception for specific kind of tort action in survival statute. 63 A.L.R.2d 1327.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged. 30 A.L.R.4th 707.

§ 91-7-239. Executor or administrator not to be sued for ninety days.

A suit or action shall not be brought against an executor or administrator until after the expiration of ninety (90) days from the date of letters testamentary or of administration.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 6 (1); 1857, ch. 60, art. 126; 1871, § 1184; 1880, § 2086; 1892, § 1922; 1906, § 2096a; Hemingway's 1917, § 1764; 1930, § 1715; 1942, § 612; Laws, 1975, ch. 373, § 7, eff from and after January 1, 1976.

Cross References —

Statute of limitations in regard to actions against executors and administrators, see § 15-1-25 et seq.

JUDICIAL DECISIONS

1. In general.

Health care providers' claim against the decedent's estate was time-barred because the four-year statute of limitations began to run ninety days after the executor was issued letters of administration, but the providers did not bring their cause of action until after the expiration of the limitations period. Rush Found. Hosp. v. Carlisle, — So. 3d —, 2018 Miss. App. LEXIS 111 (Miss. Ct. App. Mar. 6, 2018).

The purpose of this section [Code 1942, § 612] is to allow time to the administrator to examine and understand the condition of the estate, to provide the means of paying debts, if practicable, without suit by collection of assets, and to be advised of any demands against the estate which it may be necessary to defend. Great Southern Box Co. v. Barrett, 231 Miss. 101, 94 So. 2d 912, 1957 Miss. LEXIS 494 (Miss. 1957).

Where an action was brought against the administrator of an estate and two other defendants within four days after the administrator was issued letters, but the administrator did not raise the objection that the action was prematurely brought, the codefendants of the administrator could not raise the question. Great Southern Box Co. v. Barrett, 231 Miss. 101, 94 So. 2d 912, 1957 Miss. LEXIS 494 (Miss. 1957).

Suit could not properly be brought against an administratrix to have funds in a bank adjudged to belong to the plaintiff rather than to the estate until six months after date of letters of administration. Matthews v. Redmond, 202 Miss. 253, 32 So. 2d 123, 1947 Miss. LEXIS 268 (Miss. 1947).

Statute allows four years and six months within which an executor or administrator can be sued. Toler v. Wells, 158 Miss. 628, 130 So. 298, 1930 Miss. LEXIS 50 (Miss. 1930).

Claims maturing before decedent's death are barred, notwithstanding probate, by failure to sue thereon within 4 years and 6 months from grant of letters. Rogers v. Rosenstock, 117 Miss. 144, 77 So. 958, 1918 Miss. LEXIS 158 (Miss. 1918).

Claim for medical services rendered during last illness of intestate not barred until after 4 years and 6 months. Hardenstein v. Brien, 96 Miss. 493, 50 So. 979, 1910 Miss. LEXIS 152 (Miss. 1910).

A petition against the administrator and heirs to subject exempt property owned by decedent in his lifetime to a debt for labor performed, the amount of which has been allowed by the chancery court, is not a suit against an administrator, the proceeding not being a suit on a claim, and the administrator not being a necessary party thereto. Mitchener

v. Robins, 73 Miss. 383, 19 So. 103, 1895 Miss. LEXIS 134 (Miss. 1895).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 134 et seq.

CJS.

34 C.J.S., Executors and Administrators §§ 890-892.

§ 91-7-241. Suit by or against administrator not to abate.

If any executor or administrator die, resign, or be removed, suits or actions commenced by or against him shall not, for that reason, abate; but the same may be prosecuted by or against his successor, who may make himself a party by proper suggestion or, if he fail to do so, may be brought in by the opposite party by summons or scire facias. Judgments recovered by or against an executor or administrator who has died, resigned, or been removed may be revived for or against his successor in the same way.

HISTORY:

Codes, 1857, ch. 60, art. 124; 1871, § 1181; 1880, § 1514; 1892, § 1919; 1906, § 2094; Hemingway's 1917, § 1761; 1930, § 1716; 1942, § 613.

Cross References —

Limitation of actions against executor or administrator, see § 15-1-25.

Abatement of suits upon insolvency of estate, see § 91-7-273.

JUDICIAL DECISIONS

1. In general.

The statute applies to administrators appointed in this state only. Bowen v. Bonner, 45 Miss. 10, 1871 Miss. LEXIS 44 (Miss. 1871).

The administrator de bonis non may suggest the death of his predecessor, and ask that a judgment recovered by him be revived; he need not resort to scire facias. Dibble v. Norton, 44 Miss. 158, 1870 Miss. LEXIS 96 (Miss. 1870); Bowen v. Bonner, 45 Miss. 10, 1871 Miss. LEXIS 44 (Miss. 1871).

If a plaintiff die after the rendition of a judgment in his favor, the defendant may appeal before the judgment is revived in favor of the administrator. New Orleans, J., & G. N. R. Co. v. Rollins, 36 Miss. 384, 1858 Miss. LEXIS 109 (Miss. 1858).

RESEARCH REFERENCES

ALR.

Validity of exception for specific kind of tort action in survival statute. 77 A.L.R.3d 1349.

§ 91-7-243. Not bound to plead specially.

Executors, administrators, and temporary administrators shall not be bound to plead specially to any action or suit at law brought against them, but they may give any special matter in evidence under the general issue. An executor or administrator, or the sureties on his bond, shall not be chargeable beyond the amount of the assets of the testator or intestate by reason of any mistake, omission, or false pleading of the executor or administrator.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (105); 1857, ch. 60, art. 125; 1871, § 1183; 1880, § 2089; 1892, § 1923; 1906, § 2097; Hemingway's 1917, § 1765; 1930, § 1717; 1942, § 614.

JUDICIAL DECISIONS

1. In general.
Under the statute, the failure to plead plene administravit does not raise a presumption of assets. Dobbins v. Halfacre, 52 Miss. 561, 1876 Miss. LEXIS 255 (Miss. 1876).

If the administrator elect to plead specially, he will be held to the strictness of pleading. Wren's Adm'r v. Span's Adm'r, 2 Miss. 115, 1834 Miss. LEXIS 22 (Miss. 1834).

§ 91-7-245. Any one interested may defend suit.

Any legatee, heir, distributee, or creditor may be admitted by the court to defend any suit against the executor or administrator of the estate in which he is interested, and the case shall be tried and judgment rendered as if the suit had been defended by the executor or administrator; but judgment shall be given against the party for costs incurred in consequence of his becoming a party, if judgment shall be had against the executor or administrator.

HISTORY:
Codes, 1880, § 2090; 1892, § 1924; 1906, § 2098; Hemingway's 1917, § 1766; 1930, § 1718; 1942, § 615.

§ 91-7-247. Actions which accrue between administrators.

When there are two (2) or more administrators of an estate, and one or more of them take all the assets, or the greatest part thereof, and refuse to pay the debts or funeral expenses of the deceased, or to account with the other, the court, on petition of the aggrieved administrator and five (5) days' notice thereof to the other, may make an order requiring the delivery or payment to the aggrieved administrator of the proportionate share of the estate to which he is entitled. To enforce compliance, the court may revoke the letters of the administrator in default, and may fine him not exceeding One Hundred Dollars ($100.00) or imprison him not exceeding three (3) months as for contempt. Any executor being a residuary legatee may proceed in the same way and with like effect against his co-executor to recover his part of the estate.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (110); 1857, ch. 60, art. 120; 1871, § 1177; 1880, § 2082; 1892, § 1921; 1906, § 2096; Hemingway's 1917, § 1763; 1930, § 1719; 1942, § 616.

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators § 1155 et seq.

CJS.
34 C.J.S., Executors and Administrators § 853.

§ 91-7-249. Executor in his own wrong.

If any person shall alienate or embezzle any of the goods, chattels, personal property, or money of a person deceased, before taking out letters testamentary or of administration, such person shall be liable to the action of creditors and other persons aggrieved, as being executor in his own wrong.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (121); 1857, ch. 60, art. 127; 1871, § 1185; 1880, § 2087; 1892, § 1926; 1906, § 2100; Hemingway's 1917, § 1768; 1930, § 1720; 1942, § 617.

JUDICIAL DECISIONS

1. In general.

Personal liability of administrator for value of cotton taken from land of intestate and sold by him did not preclude him from bringing action against purchaser for value thereof. McGraw v. Robinson Mercantile Co., 95 Miss. 828, 49 So. 260, 1909 Miss. LEXIS 270 (Miss. 1909).

After having jointly converted promissory notes which had never been returned as assets, executors de son tort cannot claim that the notes were assets and only collectible by an administrator to be appointed. Weaver v. Williams, 75 Miss. 945, 23 So. 649, 1898 Miss. LEXIS 45 (Miss. 1898).

Charges paid by executors de son tort cannot be availed of as a set-off against a claim of an estate when unsupported by evidence showing that they were legal demands against the estate. Weaver v. Williams, 75 Miss. 945, 23 So. 649, 1898 Miss. LEXIS 45 (Miss. 1898).

RESEARCH REFERENCES

ALR.

Liability of estate for tort of executor, administrator, or trustee. 82 A.L.R.3d 892.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 34 et seq.

26 Am. Jur. Proof of Facts 2d 663, Surcharge of Executor for Nonpayment of Estate's Tax Liability.

CJS.

34 C.J.S., Executors and Administrators § 1216 et seq.

§ 91-7-251. Liability of executor or administrator of an executor de son tort.

The executor or administrator of an executor de son tort shall be liable to a recovery to the extent of the value of the property received or held by such executor de son tort, if sufficient assets shall have been received to pay the same. Any one who may have become liable as executor de son tort in any other state shall be liable to be sued in this state as such by any creditor, legatee, or distributee.

HISTORY:

Codes, 1857, ch. 60, art. 133; 1871, § 1191; 1880, § 2088; 1892, § 1927; 1906, § 2101; Hemingway's 1917, § 1769; 1930, § 1721; 1942, § 618.

RESEARCH REFERENCES

ALR.

Liability of estate for tort of executor, administrator, or trustee. 82 A.L.R.3d 892.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 1029 et seq.

CJS.

34 C.J.S., Executors and Administrators §§ 1217-1219 et seq.

§ 91-7-253. Fiduciary not to use funds; investment by fiduciary bank in time certificates of deposit.

No executor, administrator, guardian, receiver or other fiduciary appointed by or acting pursuant to the authority of any chancery court may borrow or use for his own benefit, directly or indirectly, any of the funds or property of the estate committed or entrusted to him by such court, nor purchase or acquire, directly or indirectly, any interest therein adverse to any creditor or beneficiary of such estate. Nor may he loan the same, or any part thereof, to any parent, brother, sister, son, daughter of, or one in loco parentis to the ward or himself, nor to any attorney or agent representing him or such estate, nor to the wife or any child of such attorney or agent. Nor may any court or chancellor authorize or ratify any such prohibited use, acquisition or loan.

Provided, however, the above prohibitions shall not extend to prohibit the investment by a banking corporation of the funds of an estate committed or entrusted to it in time certificates of deposit, provided such be approved by the chancellor, and the banking corporation shall first secure such certificates of deposit in excess of the portion insured by the Federal Deposit Insurance Corporation, as provided in section 81-5-33, Mississippi Code of 1972.

HISTORY:

Codes, 1942, § 619; Laws, 1936, ch. 243; Laws, 1977, ch. 493, eff from and after passage (approved April 15, 1977).

Cross References —

Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

Petition for authority to make loans or investments, see Miss. Uniform Chancery Court Rule 6.10.

JUDICIAL DECISIONS

1. In general.

A conservator's wife could be held liable in an action alleging intentional misappropriation of funds and defrauding of the estate, even though the wife asserted that she was only a "scrivener" for her husband and was not responsible for any of the transactions in the conservatorship account, where the wife received payment for keeping the books and received the benefit of direct loans and gifts from the conservatorship monies, she also received the indirect benefit of the use of other items purchased with the monies, she participated in the disbursal of the monies by writing the checks though she did not sign them, and she clearly knew where the monies were going. Bryan v. Holzer, 589 So. 2d 648, 1991 Miss. LEXIS 762 (Miss. 1991).

A finding that a conservator and his wife violated the fiduciary duty to the ward and converted the ward's funds to their own use was supported by evidence that the ward's funds had been used to purchase a van which was used by the conservator and his wife, and that the conservator, his wife, and their children were the recipients of loans and gifts from monies in the conservatorship account, without previous court approval. Bryan v. Holzer, 589 So. 2d 648, 1991 Miss. LEXIS 762 (Miss. 1991).

The Chancellor properly removed an administrator under § 91-7-253, where the administrator admitted that he had spent or lent large sums of funds taken from estate for which he was unable to account. Kelly v. Shoemake, 460 So. 2d 811, 1984 Miss. LEXIS 2019 (Miss. 1984).

Where the testator bequeathed half of his stock to his daughter and the other half to his son for life, with remainder to the daughter and the daughter as executrix surrendered the certificate and obtained two certificates, one of which was issued in the son's name and thereafter the son transferred the certificate to daughter, retaining beneficial interest therein for life, this section [Code 1942, § 619] was not applicable. Maples v. Howell, 217 Miss. 322, 64 So. 2d 364, 1953 Miss. LEXIS 435 (Miss. 1953).

RESEARCH REFERENCES

ALR.
Validity and construction of trust provision authorizing trustee to purchase trust property. 39 A.L.R.3d 836.

Am. Jur.
7 Am. Jur. Pl & Pr Forms (Rev), Conversion, Form 81.3 (complaint, petition, or declaration – for conversion – by conservatee against conservator).

§ 91-7-255. Fiduciary not to transfer negotiable papers.

No executor, administrator, guardian, receiver, or other fiduciary appointed by or acting pursuant to the authority of any chancery court may sell, assign, or transfer any note, bill of exchange, bond, stock certificate, or other negotiable paper belonging to the estate committed or intrusted to him by such court, unless he shall be authorized so to do by an order of the court or chancellor, or by the last will and testament of the decedent. Every such prohibited sale, assignment, or transfer shall be void, whether the vendee, assignee, or transferee shall have had notice or knowledge of the want or lack of authority of such fiduciary to sell, assign, or transfer the same or not.

HISTORY:
Codes, 1942, § 620; Laws, 1936, ch. 243.

Cross References —
Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

1. In general.
This section [Code 1942, § 620] was enacted to protect creditors and those interested in the estate under disposition of the assets by the executor and where there is no claim that the estate is insolvent, or that there are any creditors and that all beneficiaries have not received the specific bequests bequeathed to them, or that abatement among the beneficiaries is needed, this section is inapplicable. Maples v. Howell, 217 Miss. 322, 64 So. 2d 364, 1953 Miss. LEXIS 435 (Miss. 1953).

§ 91-7-257. Property not to be removed from state.

An executor or administrator shall not remove any of the property of the estate out of this state. If a chancellor or clerk of a chancery court shall be satisfied, by petition or otherwise in term time or vacation, that any executor or administrator is about to remove the property of the estate out of this state, he shall issue a precept to the sheriff of the proper county, commanding him to seize the property about to be removed and hold the same until legally disposed of; and the letters of such executor or administrator may be revoked, on due notice, and administration de bonis non granted to some other person. In case of any such removal, suit may be forthwith instituted on the bond by any of the distributees or creditors of the estate; and, on satisfactory evidence of the removal of the property out of the state, judgment shall be rendered for the full value thereof and such other damages as the parties suing shall have sustained.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (93); 1857, ch. 60, arts. 128, 129; 1871, §§ 1186, 1187; 1880, §§ 2010, 2011; 1892, § 1928; 1906, § 2102; Hemingway's 1917, § 1770; 1930, § 1722; 1942, § 621.

Cross References —

Suit for devastavit, see § 91-7-313.

Removal of ward's property by guardian from state, see § 93-13-65.

Additional provisions governing the conduct of executors, administrators, and other fiduciaries, see Miss. Uniform Chancery Court Rules 6.01 et seq.

JUDICIAL DECISIONS

1. In general.

Administratrix did not fail to marshal the assets of an estate in a case where stocks were located in Louisiana; because a decedent's stocks were never located inside of Mississippi, they were not removed in violation of Miss. Code Ann. § 91-7-257. Longmire v. Harveston (In re Estate of McGee), 982 So. 2d 428, 2007 Miss. App. LEXIS 703 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 237 (Miss. 2008).

§ 91-7-259. Foreign executor or administrator may sue.

Executors and administrators who have qualified in other states or countries may sue in the courts of this state, or may receive without suit and give a valid acquittance for any property of, or debts due to, their testators or intestates, after filing in the office of the clerk of the chancery court of the county where there may be some person indebted to the decedent or having some of his effects in possession, a certified copy of the record of the appointment and qualification of the executor or administrator according to the law of the state or country where he is qualified, and a certificate of the officer before whom he is liable to account as such that he is there liable to account for the thing sued for or received.

HISTORY:

Codes, 1857, ch. 60, art. 131; 1871, § 1189; 1880, § 2091; 1892, § 1925; 1906, § 2099; Hemingway's 1917, § 1767; 1930, § 1723; 1942, § 622.

Cross References —

Venue of actions against nonresident executors, see § 11-11-9.

Recording of foreign wills, see § 91-7-33.

Revocation of orders testamentary or letters of administration of nonresident, see § 91-7-89.

Suits against nonresident fiduciary, see § 91-7-313.

Suits by nonresident guardians, see § 93-13-183.

JUDICIAL DECISIONS

1. In general.

Failure to comply with this section [Code 1942, § 622] is ground for dismissing a suit brought by a foreign administrator. Davis v. Meridian & B. R. Co., 248 Miss. 707, 161 So. 2d 171, 1964 Miss. LEXIS 296 (Miss. 1964).

Qualification by a former administrator after expiration of the time within which suit for wrongful death must be brought, is ineffective to enable him to maintain a suit brought within such time. Davis v. Meridian & B. R. Co., 248 Miss. 707, 161 So. 2d 171, 1964 Miss. LEXIS 296 (Miss. 1964).

An administratrix lawfully appointed in another state could sue in state for employee's death under Federal Employers' Liability Act without taking out ancillary letters. Gulf, M. & N. R. Co. v. Wood, 164 Miss. 765, 146 So. 298, 1933 Miss. LEXIS 267 (Miss.), cert. denied, 289 U.S. 759, 53 S. Ct. 791, 77 L. Ed. 1502, 1933 U.S. LEXIS 416 (U.S. 1933), limited, Davis v. Meridian & B. R. Co., 248 Miss. 707, 161 So. 2d 171, 1964 Miss. LEXIS 296 (Miss. 1964).

Payment of debt to foreign administrator no defense to suit by heirs unless certified copy of appointment filed. Richardson v. Neblett, 122

Miss. 723, 84 So. 695, 1920 Miss. LEXIS 472 (Miss. 1920).

Defendant paying money belonging to decedent to foreign administrator not qualified in this state, was liable to local administrator for the amount although 2 years later proper certificate was filed. City Sav. & Trust Co. v. Branchieri, 111 Miss. 774, 72 So. 196, 1916 Miss. LEXIS 390 (Miss. 1916).

§ 91-7-261. Procedures for insolvent estates.

The executor or administrator shall take proper steps speedily to ascertain whether the estate be solvent or insolvent. If both the real and personal estate be insufficient to pay the debts of the deceased, he shall exhibit to the court a true account of all the personal estate, assets of every description, the land of the deceased, and all the debts due from the deceased; and if it appear to the court that the estate is insolvent, it shall make an order for the sale of all the property. The proceeds of such sale and all other assets shall be equally distributed among all the creditors whose claims shall be duly filed and established, in proportion to the sums due and owing to them respectively, the expenses of the last sickness, the funeral, and the administration, including commissions, being first paid. Before any decree for sale is made, the devisees or heirs shall be made parties to the proceeding.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (103); 1857, ch. 60, art. 98; 1871, § 1158; 1880, § 2054; 1892, § 1939; 1906, § 2113; Hemingway's 1917, § 1781; 1930, § 1724; 1942, § 623.

Cross References —

Reports of insolvency by tax collector, see § 27-49-1 et seq.

Rights of administrator de bonis non in regard to insolvent estates, see § 91-7-71.

Probate of claims, see § 91-7-149 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Expenses of last illness and funeral.
3. Attorney fees.
4. Jurisdiction.

1. In general.

A year's allowance to a widow and children in insolvent estates is a claim of next priority, is to be paid before creditors, and such allowance may be paid out of exempt personal property, in cases where the exempt property is disposed of by the will of a testator; in cases of intestacy, it descends as provided by statute, and, where administration is not necessary, is not subject to administrative expenses. Mills v. Mills, 279 So. 2d 917, 1973 Miss. LEXIS 1495 (Miss. 1973).

Duty of administrator to collect debts of insolvent estate without order of court. McGraw v. Robinson Mercantile Co., 95 Miss. 828, 49 So. 260, 1909 Miss. LEXIS 270 (Miss. 1909).

2. Expenses of last illness and funeral.

If estate be insolvent, expenses of last illness and funeral are preferred, but in determining solvency, exempt property is not considered. De Baum v. Hulett Undertaking Co., 169 Miss. 488, 153 So. 513, 1934 Miss. LEXIS 66 (Miss. 1934).

Where estate was insolvent, rent due landlord for store occupied by decedent before death, while claim superior to that of general creditors, was not preferred over claims for expenses of last illness, funeral, and administration, where administrator sold goods in store building under court order. Walker v. First Nat'l Bank, 168 Miss. 487, 151 So. 740, 1934 Miss. LEXIS 350 (Miss. 1934).

Expenses of last illness and funeral expenses constitute preference claim over enrolled judgment upon which execution has not been issued and levied. Dabney v. Continental Jewelry Co., 163 Miss. 1, 140 So. 338, 1932 Miss. LEXIS 9 (Miss. 1932).

Claim for expenses of funeral and last sickness not filed for examination pursuant to administrator's notice, though preference claims, not allowed except out of surplus left after payment of filed claims. Merchants' & Farmers Bank v. Kelleher, 119 Miss. 232, 80 So. 697, 1918 Miss. LEXIS 33 (Miss. 1919).

3. Attorney fees.

It was not an abuse of discretion to appoint attorneys representing a decedent's son appointed as temporary administrator of the decedent's estate a fee from the insolvent estate because the attorneys were creditors of the estate who were entitled to payment before any distributions to heirs. Flowers v. Flowers (In re Estate of Flowers), — So. 3d —, 2018 Miss. App. LEXIS 2 (Miss. Ct. App. Jan. 2, 2018).

In their cross-appeal, the co-executrixes of an estate that was the center of a long, drawn-out dispute, argued that the chancellor had not followed proper procedure for determining that the estate was insolvent, as stated in Miss. Code Ann. §§ 91-7-261 and 91-7-265. The appellate court ruled that the chancellor had not abused his discretion in denying the payment of attorney's fees from the estate assets. Lynn v. Lynn (In re Will of Lynn), 878 So. 2d 1052, 2004 Miss. App. LEXIS 695 (Miss. Ct. App. 2004).

4. Jurisdiction.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open, because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371, 2008 Miss. App. LEXIS 360 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

ALR.

Amount of funeral expenses allowable against decedent's estate. 4 A.L.R.2d 995.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 832 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1401 et seq. (insolvent estates).

CJS.

34 C.J.S., Executors and Administrators § 829 et seq.

§ 91-7-263. Creditor may institute insolvency proceedings.

Any creditor of the decedent may represent to the court that the estate is insolvent, and thereupon the executor or administrator and heirs or devisees shall be summoned to answer whether or not it be insolvent. If it shall be found so, like proceedings shall be had as when an estate is represented to be insolvent by the executor or administrator.

HISTORY:

Codes, 1880, § 2055; 1892, § 1940; 1906, § 2114; Hemingway's 1917, § 1782; 1930, § 1725; 1942, § 624.

§ 91-7-265. Decree of insolvency after all property sold.

Where an estate is found to be insolvent after a sale of all the property, real and personal, it may be decreed to be insolvent and be proceeded with accordingly.

HISTORY:

Codes, 1880, § 2058; 1892, § 1941; 1906, § 2115; Hemingway's 1917, § 1783; 1930, § 1726; 1942, § 625.

JUDICIAL DECISIONS

1. In general.

In their cross-appeal, the co-executrixes of an estate that was the center of a long, drawn-out dispute, argued that the chancellor had not followed proper procedure for determining that the estate was insolvent, as stated in Miss. Code Ann. § 91-7-261 and 91-7-265. The appellate court ruled that the chancellor had not abused his discretion in denying the payment of attorney's fees from the estate assets. Lynn v. Lynn (In re Will of Lynn), 878 So. 2d 1052, 2004 Miss. App. LEXIS 695 (Miss. Ct. App. 2004).

§ 91-7-267. Publication and claims presented in insolvent estate.

If an estate be declared insolvent after the executor or administrator has made publication to the creditors to present their claims and have them probated and registered, another publication to present claims shall not be necessary. If an estate be declared insolvent before the executor or administrator has made such publication, the court shall order the executor or administrator to make publication, requiring the creditors to present their claims within ninety (90) days and have them probated and registered. Any creditor who shall not register his claim by the day stated in the publication shall be forever barred.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 21 (5); 1857, ch. 60, art. 101; 1871, § 1161; 1880, § 2059; 1892, § 1942; 1906, § 2116; Hemingway's 1917, § 1784; 1930, § 1727; 1942, § 626; Laws, 1975, ch. 373, § 8, eff from and after January 1, 1976.

Cross References —

Notice to creditors of estate, see § 91-7-145.

Probate of claims against estate, see §§ 91-7-149 et seq.

§ 91-7-269. Filing, examination, and adjudication of claims in insolvent estate.

When the time for probating and registering claims has elapsed, the court shall cause notice to be inserted for three successive weeks in some newspaper published in the county that at a time fixed the claims will be taken up for examination and adjudication by the court or by the clerk in vacation, as the order may designate, that all claims not required by law to be probated and registered must be filed with the clerk by the day named in the notice, and that all creditors may attend. At the time appointed the court shall examine into the validity of each claim which has been probated and registered and such other claims as may have been filed with the clerk. The executor or administrator or any creditor may object to any claim, and the court shall hear evidence in support of the objection, shall allow any claim that should be allowed, and shall reject in whole or in part any which is in whole or in part not well founded. It shall not be necessary for any creditor to refile with the clerk any claim which has been duly probated and registered within the time and in the manner required by law. All other claims, unless filed with the clerk by the day named in the notice, shall not be allowed; but lawful claims, not required to be probated and registered, which are not filed with the clerk by the day named in the notice shall not be barred as to any surplus that remains after paying in full all claims allowed by the court at the examination and adjudication named in the notice. Provided, however, that in cases where the executor or administrator shall have, prior to the adjudication of insolvency, paid any claim or claims, whether probated and registered or not, such executor or administrator shall have the right by the day named in the notice, to file with the clerk a verified itemized statement of the amount which has been paid thereon, and obtain allowance therefor in the same amount to which the creditor or creditors, whose claim or claims had been so paid, would have been entitled had such creditor filed the claim.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 21 (5); 1857, ch. 60, art. 101; 1871, § 1161; 1880, § 2059; 1892, § 1943; 1906, § 2117; Hemingway's 1917, § 1785; 1930, § 1728; 1942, § 627; Laws, 1926, ch. 146; Laws, 1936, ch. 242.

Cross References —

Register of claims to be maintained by chancery clerk, see § 9-5-173.

Docketing proceedings in chancery court, see §§ 9-5-205, 9-5-215.

Balance of mutual dealings on death of one party, see § 11-7-67.

JUDICIAL DECISIONS

1. In general.

Decree allowing or disallowing contested claim against decedent's estate can be rendered only by chancellor having jurisdiction of estate being administered. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

In contest of claim against decedent's estate, only decree allowing or disallowing claim can be rendered, and monetary judgment against administrator for sum for which claim is allowed, if allowed, would be erroneous. Trippe v. O'Cavanagh, 203 Miss. 537, 36 So. 2d 166, 1948 Miss. LEXIS 304 (Miss. 1948).

Under this section [Code 1942, § 627] claims must be refiled with clerk of chancery court for adjudication; judgment as to priority of claim cannot be collaterally attacked. Maxey v. Goolsby, 133 Miss. 554, 98 So. 99, 1923 Miss. LEXIS 171 (Miss. 1923).

RESEARCH REFERENCES

ALR.

Exclusiveness of grounds enumerated in statute providing, under specified circumstances, extension of time for filing claims against decedent's estate. 57 A.L.R.2d 1304.

Appealability of order, of court processing probate jurisdiction court order, allowing or denying tardy presentation of claim to personal representative. 66 A.L.R.2d 659.

Executors and administrators: construction of statutory provisions giving priority on distribution to claims for wages of servants, employees, or the like. 52 A.L.R.3d 940.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 832 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1411 et seq. (settlement of accounts and distribution of insolvent estate).

CJS.

34 C.J.S., Executors and Administrators § 829 et seq.

§ 91-7-271. Distribution of assets in insolvent estate.

When the claims are established and the amount of assets ascertained, the court shall adjudge the pro rata share of each creditor, deducting first the preference claims and deducting from debts not due the legal interest from the time of payment up to the time of their maturity; and the executor or administrator shall distribute all money amongst the creditors, in proportion to their demands. A creditor whose pro rata share has been so adjudged, after ten days from the date of the decree ascertaining his share, the same not having been paid, may have execution against the executor or administrator and the sureties on his bond for such sum as may be due him, and costs of execution.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 1 (103); 1857, ch. 60, art. 102; 1871, § 1162; 1880, § 2060; 1892, § 1944; 1906, § 2118; Hemingway's 1917, § 1786; 1930, § 1729; 1942, § 628.

JUDICIAL DECISIONS

1. In general.
Representative of insolvent estate may in proceeding before chancellor adjudicating claims of creditors set up bar of statute requiring action on claims against decedent to be brought within 4 years from grant of letters. Rogers v. Rosenstock, 117 Miss. 144, 77 So. 958, 1918 Miss. LEXIS 158 (Miss. 1918).

An attorney employed by some of the creditors of an insolvent estate who realizes by his services a fund for distribution among all the creditors cannot have the fund charged with his fees, but must look alone to those who employed him for compensation. Rives v. Patty, 74 Miss. 381, 20 So. 862, 1896 Miss. LEXIS 119 (Miss. 1896).

RESEARCH REFERENCES

Am. Jur.
31 Am. Jur. 2d, Executors and Administrators § 833.
10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1420 et seq. (judgment or decree of distribution of insolvent estate).

CJS.
34 C.J.S., Executors and Administrators §§ 842-844 et seq.

§ 91-7-273. Suits not to abate on insolvency.

A suit or action which may be pending against an executor or administrator at the time the estate is reported insolvent shall not, on that account, abate, but may be prosecuted to final judgment. The judgment shall constitute a claim against the estate, if probated and registered as other claims, but shall not have priority over general creditors. If any such suit be undetermined when the claims are to be examined and allowed by the court and the distributive shares ascertained and declared, such examination and allowance may be postponed until the suit be finally determined, or the validity of the claims sued on may be determined by the chancery court.

HISTORY:
Codes, Hutchinson's 1848, ch. 49, art. 2 (1); 1857, ch. 60, art. 103; 1871, § 1163; 1880, § 2061; 1892, § 1945; 1906, § 2119; Hemingway's 1917, § 1787; 1930, § 1730; 1942, § 629.

§ 91-7-275. Suit not allowed after decree of insolvency.

A suit or action shall not be brought against an executor or administrator on any claim against the decedent after the estate has been declared insolvent.

HISTORY:
Codes, 1880, § 2062; 1892, § 1946; 1906, § 2120; Hemingway's 1917, § 1788; 1930, § 1731; 1942, § 630.

JUDICIAL DECISIONS

1. In general.
This provision bars only actions on contract, not actions in tort. Bullock v. Young, 243 Miss. 146, 137 So. 2d 777, 1962 Miss. LEXIS 326 (Miss. 1962).

A personal representative is liable to suit on a claim arising from the alleged negligence of his decedent, notwithstanding the estate has been declared insolvent. Bullock v. Young, 243 Miss. 146, 137 So. 2d 777, 1962 Miss. LEXIS 326 (Miss. 1962).

§ 91-7-277. Annual accounts.

Every executor or administrator, at least once in each year or oftener if required by the court, shall present under oath an account of his administration, showing the disbursements, every item of which and the amount thereof to be distinctly stated and supported by legal voucher, and it shall also show the receipts of money and from what sources. The failure to account annually shall be a breach of the administration bond, for which it may be put in suit, or the executor or administrator may be removed; but the court may, on application and on cause shown, extend the time for accounting. In the event that the account shall be presented by a federally regulated bank, thrift or trust company, and such account or the petition for the approval of same shall contain a statement under oath by an officer of said bank, thrift or trust company showing that the vouchers covering the disbursements in the account presented are on file with said bank, thrift or trust company, such bank, thrift or trust company shall not be required to file vouchers. Provided, however, that said bank, thrift or trust company shall produce said vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of said bank, thrift or trust company and, provided further, that the court on its own motion or on the motion of any interested party may require that said vouchers be produced and inspected at the time of hearing of any objections that may be filed to any annual accounts of any executors or administrators. The court shall examine all such accounts and the vouchers required to be filed or produced for inspection, and if satisfied that the account is just and true, it shall decree the same approved and allowed as a correct annual settlement. If the decree allowing and approving the account of any executor or administrator shall affirmatively recite that the vouchers to support the disbursements shown in the account were exhibited to and approved by the court, it shall not be necessary to file the vouchers in the cause, but they shall be preserved by the executor or administrator until after the final accounting has been approved.

Notwithstanding the foregoing, any record, voucher, claim, check, draft, receipt, writing, account, statement, note or other evidence which may be furnished, filed, probated, presented or produced, or required to be produced, by a federally regulated bank, thrift or trust company shall be deemed to be an original admitted, furnished, filed, probated, presented, or produced for all purposes and with the same effect as the original, if such financial institution produces a copy of such evidence from a format of storage commonly used by financial institutions, whether electronic, imaged, magnetic, microphotographic or otherwise.

HISTORY:

Codes, 1857, ch. 60, art. 104; 1871, § 1164; 1880, § 2067; 1892, § 1947; 1906, § 2121; Hemingway's 1917, § 1789; 1930, § 1732; 1942, § 631; Laws, 1960, ch. 217, § 5; Laws, 1968, ch. 306, § 1; Laws, 1996, ch. 400, § 43, eff from and after passage (approved March 19, 1996).

Editor's Notes —

Section 81-1-57 provides that wherever the words "Department of bank supervision", or "department" when referring to the department of bank supervision, appear they shall be construed to mean the department of banking and consumer finance.

Cross References —

Duty of chancery clerk to keep record of accounts allowed, see § 9-5-137.

Payment of inheritance tax before settlement of executor's accounts, see § 27-9-41.

Final accounts, see § 91-7-291.

Annual accounts by guardians, see § 93-13-67.

Provision that accounts be personally signed and sworn to by executor or administrator, see Miss. Uniform Chancery Court Rule 6.14.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Failure to provide accounting.

1. In general.

Daughter did not show that the son had not made a sufficient accounting of estate assets, as required by Miss. Code Ann. § 91-7-277, and, thus, no additional accounting was required regarding them in a case where the daughter sought to challenge the will of the testator, who was the father of the daughter and son. The testator's will did not require the son to furnish any accounting to any court, file an inventory of property received by the beneficiaries, or to report to any court with respect to the duties imposed upon the beneficiaries or regarding the estate administration, and there was not evidence that the estate had been mismanaged. Ellzey v. McCormick, 17 So. 3d 583, 2009 Miss. App. LEXIS 118 (Miss. Ct. App. 2009).

The Chancellor properly removed an administrator under § 91-7-277, where the administrator failed to file sufficiently specific accountings and inventories. Kelly v. Shoemake, 460 So. 2d 811, 1984 Miss. LEXIS 2019 (Miss. 1984).

The requirement of § 91-7-277 that annual accountings be made is mandatory and not simply advisory, and the fact that co-executors' failure to make annual accountings resulted in no loss to the estate was of no consequence. Abernathy v. Smith, 458 So. 2d 691 (Miss. 1984).

Statutory requirement that executor file vouchers for disbursements for annual accounts mandatory. Ridgeway v. Jones, 125 Miss. 22, 87 So. 461, 1921 Miss. LEXIS 103 (Miss. 1921).

Executor may not pay claims not probated and allowed. Ridgeway v. Jones, 125 Miss. 22, 87 So. 461, 1921 Miss. LEXIS 103 (Miss. 1921).

Expenditures for funeral expenses and monument may be allowed if reasonable. Ridgeway v. Jones, 125 Miss. 22, 87 So. 461, 1921 Miss. LEXIS 103 (Miss. 1921).

2. Failure to provide accounting.

Finding against the executrix was appropriate because she mismanaged the decedent's estate and was thus accountable for her actions. She further failed to provide an accounting as required by Miss. Code Ann. § 91-7-277. Frazier v. Shackelford (In re Estate of Carter), 912 So. 2d 138, 2005 Miss. LEXIS 662 (Miss. 2005).

RESEARCH REFERENCES

ALR.

Application of dead man's statute in proceeding involving account of personal representative. 2 A.L.R.2d 349.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 903.

CJS.

34 C.J.S., Executors and Administrators § 1038.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-7-279. Requirements of vouchers.

In every case where it is required that vouchers for disbursements in any annual or final account be filed, each such voucher shall be written upon, or affixed to, not less paper than a one half (½) page of legal cap, or a voucher may be an ordinary bank check of such size as is in general use. Each shall be entitled of the cause and numbered with the number of the case, and each shall be filed by the clerk. The clerk shall not receive and file any voucher unless it conform to, or is made by him to conform to, this section; and he shall fasten together all the vouchers belonging to the same account in their numerical order and so arrange them that each can be easily found and read.

HISTORY:

Codes, 1892, § 1948; 1906, § 2122; Hemingway's 1917, § 1790; 1930, § 1733; 1942, § 632; Laws, 1960, ch. 217, § 6; Laws, 1966, ch. 324, § 1, eff from and after passage (approved March 2, 1966).

Cross References —

Vouchers in guardianship accounts, see § 93-13-73.

What vouchers must show, see Miss. Uniform Chancery Court Rule 6.06.

§ 91-7-281. Attorney's fees allowable.

In annual and final settlements, the executor, administrator, or guardian shall be entitled to credit for such reasonable sums as he may have paid for the services of an attorney in the management or in behalf of the estate, if the court be of the opinion that the services were proper and rendered in good faith. Where the executor, administrator, or guardian acts also as attorney, the court may allow such executor, administrator, or guardian credit for his reasonable compensation as attorney in lieu of his compensation as executor, administrator, or guardian.

HISTORY:

Codes, 1892, § 1957; 1906, § 2131; Hemingway's 1917, § 1799; 1930, § 1734; 1942, § 633; Laws, 1882, p. 113; Laws, 1928, ch. 153.

Cross References —

Attorney's fees in guardianship proceedings, see § 93-13-79.

Petitions for allowance of attorney's fees, see Miss. Uniform Chancery Court Rule 6.13.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Amount of fees.
3. Executor, administrator, or guardian acting as attorney.

1. In general.

Attorney's fees are not authorized where services are rendered for sole benefit of individual interested in estate; administratrix should not have been allowed attorney's fees, to be paid out of estate, where she was the only creditor of estate and record revealed that only pleading for motion filed by her not in furtherance of recovering her claim against estate was payment of outstanding funeral bill. Braxton v. Johnson, 514 So. 2d 1232 (1987).

The payment of attorneys' fees is an expense of the administration of a decedent's estate, and since such fees are incurred after testator's death, they do not have to be probated; the testator may waive the testatrix's duty to account, but upon a charge of the devisees of mismanagement by the executrix, the chancery court may properly require an accounting, with the result that an executrix may act at her peril in paying attorneys' fees without court approval. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Although attorney's fees are the personal obligation of the administrator or executor, they may be paid out of the estate as administration expenses. Scott v. Hollingsworth, 487 So. 2d 811, 1986 Miss. LEXIS 2438 (Miss. 1986).

The supreme court would not require an estate to pay for legal services rendered by an attorney in the interest of the executrix in her individual capacity and which was of no benefit to the estate itself. Ruffin v. Burkhalter, 238 Miss. 358, 118 So. 2d 357, 1960 Miss. LEXIS 413 (Miss. 1960).

Attorney's fees in the management of statutory estates are not a charge upon the estate itself, but are personal obligations of the administrator or executor or guardian, and an allowance for attorney's fees must be done on the request or petition of the administrator or executor or guardian and not on the direct petition of the attorney himself. Hutton v. Gwin, 188 Miss. 763, 195 So. 486, 1940 Miss. LEXIS 55 (Miss. 1940).

Where the testator prescribes that his wife should be the guardian of the person and estate of his minor son until he should become twenty-one years of age and should give a bond as guardian effective during that time, and that after the minor had reached his majority the guardian should thereupon become trustee and should furnish bond as such trustee until the son should attain thirty-one years old, at which time the balance of the estate was to be distributed, a period of minority constituted a statutory guardianship and attorney's fees for services rendered during that period could not be allowed on the direct petition of the attorney himself. Hutton v. Gwin, 188 Miss. 763, 195 So. 486, 1940 Miss. LEXIS 55 (Miss. 1940).

Attorneys' fees incurred by the personal representative in the administration of an estate in his custody are his personal obligations, for which he may be reimbursed if the court be of the opinion that the services were necessary and rendered in good faith. Clarksdale Hospital v. Wallis, 187 Miss. 834, 193 So. 627, 1940 Miss. LEXIS 238 (Miss. 1940).

Allowance for attorneys' fees is unauthorized where services are rendered for sole benefit of an individual, or group of individuals, interested in the estate, as against the others interested. Clarksdale Hospital v. Wallis, 187 Miss. 834, 193 So. 627, 1940 Miss. LEXIS 238 (Miss. 1940).

Where hospital's claim to legacy was against the interest of all the other legatees and devisees under a will, and its successful termination resulted in decreasing their claims, the hospital was not entitled to reasonable attorneys' fees incurred in defending its rights to the legacy, notwithstanding that the decision as to the validity of the bequest involved a construction of the will which was of interest to all concerned. Clarksdale Hospital v. Wallis, 187 Miss. 834, 193 So. 627, 1940 Miss. LEXIS 238 (Miss. 1940).

Attorney's fees held personal debts of administrator, and not of estate. Reedy v. Allen, 181 Miss. 471, 179 So. 569, 1938 Miss. LEXIS 89 (Miss. 1938).

Ordinarily administrator is personally liable to attorney, and entitled, in connection with annual and final settlement, to credit for reasonable attorney's services on behalf of estate if court thinks they were proper and in good faith. Reedy v. Allen, 181 Miss. 471, 179 So. 569, 1938 Miss. LEXIS 89 (Miss. 1938).

Chancellor had no authority to allow attorney's fees where there was no evidence of employment contract. Reedy v. Allen, 181 Miss. 471, 179 So. 569, 1938 Miss. LEXIS 89 (Miss. 1938).

Order allowing attorney's fee in ex parte proceeding for services rendered predecessor of present administratrix and trustee could not be sustained on ground administratrix should have objected to filing petition, where neither petition nor proof showed any power in administratrix or trustee to bind estate, and it was not shown that predecessor was insolvent or out of state. Reedy v. Allen, 181 Miss. 471, 179 So. 569, 1938 Miss. LEXIS 89 (Miss. 1938).

Where will empowered executor and trustee to employ persons necessary to manage trust estate, attorney's fees could be made charge against trust estate. Gwin v. Fountain, 159 Miss. 619, 126 So. 18, 132 So. 559, 1930 Miss. LEXIS 354 (Miss. 1930).

Ordinarily debts contracted by administrator are only personal obligations, and this is especially true of attorneys' fees. Howell v. Myer, 105 Miss. 771, 63 So. 233, 1913 Miss. LEXIS 261 (Miss. 1913).

Statute is intended to prevent necessity of suit by attorney against administrator to establish claim for services to estate; statute has no reference to claim which attorney seeks to enforce over administrator's protest. Murphy v. Harris, 93 Miss. 286, 48 So. 232, 1908 Miss. LEXIS 166 (Miss. 1908).

The funeral expenses of decedent and an administrator's attorney's fees are not debts against him, and the administrator may pay them with the proceeds of a life insurance policy which is exempt from liability for his debts. Dobbs v. Chandler, 84 Miss. 372, 36 So. 388, 1904 Miss. LEXIS 43 (Miss. 1904).

2. Amount of fees.

The chancellor did not abuse his discretion by not allowing additional attorneys fees where the executrix was found in civil and criminal contempt for failing to abide by a previous court order and was subsequently jailed, and where the executrix received legal advice in connection with the contempt action from the same counsel whom she retained on behalf of the estate and thus did not have the purpose of benefiting the estate. In re Estate of Collins v. Collins, 742 So. 2d 147, 1999 Miss. App. LEXIS 251 (Miss. Ct. App. 1999).

Lawyer should submit time sheet to chancellor listing hours spent serving estate and fee normally charged for such service when pursuing attorneys fees under § 91-7-281; attorney's fees are not recoverable from estate for services performed before appointment of administrator. Braxton v. Johnson, 514 So. 2d 1232 (1987).

The chancellor did not abuse his discretion in allowing the payment of attorney's fees for services rendered prior to the date the decedent's estate could and should have been closed, nor in surcharging the executrix for the balance of the legal fees incurred after that date. Harper v. Harper, 491 So. 2d 189, 1986 Miss. LEXIS 2508 (Miss. 1986).

Award of $1500 as fees for attorney retained by an estate valued in excess of $229,000 was not so inadequate as to amount to an abuse of the chancellor's discretion. Scott v. Hollingsworth, 487 So. 2d 811, 1986 Miss. LEXIS 2438 (Miss. 1986).

Where the proper management, handling, and preservation of funds of a decedent's estate in the sum of $13,750, derived from condemnation proceedings, required the executor and life tenant to seek the aid of the chancery court and to submit the matter to its jurisdiction for proper decrees in regard to the disposition of the funds, the allowance of an attorney's fee in the sum of $1,000 was justified. Bradley v. Bradley, 185 So. 2d 655, 1966 Miss. LEXIS 1518 (Miss. 1966).

Allowance of compensation and attorney's fees to an administrator within the limits prescribed by statute is a matter addressed to the sound discretion of the chancery court, and the supreme court will not interfere with the exercise of that discretion except in cases of its manifest and flagrant abuse. Schwander v. Rubel, 221 Miss. 875, 75 So. 2d 45, 1954 Miss. LEXIS 603 (Miss. 1954).

Chancery court's allowance for attorney's fees which was slightly less than four per cent of estate, held not abuse of discretion. King v. Wade, 175 Miss. 72, 166 So. 327, 1936 Miss. LEXIS 8 (Miss. 1936).

Instead of paying attorneys and asking credit therefor, executrix may ask court to fix fees. Brown v. Franklin, 166 Miss. 899, 145 So. 752, 1933 Miss. LEXIS 328 (Miss. 1933).

Amount allowable as attorney's fee for services rendered in administration of estate rests in sound discretion of chancery court. Brown v. Franklin, 166 Miss. 899, 145 So. 752, 1933 Miss. LEXIS 328 (Miss. 1933).

Time is not the only element involved in fixing attorney's fee for services rendered executrix, since skill, responsibility, and amount involved must also be considered. Brown v. Franklin, 166 Miss. 899, 145 So. 752, 1933 Miss. LEXIS 328 (Miss. 1933).

Opinions of attorneys concerning propriety of fee for services rendered to executrix were not binding on chancery court, which might act on its own knowledge. Brown v. Franklin, 166 Miss. 899, 145 So. 752, 1933 Miss. LEXIS 328 (Miss. 1933).

Allowance of attorney's fee of $750 for services rendered executrix in estate amounting to $29,104.95, where litigation was carried to supreme court, held not abuse of discretion. Brown v. Franklin, 166 Miss. 899, 145 So. 752, 1933 Miss. LEXIS 328 (Miss. 1933).

3. Executor, administrator, or guardian acting as attorney.

As long as no duplication of services is shown, an executor is not prevented from seeking payment for services rendered purely in his fiduciary capacity that may not necessarily involve legal work, while, at the same time, seeking additional compensation for other work of a purely legal nature in lieu of payment for those other discrete services as the fiduciary. Thomas v. Evans (In re Estate of Thomas), 740 So. 2d 332, 1999 Miss. App. LEXIS 117 (Miss. Ct. App. 1999).

There is no prohibition in this section that would prevent a fiduciary who is also an attorney from petitioning for some part of his itemized services to be paid under § 91-7-299, where his right to compensation would not necessarily be commensurate with prevailing legal fees; nor is there a prohibition for that same fiduciary, as to those separately identified services that were unquestionably performed in his capacity as an attorney, seeking compensation under this section, in lieu of being paid for those particular services under § 91-7-299. Thomas v. Evans (In re Estate of Thomas), 740 So. 2d 332, 1999 Miss. App. LEXIS 117 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR.

Allowance of fees for guardian ad litem appointed for infant defendant, as costs. 30 A.L.R.2d 1148.

Right to allowance out of estate of attorneys' fees incurred in attempt to establish or defeat will. 40 A.L.R.2d 1407.

Right of executor or administrator to extra compensation for legal services rendered by him. 65 A.L.R.2d 809.

Personal liability of executor or administrator for fees of attorney employed by him for the benefit of the estate. 13 A.L.R.3d 518.

Amount of attorneys' compensation in matters involving guardianship and trusts. 57 A.L.R.3d 550.

Amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates. 58 A.L.R.3d 317.

Liability of estate for legal services of attorney employed by estate attorney without consent of executor or administrator. 83 A.L.R.3d 1160.

Award of attorneys' fees out of trust estate in action by trustee against cotrustee. 24 A.L.R.4th 624.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 428, 430.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1451 et seq. (compensation and allowances).

CJS.

34 C.J.S., Executors and Administrators § 1072.

Law Reviews.

1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March, 1979.

§ 91-7-283. Defaulters to be listed and cited.

Unless the court or chancellor has, by order entered on the minutes, designated another annual term for that purpose, it shall be the duty of the clerk at the first term of the chancery court of his county in each year to make up a complete and impartial list of all executors and administrators and guardians who have failed to present and settle their accounts within the year preceding. In each and every such case, the clerk shall enter the same on the motion docket and thereby move the court for an order on the defaulter; and the court shall, in each and every such case, order a citation to be issued for the defaulter and for the surety or sureties on his bond, returnable forthwith or at the next term of court. On the return thereof, unless sufficient cause be shown for such failure and that the same was not the result of negligence or contumacy, the court shall proceed against the delinquent executor, administrator, or guardian for a contempt, and may also remove him from office. If there be no such defaulter, the clerk shall so report and obtain an order reciting his said report to that effect, which order shall be entered on the minutes of the term. If there be any defaulter and the clerk shall fail to fully prepare the list and to enter the motions herein required, he shall not be entitled to any allowance for attendance on the term nor to any annual compensation for ex officio services to the court. Any allowance by the court contrary to the terms of this section may nevertheless be recovered from the said clerk on his bond by the state tax commission, or by any other office similarly empowered, for the benefit of the county treasury; in addition to which, the clerk shall be liable on his bond at the suit of any party in interest who has been damaged in any case by the said failure of the clerk.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (94); 1857, ch. 60, art. 105; 1871, § 1165; 1880, § 2068; 1892, § 1949; 1906, § 2123; Hemingway's 1917, § 1791; 1930, § 1735; 1942, § 634.

Editor's Notes —

Section 27-3-4 provides that the terms " 'Mississippi State Tax Commission,' 'State Tax Commission,' "Tax Commission' and 'commission' appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

Cross References —

Docketing in matters testamentary, see § 9-5-203.

JUDICIAL DECISIONS

1. In general.

Supreme court will not interfere with action of chancery court in removing trustee on its own motion, unless palpably unjust. Nutt v. State, 96 Miss. 473, 51 So. 401, 1910 Miss. LEXIS 171 (Miss. 1910).

§ 91-7-285. Process for derelict fiduciary.

Whenever it shall appear of record, or otherwise, that any executor, administrator, guardian, receiver, or fiduciary appointed by any chancery court is derelict in the performance of any duty required of him by law or the orders of the court or chancellor, or is liable to be punished or removed for any cause prescribed by law, then such court or the chancellor in vacation may, on the application of any interested party or of his or its own motion, order a citation for such executor, administrator, guardian, receiver, or other fiduciary, as the case may be, to be issued by the clerk of the court in which such cause or matter is pending, returnable forthwith or at such time and place, in term time or vacation, as may be specified in such order, to appear and show cause why he should not be removed or punished for contempt, either or both, as may be directed in such order. The citation shall be directed to the sheriff of the county of the residence of such fiduciary, if known to the clerk; otherwise, it shall be directed to the sheriff of the county where such matter or cause is pending, and shall be executed without advance payment of fees.

HISTORY:

Codes, 1942, § 635; Laws, 1936, ch. 239.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Notice.

1. In general.

In a father's petition to remove a conservator under Miss. Code Ann. § 91-7-285 and to set aside an allegedly fraudulent conveyance, a chancery court erred by dismissing based on a lack of standing because the father was an interested party due to the fact that his daughters were beneficiaries under their mother's will. Peyton v. Longo (In re Davis), 954 So. 2d 521, 2007 Miss. App. LEXIS 251 (Miss. Ct. App. 2007).

An administrator's failure to file sufficiently specific accountings and inventories and his admission that he had spent or lent large sums of funds taken from the estate for which he was unable to account formed a sufficient basis for the chancellor to remove him, under § 91-7-285, as executor of the estate. Kelly v. Shoemake, 460 So. 2d 811, 1984 Miss. LEXIS 2019 (Miss. 1984).

2. Notice.

A conservator is entitled to notice and a hearing prior to his removal. Jackson v. Jackson, 732 So. 2d 916, 1999 Miss. LEXIS 54 (Miss. 1999).

§ 91-7-287. Publication of process for defaulter.

If the citation be returned unexecuted because such fiduciary cannot be found after diligent search by the sheriff to whom it is directed, then the clerk shall make and file among the papers in the cause an affidavit stating such information as he may have been able to ascertain after diligent inquiry concerning the whereabouts and post office address of such fiduciary. If by such affidavit it shall appear that the whereabouts of such fiduciary is unknown to the clerk or that he is a nonresident of, or absents himself from, this state, then the court or chancellor shall make an order directing the issuance and publication of an alias citation for such fiduciary to appear and show cause why he should not be removed, at a time and place specified therein, not less than thirty days from the date of such order. The sheriff of the county where such matter or cause is pending shall thereupon make publication of such citation by posting a true copy thereof at three public places in his county, one of which shall be at the courthouse, not less than twenty-one days before the return day thereof, and shall make return of the citation showing such publication and the date and places where such copies were posted. If the clerk's affidavit shall show the post office address of such fiduciary, then the clerk shall, at the time of issuing such alias citation for publication, mail postage prepaid a true copy thereof to him at such address and note the fact on his general docket in the same manner and with the same effect as in other like cases. On the return of such alias citation, executed by publication as aforesaid, the court or chancellor shall be as fully empowered to proceed as if such fiduciary had been personally served in this state.

HISTORY:
Codes, 1942, § 636; Laws, 1936, ch. 239.

§ 91-7-289. Hearing for derelict fiduciary.

If on the return day it shall appear that the citation has been served in this state, or publication made in the manner required by Section 91-7-287, the court or chancellor may proceed to hear the matter, and may remove or punish such fiduciary, either or both, or make such other order therein as may seem just and proper; or the court or chancellor may continue the matter for further hearing and final determination to such time and place as may be designated in the order of continuance.

HISTORY:
Codes, 1942, § 637; Laws, 1936, ch. 239.

§ 91-7-291. Final accounts.

When the estate has been administered by payment of the debts and the collection of the assets, it shall be the duty of the executor or administrator, unless the court or chancellor, on cause shown, shall otherwise order, to make and file a final settlement of the administration by making out and presenting to the court, under oath, his final account, which shall contain a distinct statement of all the balances of the annual accounts, either as debits or credits, all other charges and disbursements supported by legal vouchers, amounts received and not contained in any previous annual account, and a statement of the kind and condition of all assets in his hands. In the event that the account shall be presented by a bank or trust company which is subject to the supervision of the department of bank supervision of the State of Mississippi or of the comptroller of the currency of the United States and such account, or the petition for the approval of same, shall contain a statement under oath by an officer of said bank or trust company showing that the vouchers covering the disbursements in the account presented are on file with the said bank or trust company, such bank or trust company shall not be required to file vouchers. Provided, however, that said bank or trust company shall produce said vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of said bank or trust company; and provided, further, that the court on its own motion, or on the motion of any interested party, may require that said vouchers be produced and inspected at the time of hearing of any objections that may be filed to any final account.

HISTORY:

Codes, 1857, ch. 60, art. 106; 1871, § 1166; 1880, § 2069; 1892, § 1950; 1906, § 2124; Hemingway's 1917, § 1792; 1930, § 1736; 1942, § 638; Laws, 1960, ch. 217, § 7.

Editor's Notes —

Section 81-1-57 provides that wherever the words "Department of bank supervision", or "department" when referring to the department of bank supervision, appear they shall be construed to mean the department of banking and consumer finance.

Cross References —

Payment of income tax as prerequisite to approval of final account, see § 27-7-69.

Payment of estate taxes as prerequisite to approval of final account, see § 27-9-41.

Annual accounts, see § 91-7-277.

Reopening of accounts after final accounting, see § 91-7-309.

Production of vouchers in guardianship proceedings, see § 93-13-73.

Requirement that account be personally signed and sworn to by executor or administrator, see Miss. Uniform Chancery Court Rule 6.14.

JUDICIAL DECISIONS

1. In general.

In a proceeding by a widow to reopen the estate of her deceased husband more than two years after entry of a final decree on the ground that the final account had never been filed and that the final decree was therefore a nullity, the trial court properly denied the petition where the transcript was a part of the record and it indicated that, although the final account had not be stamped "Filed" until three years later, there was no dispute that it had been presented to the court, that it had been a part of the record on presentation of same, and that the decree had been based upon said account and evidence heard for the approval thereof, and where there was no specific charge of fraud against the executor which would constitute a bar to the statute of limitations. Byrd v. Page, 384 So. 2d 1038, 1980 Miss. LEXIS 2015 (Miss. 1980).

Chancellor in vacation may approve executor's final account. United States Fidelity & Guaranty Co. v. State, 110 Miss. 16, 69 So. 1007, 1915 Miss. LEXIS 20 (Miss. 1915).

Administratrix de bonis non entitled to allowance for premium on special bond executed to collect money for land sold by predecessor under order of court. Davis v. Blumenberg, 107 Miss. 432, 65 So. 503, 1914 Miss. LEXIS 102 (Miss. 1914).

In a suit by a distributee to compel an accounting by the surviving executor it is proper upon the latter's application to make a personal representative of the deceased executor a party to the proceeding. Owens v. Owens' Estate, 84 Miss. 673, 37 So. 149, 1904 Miss. LEXIS 95 (Miss. 1904).

Where executors deposited money collected in their own bank, where it remained for ten years credited to them as guardians, when they were not guardians, and rendered no accounts for more than two years, in the meantime lending money to the distributees at interest and selling them property, taking interest-bearing notes therefor, they are chargeable with interest at the legal rate during the time the money was in the bank. Owens v. Owens' Estate, 84 Miss. 673, 37 So. 149, 1904 Miss. LEXIS 95 (Miss. 1904).

Where executors without excuse left money due the estate in the hands of the debtor for nearly fifteen years, not collecting it until compelled to do so in a proceeding for an accounting, they were chargeable with interest. Owens v. Owens' Estate, 84 Miss. 673, 37 So. 149, 1904 Miss. LEXIS 95 (Miss. 1904).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 878 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1101 et seq. (final account).

CJS.

34 C.J.S., Executors and Administrators § 968 et seq.

§ 91-7-293. Names of interested parties to be stated.

The executor or administrator shall file with his final account a written statement, under oath, of the names of the heirs or devisees and legatees of the estate, so far as known, specifying particularly which, if any, are under the age of twenty-one years, of unsound mind, or convict of felony; the places of residence of each and their post-office address if they be nonresidents or, if the post-office address be unknown, the statement must aver that diligent inquiry has been made to learn the same without avail and giving the names and places of residence of the guardians of all who have guardians, so far as known.

HISTORY:

Codes, 1892, § 1951; 1906, § 2125; Hemingway's 1917, § 1793; 1930, § 1737; 1942, § 639.

Cross References —

Requirement that account be personally signed and sworn to by executor or administrator, see Miss. Uniform Chancery Court Rule 6.14.

JUDICIAL DECISIONS

1. In general.

Administratrix's duty to protect estate assets required administratrix to contest all claims against estate that may properly and in good faith be contested and to use reasonable diligence to ascertain potential heirs, and to file names of heirs in final account. Shepard v. Jones by & Through Jones (In re Estate of Stowers), 678 So. 2d 660, 1996 Miss. LEXIS 329 (Miss. 1996).

A chancery court did not have jurisdiction to hear a will contest where the executor failed to properly designate the beneficiaries as necessary parties, since the "interested and necessary parties" were not timely noticed and properly joined in the lawsuit; the chancellor should have joined all necessary and proper parties before exercising jurisdiction. Padron v. Martell (In re Estate of McClerkin), 651 So. 2d 1052, 1995 Miss. LEXIS 135 (Miss. 1995).

In an action to probate a will, the chancellor erred in sustaining the executor's and beneficiaries' motions to dismiss a caveat against probate filed by will contestants on the ground that the will was not contested within 2 years as required by § 91-7-23 where the beneficiaries were not listed as interested parties on the petition to probate the will, since the beneficiaries were necessary parties entitled to notice of the action. Padron v. Martell (In re Estate of McClerkin), 651 So. 2d 1052, 1995 Miss. LEXIS 135 (Miss. 1995).

An administratrix perpetrated a fraud on the court where she intentionally chose not to reveal the existence of a potential heir to the court, relying on her and her attorney's determination that an alleged illegitimate daughter of the decedent was not an heir, where the administratrix, who was the decedent's widow, claimed to be the sole heir at law and benefited from her silence regarding the existence of the illegitimate daughter. Smith v. Estate of King, 579 So. 2d 1250, 1991 Miss. LEXIS 250 (Miss. 1991).

An administratrix is under an affirmative duty to disclose to the court the existence of known potential heirs and claimants. Smith v. Estate of King, 501 So. 2d 1120, 1987 Miss. LEXIS 2287 (Miss. 1987).

This section [Code 1942, § 639], while it prescribed who are necessary parties to the final account of an administrator, does not preclude as proper parties those having an interest in the net amount to be distributed by the administrator. Stone v. Townsend, 190 Miss. 547, 1 So. 2d 237, 1941 Miss. LEXIS 81 (Miss. 1941).

Judgment creditors of the heirs of an intestate were proper parties to a proceeding involving the final account of the administrator. Stone v. Townsend, 190 Miss. 547, 1 So. 2d 237, 1941 Miss. LEXIS 81 (Miss. 1941).

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 91-7-295. Summons or publication for final account.

The final account so presented, with the statement as to parties, shall remain on file, subject to the inspection of any person interested. Summons shall be issued or publication be made for all parties interested, as in other suits in the chancery court, to appear at a term of the court, or before the chancellor in vacation, not less than thirty (30) days from the service of the summons or the completion of the publication, and show cause, if any they can, why the final account of the executor, administrator, or guardian should not be allowed and approved.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 20 (12); 1857, ch. 60, art. 106; 1871, § 1167; 1880, § 2069; 1892, § 1952; 1906, § 2126; Hemingway's 1917, § 1794; 1930, § 1738; 1942, § 640; Laws, 1960, ch. 222.

JUDICIAL DECISIONS

1. In general.

After the final account has been filed, it is the administratrix duty to cause summons to be issued for all parties interested as far as known to her at the hearing on the final account. Smith v. Estate of King, 501 So. 2d 1120, 1987 Miss. LEXIS 2287 (Miss. 1987).

A minor seeking to be declared an heir of the decedent as an illegitimate daughter and to share in the estate should have been allowed to amend her complaint to allege that the widow and former executrix knew of the existence of the minor as an illegitimate child of the decedent, but fraudulently failed to so inform the court, notwithstanding that the minor's petition was filed more than 90 days after the publication of notice to the creditors of the estate. Smith v. Estate of King, 501 So. 2d 1120, 1987 Miss. LEXIS 2287 (Miss. 1987).

It is competent for the parties in interest to waive process and consent to the hearing of a final account. Pollock v. Buie, 43 Miss. 140, 1870 Miss. LEXIS 16 (Miss. 1870).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 868, 869.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1133 et seq. (notice).

CJS.

34 C.J.S., Executors and Administrators § 957.

§ 91-7-297. Hearing and adjudication of final account.

If process be returned executed, or publication has been made, the court shall examine the final account so presented and filed, hear the evidence in support of it, and the objections and evidence against it. If the court shall be satisfied that the account is correct and supported by legal vouchers where required to be filed or produced for inspection, it shall make a final decree of approval and allowance, and shall, at the same time, order the executor or administrator to make distribution of the property in his hands. In proceedings for a final settlement, the court may allow any party interested to surcharge and falsify any annual or partial settlement of the executor or administrator.

HISTORY:

Codes, 1857, ch. 60, art. 107; 1871, § 1169; 1880, § 2070; 1892, § 1953; 1906, § 2127; Hemingway's 1917, § 1795; 1930, § 1739; 1942, § 641; Laws, 1960, ch. 217, § 8.

Cross References —

Tax upon settlement of fiduciary's account, see § 27-7-69.

Payment of income tax as prerequisite to approval of final account, see § 27-7-69.

Executor's or administrator's liability for inheritance taxes, see § 27-9-37.

Payment of estate taxes as prerequisite to approval of final account, see § 27-9-41.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Discharge of representative.

1. In general.

Executor should be surcharged in his final account with sum which he paid out of funds of estate in settlement of just claims against estate, which were required by law to be duly probated but which were not probated within six-month period after publication of first notice by executor to creditors of estate, as such expenditures are without authority of law unless claims had been probated. Oberst v. Mullens, 43 So. 2d 560 (Miss. 1949).

Liability of surety may not be fixed in proceeding for final accounting by executor. Walton v. Walton's Estate, 143 Miss. 666, 109 So. 707, 1926 Miss. LEXIS 306 (Miss. 1926).

Surviving partner administering partnership estate properly allowed credit in his final account for payment of partnership debt out of his individual funds. Byrd v. King, 120 Miss. 435, 82 So. 312, 1919 Miss. LEXIS 104 (Miss. 1919).

Decree directing distribution to heirs does not affect right to payment of probated claims; fact claimant was administrator who had filed his final account immaterial. Oliver v. Smith, 94 Miss. 879, 49 So. 1, 1909 Miss. LEXIS 364 (Miss. 1909).

Until an executor has finally accounted the statute of limitations does not run in his favor against a legatee even where under the will he was to own the entire estate as long as he remained single, and the legatee's right to the legacy accrued only upon his subsequent marriage. Edwards v. Kelly, 83 Miss. 144, 35 So. 418, 1903 Miss. LEXIS 22 (Miss. 1903).

An administrator is not chargeable with property of which he had no knowledge, and is bound only to exercise the care of a prudent man in the management of his own business. O'Brian Bros. v. Wilson, 82 Miss. 93, 33 So. 946 (Miss. 1903).

2. Discharge of representative.

Where a decree made the discharge of the administrator of a decedent's estate conditioned on the administrator's filing of vouchers showing the distribution of all funds, payments of all debts, and all other expenses, and the administrator had not filed such vouchers and there was no showing that there had been a waiver of the filing of the vouchers with the consent and approval of the chancellor who issued the decree, the administrator had authority to act in an administrative capacity for all the heirs of the decedent and to institute a suit on a note against the defendant after the entry of the decree. Twilley v. McLain, 233 So. 2d 794, 1970 Miss. LEXIS 1675 (Miss. 1970).

RESEARCH REFERENCES

ALR.

Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate. 1 A.L.R.2d 1060.

Application of dead man's statute in proceeding involving account of personal representative. 2 A.L.R.2d 349.

Right of executor or administrator to appeal from order granting or denying distribution. 16 A.L.R.3d 1274.

Right to partial distribution of estate or distribution of particular assets, prior to final closing. 18 A.L.R.3d 1173.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration. 2 A.L.R.4th 1315.

CJS.

34 C.J.S., Executors and Administrators § 1017 et seq.

§ 91-7-299. Allowance to executor or administrator.

On the final settlement the court shall make allowance to the executor or administrator for the property or the estate which has been lost, or has perished or decreased in value, without his fault; and profit shall not be allowed him in consequence of increase. The court shall allow to an executor or administrator, as compensation for his trouble, either in partial or final settlements, such sum as the court deems proper considering the value and worth of the estate and considering the extent or degree of difficulty of the duties discharged by the executor or administrator; in addition to which the court may allow him his necessary expenses, including a reasonable attorney's fee, to be assessed out of the estate, in an amount to be determined by the court.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 4 (3); 1857, ch. 60, art. 109; 1871, § 1171; 1880, § 2072; 1892, § 1956; 1906, § 2130; Hemingway's 1917, § 1798; 1930, § 1740; 1942, § 642; Laws, 1989, ch. 443, § 1, eff from and after July 1, 1989.

Cross References —

Compensation of temporary administrator, see § 91-7-59.

Petition by executor or administrator for allowance of commissions, or for compensation for extra services and expenses, see Miss. Uniform Chancery Court Rule 6.12.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Court's discretion.
3. Compensation fixed by will.
4. Continuing a business.
5. Executor, administrator, or guardian acting as attorney.
6. Allowance for necessary expenses.
7. Propriety of particular awards.
8. Miscellaneous.

1. In general.

Under this section [Code 1942, § 642] the executors are entitled to an allowance of compensation, which should be fixed within the limits of the statute on the gross personal estate actually accounted for by the executors in good faith. Schwander v. Rubel, 221 Miss. 875, 75 So. 2d 45, 1954 Miss. LEXIS 603 (Miss. 1954).

Acceptance by an executor or trustee of an appointment under a will, whether under a stated compensation or where none is provided, except where a statute fixes it, is conclusive of any right to an increased compensation. Barry v. Barry, 198 Miss. 677, 21 So. 2d 922, 1945 Miss. LEXIS 239 (Miss. 1945).

An executor or trustee cannot accept his appointment and reject the condition as to compensation upon which it is made. Barry v. Barry, 198 Miss. 677, 21 So. 2d 922, 1945 Miss. LEXIS 239 (Miss. 1945).

In fixing amount of compensation under this section [Code 1942, § 642], there are numerous elements to be considered, such as: the mechanical work of making out the reports and of collecting the money and of disbursing it; the skill, responsibility, and amount involved; skillful, prompt and efficient service in the speedy disposition of winding up and settling the estate, responsibility and skill being important elements. Ralston v. Bank of Clarksdale, 188 Miss. 345, 194 So. 923, 1940 Miss. LEXIS 35 (Miss. 1940).

Surviving partner not entitled to compensation for administering partnership estate, unless authorized by statute, partnership agreement, or some other valid understanding. Byrd v. King, 120 Miss. 435, 82 So. 312, 1919 Miss. LEXIS 104 (Miss. 1919).

2. Court's discretion.

The supreme court will not interfere with the chancery court's exercise of discretion in regard to the allowance of compensation for administrator's fees within the limits prescribed by this section [Code 1942, § 642], except in cases of its manifest and flagrant abuse. Bryan v. Quinn, 233 Miss. 366, 102 So. 2d 124, 1958 Miss. LEXIS 392 (Miss. 1958).

The matter of the allowance of fees to executors and administrators for services rendered in the administration of an estate rests in the sound discretion of the chancery court, there being a minimum allowance of not less than one per cent and the maximum amount of seven per cent. Ralston v. Bank of Clarksdale, 188 Miss. 345, 194 So. 923, 1940 Miss. LEXIS 35 (Miss. 1940).

Unless the record discloses an abuse of discretion vested in the chancery court, the supreme court will not disturb the chancellor's action in fixing administrator's fees within the limits provided by this section [Code 1942, § 642]. Ralston v. Bank of Clarksdale, 188 Miss. 345, 194 So. 923, 1940 Miss. LEXIS 35 (Miss. 1940).

3. Compensation fixed by will.

Executor accepting appointment under will which fixes executor's compensation is entitled to no other compensation. Vicksburg Public Library v. First Nat'l Bank & Trust Co., 168 Miss. 88, 150 So. 755, 1933 Miss. LEXIS 183 (Miss. 1933).

Where will fixes executor's compensation, this section [Code 1942, § 642] does not apply. Vicksburg Public Library v. First Nat'l Bank & Trust Co., 168 Miss. 88, 150 So. 755, 1933 Miss. LEXIS 183 (Miss. 1933).

Where will appointed same corporation as executor and trustee, directed that "executor" be paid certain percentage of proceeds from sale of realty, and, for its services as "trustee," certain percentage of trust fund, and used words "executor" and "trustee" interchangeably, corporation held not entitled to executor's statutory compensation as to personal estate administered. Vicksburg Public Library v. First Nat'l Bank & Trust Co., 168 Miss. 88, 150 So. 755, 1933 Miss. LEXIS 183 (Miss. 1933).

4. Continuing a business.

Without authority from the chancery court to continue the business of a testator, the estate is not liable to an executor for his services upon any basis of quantum meruit. Barry v. Barry, 198 Miss. 677, 21 So. 2d 922, 1945 Miss. LEXIS 239 (Miss. 1945).

In administering estates of decedents, operation of a mercantile business should not be made alluring to administrators by allowance of salaries or exorbitant commissions, estates being administered for benefit of parties in interest, creditors, and distributees. Crescent Furniture & Mattress Co. v. Morgan, 178 Miss. 824, 173 So. 290, 1937 Miss. LEXIS 211 (Miss. 1937).

Administrator was not entitled to salary for conducting intestate's business in view of statute fixing compensation at not less than one or more than seven per cent of estate and necessary expenses. Crescent Furniture & Mattress Co. v. Morgan, 178 Miss. 824, 173 So. 290, 1937 Miss. LEXIS 211 (Miss. 1937).

5. Executor, administrator, or guardian acting as attorney.

Where an executor, administrator, or guardian also acts as attorney for the estate, there is no potential for double compensation, at least in the circumstance where the fiduciary fully itemizes his services in order to show the extent and degree of difficulty of his work and any separate legal work is separately itemized. Thomas v. Evans (In re Estate of Thomas), 740 So. 2d 332, 1999 Miss. App. LEXIS 117 (Miss. Ct. App. 1999).

There is no prohibition in the statute that would prevent a fiduciary who is also an attorney from petitioning for some part of his itemized services to be paid under this section, where his right to compensation would not necessarily be commensurate with prevailing legal fees; nor is there a prohibition for that same fiduciary, as to those separately identified services that were unquestionably performed in his capacity as an attorney, seeking compensation under § 91-7-281, in lieu of being paid for those particular services under this section. Thomas v. Evans (In re Estate of Thomas), 740 So. 2d 332, 1999 Miss. App. LEXIS 117 (Miss. Ct. App. 1999).

6. Allowance for necessary expenses.

Where heirs to an estate were unable to agree among themselves as to being appraisers and later agreed on disinterested parties to appraise the estate, the chancellor correctly allowed the administrator reimbursement of allowance of appraiser's fees in amount of $5 each, to two appraisers. Hughes v. Box, 224 Miss. 513, 81 So. 2d 242, 1955 Miss. LEXIS 516 (Miss. 1955).

Where at a sale of personal property an administrator employed an auctioneer and a bookkeeper and allowed them a total of $75 on the ground that their services were necessary and were to the best interests of the estate, the expense was properly allowed. Hughes v. Box, 224 Miss. 513, 81 So. 2d 242, 1955 Miss. LEXIS 516 (Miss. 1955).

Where in the course of administration of an estate the heirs petitioned for sale of cotton gin property owned by decedent, and the court appointed an administrator as a special commissioner to make the sale and the administrator obtained allowances for services of a surveyor, auctioneer and bookkeeper, the total amount of these expenses being $114, and the cotton gin property brought $53,000 at a sale which far exceeded its appraised value, these items of expense were properly allowed to the administrator. Hughes v. Box, 224 Miss. 513, 81 So. 2d 242, 1955 Miss. LEXIS 516 (Miss. 1955).

The allowance by the chancellor of payment by the administrator of a liberal commission to a broker for private sale of cattle was sustained hesitantly where the administrator was paid the maximum of seven per cent of the funds coming into his hands. Dabbs v. Fisher, 27 So. 2d 342 (Miss. 1946).

7. Propriety of particular awards.

Attorney fees granted to an executor's attorney were not excessive because the fees were reasonable and not out of line with the fees claimed by the trustee who challenged them. Carson Family Trust v. Carson (In re Estate of Carson), 986 So. 2d 1072, 2008 Miss. App. LEXIS 434 (Miss. Ct. App. 2008).

The chancery court properly denied executrix fees where the chancellor found that the estate was administered in a grossly negligent manner; in support of this finding of negligent administration, or maladministration, the chancellor cited the executrix's noncompliance with court orders that eventually culminated in her being found guilty of civil and criminal contempt. In re Estate of Collins v. Collins, 742 So. 2d 147, 1999 Miss. App. LEXIS 251 (Miss. Ct. App. 1999).

An administrator's fee, an attorney's fee, and accounting fees were excessive where (1) the $3.1 million estate was very simple, (2) the executor, attorney, and accountant had ready access to information which made their jobs considerably easier, and (3) the fees equated to approximately $1200 per hour for the administrator and attorney and $300 per hour for the accountant. Rich v. Moore (In re Estate of Johnson), 735 So. 2d 231, 1999 Miss. LEXIS 114 (Miss. 1999).

Absent maladministration, compensation for an executor of an estate with a gross value in excess of $229,000 should be awarded within the statutory guidelines, rather than at $1500 or 6/10 of one percent of the value of the estate. Scott v. Hollingsworth, 487 So. 2d 811, 1986 Miss. LEXIS 2438 (Miss. 1986).

Where the decedent left an estate of the approximate value of $139,000, the allowance to the executrix of a fee of $5,000 was not a manifest and flagrant abuse of discretion by the chancellor. Bryan v. Quinn, 233 Miss. 366, 102 So. 2d 124, 1958 Miss. LEXIS 392 (Miss. 1958).

Allowance of $3,000 to executor as compensation for his services is not excessive when total assets of estate amounted to $48,126.43, total disbursements amounted to $42,109.05 and he was successful in making sale of 500 acres of land for sum of $36,000, which was $8,000 in excess of all prior offers. Oberst v. Mullens, 43 So. 2d 560 (Miss. 1949).

Allowance to administrator of $2,000 as his compensation for services rendered in an estate consisting of something over $65,000 did not indicate an abuse of discretion of the chancery court. Ralston v. Bank of Clarksdale, 188 Miss. 345, 194 So. 923, 1940 Miss. LEXIS 35 (Miss. 1940).

8. Miscellaneous.

Appellant's delay in closing the estate and his other indiscretions as executor, most notably his decision to borrow thousands of dollars from the estate without court approval, provided ample reason for the chancery court to refuse to reimburse appellant for his work as executor. Dodson v. Dodson (In re Estate of Dodson), 20 So. 3d 73, 2009 Miss. App. LEXIS 716 (Miss. Ct. App. 2009).

Compensation allowed executor should not be reduced on ground that he did not comply with law as to payment of unprobated claims, when amounts expended by him without authority of law were restored by him to estate although claims were actually owed by testatrix and estate would have been liable had they been duly probated in time required by law. Oberst v. Mullens, 43 So. 2d 560 (Miss. 1949).

An executor who renders services to an estate beyond what his duties require and for which he had the right to employ another cannot receive additional compensation therefor, unless by agreement with the court or beneficiaries before he performed the service. Barry v. Barry, 198 Miss. 677, 21 So. 2d 922, 1945 Miss. LEXIS 239 (Miss. 1945).

Administrator was not entitled to commissions based upon that part of estate for which he did not account. Crescent Furniture & Mattress Co. v. Morgan, 178 Miss. 824, 173 So. 290, 1937 Miss. LEXIS 211 (Miss. 1937).

Where it appeared that an executor intended to return his commission to the estate it was improper to treat his intention as a donation to a part of the distributees, as each was entitled to a share therein. Owens v. Owens' Estate, 84 Miss. 673, 37 So. 149, 1904 Miss. LEXIS 95 (Miss. 1904).

RESEARCH REFERENCES

ALR.

Costs and other expenses incurred by fiduciary whose appointment was improper as chargeable against estate. 4 A.L.R.2d 160.

Right of executor or administrator to extra compensation for his legal services rendered by him. 65 A.L.R.2d 809.

Right of executor or administrator to extra compensation for his accounting services rendered by him. 65 A.L.R.2d 838.

Right to double compensation where same person (natural or corporate) acts as executor and trustee. 85 A.L.R.2d 537.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation. 96 A.L.R.3d 1102.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 836 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1471 et seq. (compensation and allowances; extra compensation).

8 Am. Jur. Legal Forms 2d, Executors and Administrators § 104:226 et seq. (compensation for executors and administrators).

CJS.

34 C.J.S., Executors and Administrators § 970 et seq.

§ 91-7-301. Personal estate sold for division.

When personal property of a deceased person cannot be equally divided in kind, the court may, on petition, decree a sale of such property and order a distribution of the proceeds; and such sale may be for cash or on credit, as the court may direct. All parties interested as distributees or legatees shall be cited by summons or by publication, but if the value of the property do not exceed Five Hundred Dollars ($500.00), notice to the distributees or legatees shall not be necessary.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (82); 1857, ch. 60, art. 116; 1871, § 1173; 1880, § 2077; 1892, § 1903; 1906, § 2078; Hemingway's 1917, § 1745; 1930, § 1741; 1942, § 643.

Cross References —

Bringing advancements into hotchpot, see § 91-1-17.

JUDICIAL DECISIONS

1. In general.

As long as the parties in interest are before the court, either as plaintiffs or defendants, it does not matter whether the petition be filed by the administrator or the distributees. Nabors v. McKay, 27 Miss. 799, 1854 Miss. LEXIS 134 (Miss. 1854).

§ 91-7-303. Distribution compelled.

Any person entitled to a distributive share of an intestate's estate, or to a legacy under a last will and testament, may, at any time after the expiration of six months from the grant of letters testamentary or of administration, petition the court therefor, setting forth his claim; and the administrator or executor and all persons interested as distributees or legatees shall be cited to appear. Upon return of summons executed or publication made, the court may order the administrator or executor to make the distribution or to pay the legacies according to the rights of the parties, as may be adjudged; but the administrator or executor shall not be compelled, before final settlement, to make distribution or to pay any legacy until bond, with sufficient sureties, be given by the distributee or legatee, conditioned to refund his proportionate part of any debts or demands that may afterwards appear against the estate, and the costs of recovering the same.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (91); 1857, ch. 60, art. 118; 1871, § 1175; 1880, § 2076; 1892, § 1961; 1906, § 2137; Hemingway's 1917, § 1805; 1930, § 1742; 1942, § 644; Laws, 1924, ch. 152.

Cross References —

Partition of land by agreement or by arbitration, see § 11-21-1.

Ordering sale of land rather than partition, see § 11-21-11.

Bringing advancements into hotchpot, see § 91-1-17.

Distribution of insolvent estate, see §§ 91-7-261, 91-7-271.

Appointment of custodian for unclaimed distributive share, see § 91-7-321.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Refunding bonds.

1. In general.

Residuary legatee cannot recover from estate of decedent's sister such sums as were expended by sister in her own behalf after acquiring possession of decedent's estate on setting aside of will as court would have compelled trustees under will, if it had not been set aside, to expend for her benefit. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195, 1949 Miss. LEXIS 382 (Miss. 1949).

Residuary legatee who was to receive on death of decedent's sister a one-fifth part of property remaining in hands of trustees under will is not guilty of laches by failure to demand anything of trustees until death of decedent's sister as he had no right to anything until her death. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195, 1949 Miss. LEXIS 382 (Miss. 1949).

Beneficiary of testamentary trust has right to follow trust property which has been wrongfully transferred to third party with notice of trust and to recover res if he can identify it in hands of third party, or he can have judgment against third party for value of trust property if such identification or tracing is impossible. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195, 1949 Miss. LEXIS 382 (Miss. 1949).

Distributee may sue in chancery but not at law to recover personal property of decedent where there are no outstanding debts against estate and no administration, or final settlement of administration. Jones v. R. L. Clemmer & Son, 98 Miss. 508, 54 So. 4, 1910 Miss. LEXIS 90 (Miss. 1910).

No proceeding for distribution of any of the estate before expiration of statutory time period from grant of letters is permissible. Jones v. Jones, 94 Miss. 460, 49 So. 115, 1909 Miss. LEXIS 367 (Miss. 1909).

Proceeds of sale of timber being only assets of estate of deceased wife, assignee of husband, entitled to share thereof, could maintain bill for distribution of the funds in hands of administrator. McIntosh Bros. v. Rutland, 88 Miss. 718, 41 So. 372, 1906 Miss. LEXIS 182 (Miss. 1906).

2. Refunding bonds.

After the expiration of the statutory time period, if there be assets, the distributees are prima facie entitled to distribution upon the execution of the refunding bonds. Packwood v. Elliott, 43 Miss. 504, 1870 Miss. LEXIS 59 (Miss. 1871).

The distributees may compel distribution of any balance not required for the immediate exigencies of the estate, upon the execution of refunding bonds. Allison v. Abrams, 40 Miss. 747, 1866 Miss. LEXIS 110 (Miss. 1866).

RESEARCH REFERENCES

ALR.

Ademption of bequest of proceeds of property. 45 A.L.R.3d 10.

Proper disposition under will providing for allocation of express percentages or proportions amounting to more or less than whole of residuary estate. 35 A.L.R.4th 788.

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators § 974 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1181 et seq. (orders for distribution).

CJS.

34 C.J.S., Executors and Administrators § 675 et seq.

§ 91-7-305. Distribution of assets in kind to surviving spouse.

(1) Whenever under any last will and testament or trust indenture the executor, trustee, or other fiduciary is required to, or has an option to, satisfy a bequest, devise, or transfer in trust to or for the benefit of the surviving spouse of a decedent by a transfer of assets of the estate or trust in kind at the values as finally determined for federal estate tax purposes, the executor, trustee, or other fiduciary shall, in the absence of contrary provisions in such will or trust indenture, satisfy such bequest, devise, or transfer by the distribution of assets, including cash, fairly representative of the appreciation or depreciation in the value of all property available for distribution in satisfaction of such bequest, devise, or transfer.

(2) This section shall apply to wills of decedents dying before or after May 20, 1966, and to trust agreements executed before or after such date; provided, however, that this section shall not be applied so as to require repayment to the fiduciary of any distributions actually made prior to such date, nor to impose any obligation or liability upon the fiduciary by reason of distributions actually made prior to such date.

(3) The enactment of this statute is not intended to imply that the present law of this state, relating to selection of property by fiduciaries in the circumstances herein described, has been otherwise than as set forth in subsection (1) hereof.

HISTORY:

Codes, 1942, § 644.7; Laws, 1966, ch. 393, §§ 1-4, eff from and after passage (approved May 20, 1966).

Cross References —

Payment of indebtedness or delivery of personal property of decedent to decedent's successor, see § 91-7-322.

RESEARCH REFERENCES

ALR.

Statutory or constitutional provision allowing widow but not widower to take against will and receive dower interests, allowances, homestead rights, or the like as denial of equal protection of law. 18 A.L.R.4th 910.

§ 91-7-307. Delaying settlement.

If an executor or administrator improperly delay making a final settlement, he shall be summoned to show cause why a final settlement should not be made. On the return of summons executed, if a final settlement be not made or cause shown why it cannot then be made, the court may fine such delinquent in any sum not exceeding Five Hundred Dollars ($500.00) and imprison him not exceeding three months, for a contempt. Any executor or administrator whose letters have been revoked may be dealt with in like manner for failure to make settlement.

HISTORY:

Codes, 1857, ch. 60, art. 108; 1871, § 1170; 1880, § 2071; 1892, § 1955; 1906, § 2129; Hemingway's 1917, § 1797; 1930, § 1743; 1942, § 645.

RESEARCH REFERENCES

ALR.

Personal liability of executor or administrator for interest on legacies or distributive shares where payment is delayed. 18 A.L.R.2d 1384.

§ 91-7-309. Accounts may be opened and falsified in two years.

Any person interested may, at any time within two years after final settlement, by bill or petition, open the account of any executor, administrator, or guardian and surcharge and falsify the same, and not after, saving to minors and persons of unsound mind the same time after the removal of their disabilities. Such bills or petitions may be filed without leave of the court or chancellor, and evidence shall be admissible in such cases to show the falsity of the account. Such bills and petitions shall not be governed by the rules applicable to bills of review in chancery, but in such cases it will be the duty of the court to correct any errors of law or fact occurring in the final settlement of the executor, administrator, or guardian.

HISTORY:

Codes, 1880, § 2075; 1892, § 1960; 1906, § 2136; Hemingway's 1917, § 1804; 1930, § 1744; 1942, § 646; Laws, 1894, ch. 53.

Cross References —

Contents of final accounts, see § 91-7-291.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.

1. In general.

Chancellor did not err in dismissing a nephew's case against his uncles on the ground that his claim was time-barred pursuant to Miss. Code Ann. § 91-7-309 because if either the two-year statute of limitations under § 91-7-309 or the three-year statute of limitations for an action to set aside a deed based on fraud was applied, the nephew's claim was still time-barred; the statute of limitations began running against the nephew on November 26, 1999, his twenty-first birthday, but the nephew did not file his lawsuit until May 21, 2009, which was well outside of the statute of limitations. Walton v. Walton, 52 So. 3d 468, 2011 Miss. App. LEXIS 32 (Miss. Ct. App. 2011).

Decedent's grandson, who was not an heir at law, failed to set out in his complaint basic available information, such as the time of the alleged fraud on the part of the decedent's administrator; the allegation of fraud was not stated with the required particularity to overcome the two-year statute of limitations. McClendon v. Hudson (In re Estate of Hudson), 962 So. 2d 90, 2007 Miss. App. LEXIS 489 (Miss. Ct. App. 2007).

In a proceeding by a widow to reopen the estate of her deceased husband more than two years after entry of a final decree on the ground that the final account had never been filed and that the final decree was therefore a nullity, the trial court properly denied the petition where the transcript was a part of the record and it indicated that, although the final account had not be stamped "Filed" until three years later, there was no dispute that it had been presented to the court, that it had been a part of the record on presentation of same, and that the decree had been based upon said account and evidence heard for the approval thereof, and where there was no specific charge of fraud against the executor which would constitute a bar to the statute of limitations. Byrd v. Page, 384 So. 2d 1038, 1980 Miss. LEXIS 2015 (Miss. 1980).

The action of an administratrix of a decedent, attacking final decrees entered in her decedent's guardianship and in settlement of the decedent's deceased father's estate, claiming an interest in the after-acquired property of coheirs, was barred by the section [Code 1942, § 646] where no petition was filed to falsify the settlement of the two administrations within two years after the date of the decrees. Barrett v. Turner, 229 So. 2d 563, 1969 Miss. LEXIS 1249 (Miss. 1969).

This provision does not apply to one entitled to participate in the distribution who was not made a party to the administration proceeding, where there was no statutory proceeding to determine heirs. Shepherd v. Townsend, 249 Miss. 383, 163 So. 2d 746, 1964 Miss. LEXIS 401 (Miss. 1964).

Petition by war veteran's widow against administratrix and her bondsmen to review previous proceedings whereby administratrix distributed to various persons sums due to veteran under federal acts held not demurrable because distributees were not joined as parties, where money involved, under federal and state statutes, belonged to widow as sole distributee, and persons to whom administratrix distributed money were strangers to estate so far as widow's rights were concerned. Lewis v. Jefferson, 173 Miss. 657, 161 So. 669, 1935 Miss. LEXIS 217 (Miss. 1935).

Since heirs under statute could challenge administrator's final steps until two years after final account was approved, judgment approving administrator's sale was interlocutory, and hence court at subsequent term could require administrator to charge himself with true value of merchandise sold and subsequently repurchased by administrator after fraudulently inducing widow not to bid. Rea v. Smith, 172 Miss. 238, 159 So. 845, 1935 Miss. LEXIS 132 (Miss. 1935).

Person interested in estate after dismissal of exception to account was without right to reopen, falsify, and surcharge account on same issue. Bright v. Bright, 156 Miss. 766, 126 So. 901, 1930 Miss. LEXIS 223 (Miss. 1930).

Where heir did not demand accounting, his heirs cannot do so after 30 years. Norris v. Burnett, 108 Miss. 407, 66 So. 332, 1914 Miss. LEXIS 174 (Miss. 1914).

2. Applicability.

Chancellor erred when he dismissed the contempt petition that the decedent's granddaughter filed in the decedent's conservatorship matter as her claims were not governed by the two-year statute of limitations as her claims were not premised on reopening or falsifying the conservator's final accounting; instead, the seven-year statute of limitations governed her contempt claim that the conservator disregarded the chancellor's order to transfer the balance of the decedent's account to the decedent's estate; and the granddaughter's remaining claims, including breach of the conservator's fiduciary duty and other claims related to opening the joint account, fell under the three-year "catch-all" statute of limitations. Fitzmaurice v. Vandevort (In re Margarette Smith), 237 So. 3d 852, 2017 Miss. App. LEXIS 447 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 118 (Miss. 2018), cert. denied, 237 So. 3d 1268, 2018 Miss. LEXIS 120 (Miss. 2018).

§ 91-7-311. Bonds to be recorded; suits thereon.

All bonds required and given in the administration of estate, testate and intestate, and the bond or bonds of the county administrator shall be recorded in the office of the clerk of the chancery court of the county, in a book kept for that purpose, and may be put in suit by any person injured by a breach thereof, he being responsible for costs. Any such bond shall not be void upon the first recovery, but may be sued on from time to time until the whole penalty shall have been recovered. When the whole penalty shall be recovered, the chancery court shall apportion the recovery, according to the rights of parties.

HISTORY:

Codes, 1892, § 1854; 1906, § 2028; Hemingway's 1917, § 1693; 1930, § 1745; 1942, § 647.

Cross References —

Chancery court's concurrent jurisdiction over suits on bonds of fiduciaries, see Miss. Const. Art. 6, § 161.

Bond of executor or administrator with will annexed, see § 91-7-41.

When bond is not required, see § 91-7-45.

Administrator's bond, see § 91-7-67.

Bond of administrator de bonis non, see § 91-7-69.

Right of administrator de bonis non to maintain action on bond of former executor or administrator, see § 91-7-71.

County administrator's bond, see § 91-7-75.

Suit on bond for failure to account, see § 91-7-277.

JUDICIAL DECISIONS

1. In general.

On appeal from decree on exceptions to final account of administrator, supreme court would render decree against surety on administrator's bond, where surety waived process on petition filed showing breach of bond, appeared in court and controlled exceptions to final account, agreed to appointment of master, excepted to his report, appeared in supreme court and made no objection to form of petition. Crescent Furniture & Mattress Co. v. Morgan, 178 Miss. 824, 173 So. 290, 1937 Miss. LEXIS 211 (Miss. 1937).

Liability of surety on administrator's bond held not limited to those creditors who appealed from decree on exceptions to final account. Crescent Furniture & Mattress Co. v. Morgan, 178 Miss. 824, 173 So. 290, 1937 Miss. LEXIS 211 (Miss. 1937).

Suit maintainable in Mississippi on bond of executor, in name of Tennessee to compel executor appointed in Tennessee to pay over money converted in Mississippi, to be administered according to Tennessee law. Cutrer v. Tennessee, 98 Miss. 841, 54 So. 434, 1910 Miss. LEXIS 132 (Miss. 1910).

Courts of Mississippi have jurisdiction of suit on executrix's bond for concealing assets, though she resides in Alabama, where she resided in Mississippi at the decedent's death, administration undertaken here, situs of assets here, and surety resides here. Myers v. Martinez, 95 Miss. 104, 48 So. 291, 1909 Miss. LEXIS 206 (Miss. 1909).

RESEARCH REFERENCES

Am. Jur.

31 Am. Jur. 2d, Executors and Administrators §§ 1105, 1114.

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 1601 et seq. (actions on administration bonds).

§ 91-7-313. Suit for devastavit.

Parties interested in an estate as legatees, distributees, or creditors may, either jointly or severally, institute proceedings upon the bond of the executor or administrator or guardian for a devastavit against the principal and his surety without first having instituted suit against the executor or administrator or guardian to establish a devastavit. When any executor, administrator or guardian is a nonresident of, or shall absent himself from, or conceal himself within this state so that personal service of summons or citation or attachment cannot be made upon him, and such nonresident, absent or concealed executor, administrator, or guardian shall fail to file his accounts and make his settlements as required by law, or shall have unlawfully removed any of the property committed to his trust, or shall have been guilty of any misappropriation or devastavit, it shall be the duty of the court, on the motion of the clerk as elsewhere provided in this chapter, or on the motion of any party in interest, to proceed against the surety or sureties on the bond of said executor, administrator, or guardian, in respect to all of which matters the said surety or sureties shall be taken and held as principal. In proceeding as aforementioned, the default of the said executor, administrator, or guardian in failing to file and settle his accounts as required by law shall be taken as prima facie evidence that the said defaulter has misappropriated the money or property, or both, which may be disclosed by the inventory, appraisement, or by any other of the official papers in the case, or which may be shown by competent evidence outside of said record, to have come into the possession of said defaulter.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 12 (4); 1857, ch. 60, art. 123; 1871, § 1180; 1880, § 2084; 1892, § 1855; 1906, § 2030; Hemingway's 1917, § 1695; 1930, § 1746; 1942, § 648.

Cross References —

Chancery court's concurrent jurisdiction over suits on bonds of fiduciaries, see Miss. Const. Art. 6, § 161.

Limitation of actions against executors or administrators, see § 15-1-25.

Penalty for removal of estate property from state, see § 91-7-257.

§ 91-7-315. New bond of executors and administrators may be required.

If the bond of an executor or an administrator, whether taken at the time of the grant of letters or afterwards, be insufficient, the court or chancellor or clerk may, on five days' notice to the executor or administrator, require him to give a new bond; and in default thereof the letters shall be revoked and administration de bonis non granted to some competent person. If such new bond be given, it shall be cumulative security and shall bind the obligors therein for past as well as future liabilities.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (64); 1857, ch. 60, art. 66; 1871, § 1121; 1880, § 2012; 1892, § 1862; 1906, § 2037; Hemingway's 1917, § 1702; 1930, § 1747; 1942, § 649.

Cross References —

Bond of executor or administrator with will annexed, see § 91-7-41.

Administrator's bond, see § 91-7-67.

County administrator's bond, see § 91-7-75.

JUDICIAL DECISIONS

1. In general.

Certificate whereby defendant assumed liability for losses under administrator's bond arising out of acts committed after May 1, 1933, was not "new bond" so as to bind defendant under statute for past as well as future liability, but was merely written evidence of limited assumption of liability, and hence defendant was liable for amount wrongfully disbursed by administrator after May 1, 1933, but not for amounts wrongfully disbursed prior to that time. National Surety Corp. v. Laughlin, 178 Miss. 499, 172 So. 490, 1937 Miss. LEXIS 187 (Miss. 1937).

RESEARCH REFERENCES

ALR.

What funds, not part of the estate, are received under color of office so as to render liable surety on executor's or administrator's bond. 82 A.L.R.3d 869.

Am. Jur.

9A Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Forms 361 et seq. (additional bond).

CJS.

34 C.J.S., Executors and Administrators § 1080.

§ 91-7-317. Relief of sureties and new bond.

A surety on any bond of an executor, administrator, county administrator, or any other administrator apprehending danger of loss because of his suretyship may petition the court, chancellor, or clerk to require the executor or administrator to give a new bond and that he may be discharged from further liability. The court, chancellor, or clerk, on five days' notice to the executor or administrator, shall grant such petition and require a new bond, within a reasonable time, to be prescribed. In case of refusal or failure to give such new bond, the executor or administrator shall be removed and administration de bonis non granted. The acts done by the executor or administrator, and all proceedings that may have been instituted against him, shall be treated and conducted by or against his successor, as in case of the death of an executor or administrator. If the executor or administrator shall give new bond as required, the original bond shall from that time cease to be operative in future, but not as to previous liabilities; and the effect of such new bond shall be to bind the obligors therein for past as well as future liabilities.

HISTORY:

Codes, Hutchinson's 1848, ch. 49, art. 1 (65); 1857, ch. 60, art. 66; 1871, § 1121; 1880, §§ 2002, 2012; 1892, § 1863; 1906, § 2038; Hemingway's 1917, § 1703; 1930, § 1748; 1942, § 650.

Cross References —

Cancellation of bond of executor or administrator by chancery court, see § 9-5-103.

Sureties generally, see § 87-5-1 et seq.

JUDICIAL DECISIONS

1. In general.

A surety on an administrator's bond is entitled under this section [Code 1942, § 650] as a matter of right to be discharged of liability without arriving or proving any facts giving rise to an apprehension of loss. In re Estate of Rowell, 247 Miss. 571, 156 So. 2d 812, 1963 Miss. LEXIS 326 (Miss. 1963).

§ 91-7-319. Executors may receive credit for costs of bond in surety company.

Any receiver, assignee, guardian, executor, administrator, or other fiduciary required by law or the order of any court or judge to give bond or other obligation, as such, may include, as a part of the lawful expense of executing this trust, and may receive credit for the sum paid to a guaranty or surety company, authorized under the laws of this state so to do, for becoming his surety on such bond, not to exceed the sum paid for such bond as determined by the rate on file with and approved by the Commissioner of Insurance for such company.

HISTORY:

Codes, 1906, §§ 2029, 2440; Hemingway's 1917, §§ 1694, 2001; 1930, § 760; 1942, § 1675; Laws, 1900, chs. 93, 96; Laws, 1956, ch. 235; Laws, 1987, ch. 422, § 56, eff from and after January 1, 1988.

JUDICIAL DECISIONS

1. In general.

Premium of bond of surviving partner proper charge against partnership property under this section [Code 1942, § 1675]. Rose v. Jones, 118 Miss. 494, 78 So. 771, 1918 Miss. LEXIS 41 (Miss. 1918).

§ 91-7-321. Custodian appointed for distributive share.

If any person entitled, under a decree of the chancery court, to a distributive share of an estate, or any other funds under the control of the court, shall not apply for it within six months after the decree of the court adjudicating his right thereto, a custodian of such share or interest may be appointed by the court, or the chancellor in vacation, without notice to any one. The court may make such order for the safekeeping or secure investment of the fund as may be proper.

HISTORY:

Codes, 1880, § 2074; 1892, § 1959; 1906, § 2135; Hemingway's 1917, § 1803; 1930, § 1750; 1942, § 652.

OPINIONS OF THE ATTORNEY GENERAL

Under Miss. Code Section 91-7-321, court may "make such order for the safekeeping or secure investment of the fund as may be proper"; however, these funds are not public funds; rather they are private funds being held in trust for beneficiaries; as such, deposit into account of county treasury would not be appropriate. 1993 Miss. Op. Att'y Gen. 227.

§ 91-7-322. Payment of indebtedness or delivery of personal property of decedent to decedent's successor; affidavit of successor.

(1) Except as may be otherwise provided by Sections 81-5-63, 81-12-135, 81-12-137 and 91-7-323, at any time after thirty (30) days from the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent shall make payment when due of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action to a person claiming to be the successor of the decedent, as defined herein, upon being presented an affidavit made by the successor stating:

(a) That the value of the entire estate of the decedent, wherever located, excluding all liens and encumbrances thereon, does not exceed Fifty Thousand Dollars ($50,000.00);

(b) That at least thirty (30) days have elapsed since the death of the decedent;

(c) That no application or petition for the appointment of a personal representative of the decedent is pending, nor has a personal representative of the decedent been appointed in any jurisdiction; and

(d) The facts of relationship establishing the affiant as a successor of the decedent.

(2) For the purposes of this section, "successor" means the decedent's spouse; or, if there is no surviving spouse of the decedent, then the adult with

whom any minor children of the decedent are residing; or, if there is no surviving spouse or minor children of the decedent, then any adult child of the decedent; or, if there is no surviving spouse or children of the decedent, then either parent of the decedent.

(3) Any person who is the successor of the decedent, because the person is an adult with whom the minor children of the decedent are living, shall receive any property or payments of or for the decedent for the use and benefit of said children.

(4) The successor of a decedent, upon complying with the provisions of subsection (1) of this section, shall be empowered to negotiate, transfer ownership and exercise all other incidents of ownership with respect to the personal property and instruments described in subsection (1) of this section.

(5) Any person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to the provisions of subsection (1) of this section shall be discharged and released to the same extent as if such person had dealt with a personal representative of the decedent. Such person shall not be required to see to the proper application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered, in accordance with the provisions of subsection (1) of this section, refuses to pay, deliver, transfer or issue any personal property or evidence thereof to the successor, such property or evidence thereof may be recovered or its payment, delivery, transfer or issuance compelled upon proof of the successor's right in a proceeding brought in chancery court for such purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made shall be answerable and accountable to the personal representative of the estate, if any, or to any other person having a superior right.

HISTORY:

Laws, 1982, ch. 403, § 1; Laws, 1983, ch. 407; Laws, 1984, ch. 333; Laws, 1986, ch. 386; Laws, 2003, ch. 408, § 1; Laws, 2009, ch. 390, § 1, eff from and after July 1, 2009.

§ 91-7-323. Wages due deceased employee.

When any person, male or female, shall die leaving wages, salary or other compensation due him, it shall be lawful for the debtor to pay said wages, salary or other compensation to the wife or husband, as the case may be, of said deceased creditor if he or she leaves a wife or husband, as the case may be, surviving him or her; and if he or she shall leave no wife or husband surviving him or her, then to his or her children if adults; and if he or she shall leave no children and no wife or husband surviving him or her, then to his or her mother; and if he or she shall leave no wife or husband or children or mother surviving him or her, then to his or her father; and if he or she shall leave no wife or children or husband or mother or father surviving him or her, then to his or her brothers and sisters if adults. If such creditor shall have left no wife, husband, children, nor brothers nor sisters, nor father nor mother surviving him or her, or if any of his or her children surviving him or her shall be minors, or if any of his or her brothers or sisters surviving him or her, entitled to inherit, shall be minors, then it shall be lawful for said debtor to pay said wages, salary or other compensation to the chancery clerk of the county in which said creditor resided at the time of his or her death, or of the county where he or she died.

HISTORY:

Codes, 1906, § 2133; Hemingway's 1917, § 1801; 1930, § 1751; 1942, § 653; Laws, 1920, ch. 304; Laws, 1981, ch. 394, § 1, eff from and after July 1, 1981.

Cross References —

Payment of indebtedness or delivery of personal property of decedent to decedent's successor, see § 91-7-322.

OPINIONS OF THE ATTORNEY GENERAL

Consistent with and pursuant to IRS Revenue Ruling 86-109, neither federal nor state income taxes would be deducted from payments of accrued wages or vacation pay issued to a deceased state employee's designee or successor. 1999 Miss. Op. Att'y Gen. 230.

RESEARCH REFERENCES

Am. Jur.

9A Am. Jur. Pl & Pr Forms (Rev), Estates, Form 4.1 (Complaint, petition, or declaration – To collect compensation owed to deceased spouse).

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Form 1507.1 (Affidavit or declaration – To collect compensation owed deceased spouse).

§ 91-7-325. Suit to recover wages if not paid within sixty days.

After the sixty days referred to in Section 91-7-323 have passed, the parties hereinbefore designated as being the person to whom the wages so due the deceased creditor may be paid shall have the right, if they be adults, to maintain a suit to recover the amount due to the deceased creditor. When the party or parties entitled to receive said amount are minors, suit may be brought and maintained for them, by and in the name of the chancery clerk who is entitled to receive same.

HISTORY:

Codes, Hemingway's 1921 Supp. § 1801a; Laws, 1930, § 1752; Laws, 1942, § 654; Laws, 1920, ch. 304.

RESEARCH REFERENCES

Am. Jur.

9A Am. Jur. Pl & Pr Forms (Rev), Estates, Form 4.1 (Complaint, petition, or declaration – To collect compensation owed to deceased spouse).

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Form 1507.1 (Affidavit or declaration – To collect compensation owed deceased spouse).

§ 91-7-327. Duty of chancery clerk when wages paid to him.

Where such wages are paid to the chancery clerk as provided in Sections 91-7-323 and 91-7-325, it shall be the duty of the chancery clerk to pay that portion of the wages of such employee which may belong to the adult children or brothers and sisters of such deceased employe, and to report to the next term of the chancery court who are the minor brothers or sisters or children of said employe and how much is coming to each one of the heirs of said employe. Thereupon the chancery court shall enter an order upon the minutes of the court, directing the payment by the chancery clerk of the shares of such minor children or brothers and sisters of such deceased employe. In any case where the employer shall pay such wages to the chancery clerk, he shall be discharged from all further liability. For receiving and disbursing the wages which may be paid to him, the clerk shall receive the commissions allowed to administrators and executors for collecting and distributing moneys belonging to the estate of a decedent.

HISTORY:
Codes, 1906, § 2134; Hemingway's 1917, § 1802; 1930, § 1753; 1942, § 655.

RESEARCH REFERENCES

Am. Jur.
9A Am. Jur. Pl & Pr Forms (Rev), Estates, Form 4.1 (Complaint, petition, or declaration – To collect compensation owed to deceased spouse).

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Form 1507.1 (Affidavit or declaration – To collect compensation owed deceased spouse).

§ 91-7-329. Not to apply to estates administered upon.

Sections 91-7-323 through 91-7-327 shall not apply in cases where the estate of deceased creditor is administered upon.

HISTORY:
Codes, Hemingway's 1921 Supp. § 1801b; 1930, § 1754; 1942, § 656; Laws, 1920, ch. 304.

RESEARCH REFERENCES

Am. Jur.
9A Am. Jur. Pl & Pr Forms (Rev), Estates, Form 4.1 (Complaint, petition, or declaration – To collect compensation owed to deceased spouse).

10 Am. Jur. Pl & Pr Forms (Rev), Executors and Administrators, Form 1507.1 (Affidavit or declaration – To collect compensation owed deceased spouse).

§ 91-7-331. "Administrator" defined.

The word administrator in this chapter shall embrace a temporary administrator whenever the contrary is not clearly inferable from the context.

HISTORY:
Codes, 1880, § 2093; 1892, § 1962; 1906, § 2138; Hemingway's 1917, § 1806; 1930, § 1749; 1942, § 651.

JUDICIAL DECISIONS

1. In general.
Temporary administrator held entitled to compensation on same basis as regular administrator. King v. Wade, 175 Miss. 72, 166 So. 327, 1936 Miss. LEXIS 8 (Miss. 1936).

CHAPTER 8.

MISSISSIPPI UNIFORM TRUST CODE

Article 1. General Provisions and Definitions. 91-8-101
Article 2. Judicial Proceedings. 91-8-201
Article 3. Representation. 91-8-301
Article 4. Creation, validity, modification, and termination of trust. 91-8-401
Article 5. Creditor's Claims; Spendthrift and Discretionary Trusts [Reserved].
Article 6. Revocable Trusts. 91-8-601
Article 7. Office of Trustee. 91-8-701
Article 8. Duties and Powers of Trustee. 91-8-801
Article 9. Uniform Prudent Investor Act. 91-8-901
Article 10. Liability of Trustees and Rights of Persons Dealing with Trustee. 91-8-1001
Article 11. Miscellaneous Provisions. 91-8-1101
Article 12. Trust Advisors and Trust Protectors. 91-8-1201

ARTICLE 1.

GENERAL PROVISIONS AND DEFINITIONS.

Sec.
91-8-101. Short title.
91-8-102. Scope.
91-8-103. Definitions.
91-8-104. Knowledge.
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91-8-106. Common law of trusts; principles of equity.
91-8-107. Governing law.
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91-8-110. Others treated as qualified beneficiaries.
91-8-111. Nonjudicial settlement agreements.
91-8-112. Rules of construction.

§ 91-8-101. Short title.

This chapter may be cited as the Mississippi Uniform Trust Code.

HISTORY:

Laws, 2014, ch. 421, § 1, eff from and after July 1, 2014.

Editor's Notes —

Laws of 2014, ch. 421, § 104 provides:

"SECTION 104. The codifier is directed to codify Sections 1 through 104 of this act as Title 91, Chapter 8, Mississippi Code of 1972." At the direction of the co-counsel for the Joint Legislative Committee on Compilation, Revision and Publication of Legislation, Section 104 has not been codified as it is only directory language.

Comparable Laws from other States —

Alabama: Code of Ala. § 19-3B-101 et seq.

District of Columbia: D.C. Code § 19-1301.01 et seq.

Kansas: K.S.A. § 58a-101 et seq.

Maine: 18-B M.R.S. § 101 et seq.

Missouri: §§ 456.1-101 through 456.11-1106 R.S. Mo.

Nebraska: R.R.S. Neb. § 30-3801 et seq.

New Hampshire: RSA 564-B:1-101 et seq.

New Mexico: N.M. Stat. Ann. § 46A-1-101 et seq.

North Carolina: N.C. Gen. Stat. § 36C-1-101 et seq.

North Dakota: N.D. Cent. Code §§ 59-09-01 through 59-19-02.

Ohio: O.R.C. §§ 5801.01 through 5811.03.

Oregon: ORS § 130.001 et seq.

Pennsylvania: 20 Pa.C.S. §§ 7701 through 7790.3.

South Carolina: S.C. Code Ann. § 62-7-101 et seq.

Tennessee: Tenn. Code Ann. § 35-15-101 et seq.

Utah: Utah Code Ann. §§ 75-7-101 through 75-7-1201.
Vermont: 14A V.S.A. § 101 et seq.
Virginia: Va. Code Ann. § 64.2-700 et seq.
West Virginia: W. Va. Code § 44D-1-101 et seq.
Wyoming: Wyo. Stat. § 4-10-101 et seq.

§ 91-8-102. Scope.

This chapter applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

HISTORY:

Laws, 2014, ch. 421, § 2, eff from and after July 1, 2014.

§ 91-8-103. Definitions.

In this chapter:

(1) "Action," with respect to an act of a trustee, includes a failure to act.

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on July 1, 2014, or as later amended.

(3) "Beneficial interest" means a distribution interest or a remainder interest; provided, however, a beneficial interest specifically excludes a power of appointment or a power reserved by a settlor.

(4) "Beneficiary" means a person that:

(A) Has a present or future beneficial interest in a trust, vested or contingent; or

(B) In a capacity other than that of trustee, holds a power of appointment over trust property.

(5) "Beneficiary surrogate" means a person, including a trust protector or trust advisor, other than a trustee, designated by the settlor in the trust instrument or in a writing delivered to the trustee, or designated in a writing delivered to the trustee by a trust protector or trust advisor with power under the terms of the trust instrument to receive notices, information, and reports otherwise required to be provided to a beneficiary under Section 91-8-813(a) and (b), or to represent a beneficiary under Section 91-8-303(8).

(6) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in Section 91-8-405(a).

(7) "Conservator" means a person appointed by the court to administer the estate of a minor or adult individual pursuant to Section 93-13-251.

(8) "Directed trust" means a trust where through the terms of the trust, one or more persons are given the authority to direct or consent to a fiduciary's actual or proposed investment decision, distribution decision, or any other decision of the fiduciary.

(9) "Distribution interest" means:

(A) An interest, other than a remainder interest, held by an eligible distributee or permissible distributee under a trust and may be a current distribution interest or a future distribution interest;

(B) A distribution interest is classified as either a mandatory interest, a support interest or a discretionary interest; and although not the exclusive means to create each such respective distribution interest, absent clear and convincing evidence to the contrary, use of the example language accompanying the following definitions of each such respective distribution interest results in the indicated classification of distribution interest:

(i) A mandatory interest means a distribution interest in which the timing of any distribution must occur within one (1) year from the date the right to the distribution arises and the trustee has no discretion in determining whether a distribution shall be made or the amount of such distribution; example distribution language indicating a mandatory interest includes, but is not limited to:

a. All income shall be distributed to a named beneficiary; or

b. One Hundred Thousand Dollars ($100,000.00) a year shall be distributed to a named beneficiary;

(ii) A support interest means a distribution interest that is not a mandatory interest but still contains mandatory language such as "shall make distributions" and is coupled with a standard capable of judicial interpretation; example distribution language indicating a support interest includes, but is not limited to:

a. The trustee shall make distributions for health, education, maintenance, and support;

b. Notwithstanding the distribution language used, if a trust instrument containing such distribution language specifically provides that the trustee exercise discretion in a reasonable manner with regard to a discretionary interest, then notwithstanding any other provision of this subparagraph defining distribution interests, the distribution interest shall be classified as a support interest;

(iii) A discretionary interest means any interest that is not a mandatory or a support interest and is any distribution interest where a trustee has any discretion to make or withhold a distribution; example distribution language indicating a discretionary interest includes, but is not limited to:

a. The trustee may, in the trustee's sole and absolute discretion, make distributions for health, education, maintenance, and support;

b. The trustee, in the trustee's sole and absolute discretion, shall make distributions for health, education, maintenance, and support;

c. The trustee may make distributions for health, education, maintenance, and support;

d. The trustee shall make distributions for health, education, maintenance, and support; however, the trustee may exclude any of the beneficiaries or may make unequal distributions among them; or

e. The trustee may make distributions for health, education, maintenance, support, comfort, and general welfare;

f. A discretionary interest may also be evidenced by:

1. Permissive distribution language such as "may make distributions";

2. Mandatory distribution language that is negated by the discretionary distribution language contained in the trust such as "the trustee shall make distributions in the trustee's sole and absolute discretion";

g. An interest that includes mandatory distribution language such as "shall" but is subsequently qualified by discretionary distribution language shall be classified as a discretionary interest and not as a support or a mandatory interest;

(C)(i) To the extent a trust contains distribution language indicating the existence of any combination of a mandatory, support and discretionary interest, that combined interest of the trust shall be divided and treated separately as follows:

a. The trust shall be a mandatory interest only to the extent of the mandatory distribution language;

b. The trust shall be a support interest only to the extent of such support distribution language; and

c. The remaining trust property shall be held as a discretionary interest;

(ii) For purposes of this subparagraph (C), a support interest that includes mandatory distribution language such as "shall" but is subsequently qualified by discretionary distribution language, shall be classified as a discretionary interest and not as a support interest.

(10) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(11) "Excluded fiduciary" means any trustee, trust advisor, or trust protector to the extent that, under the terms of a trust:

(A) The trustee, trust advisor, or trust protector is excluded from exercising a power, or is relieved of a duty; and

(B) The power or duty is granted or reserved to another person.

(12) "Fiduciary" means:

(A) A trustee, conservator, guardian, agent under any agency agreement or other instrument, an executor, personal representative or administrator of a decedent's estate, or any other party, including a trust advisor or a trust protector, who is acting in a fiduciary capacity for any person, trust, or estate;

(B) For purposes of subparagraph (A), an agency agreement includes, but is not limited to, any agreement under which any delegation is made, either pursuant to Section 91-8-807 or by anyone holding a power or duty pursuant to Article 12;

(C) For purposes of the definition of fiduciary in Section 91-8-103, fiduciary does not mean any person who is an excluded fiduciary as such is defined in Section 91-8-103.

(13) "Guardian" means a person appointed by the court pursuant to Section 93-13-13 or a parent to make decisions regarding the support, care,

education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem.

(14) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(15) "Internal Revenue Code" means the Internal Revenue Code of 1986, as in effect on July 1, 2014, or as later amended.

(16) "Jurisdiction," with respect to a geographic area, includes a state or country.

(17) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(18) "Power of appointment" means:

(A) An inter vivos or testamentary power to direct the disposition of trust property, other than a distribution decision made by a trustee or other fiduciary to a beneficiary;

(B) Powers of appointment are held by the person to whom such power has been given, and not by a settlor in that person's capacity as settlor.

(19) "Power of withdrawal" means a presently exercisable general power of appointment other than a power: (A) exercisable by a trustee and limited by an ascertainable standard; or (B) exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(20) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(21) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined:

(A) Is a distributee or permissible distributee of trust income or principal;

(B) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or

(C) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(22) "Remainder interest" means an interest under which a trust beneficiary will receive property held by a trust outright at some time during the future.

(23) "Reserved power" means a power held by a settlor.

(24) "Revocable," as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(25) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one (1) person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(26) "Spendthrift provision" means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest.

(27) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(28) "Successors in interest" means the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs at law.

(29) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(30) "Trust advisor" means any person described in Section 91-8-1201(a).

(31) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

(32) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

(33) "Trust protector" means any person described in Section 91-8-1201(a).

HISTORY:
Laws, 2014, ch. 421, § 3, Laws, 2016, ch. 396, § 1, eff from and after July 1, 2014.

Cross References —
Article 12 of this chapter, see §§ 91-8-1201 through 91-8-1206.

Federal Aspects—
Sections 2041 and 2514 of the Internal Revenue Code of 1986, see 26 U.S.C. §§ 2041 and 2514, respectively.

§ 91-8-104. Knowledge.

(a) Subject to subsection (b), a person has knowledge of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received a notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

HISTORY:
Laws, 2014, ch. 421, § 4, eff from and after July 1, 2014.

§ 91-8-105. Default and mandatory rules.

(a) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee or any other fiduciary under this chapter, relations among trustees and such other fiduciaries, and the rights and interests of a beneficiary. The terms of a trust may expand, restrict, eliminate, or otherwise vary the duties and powers of a trustee, any such other fiduciary, relations among any of them, and the rights and interests of a beneficiary; however, nothing contained in this subsection shall be construed to override or nullify the provisions of subsection (b). The rule of statutory construction that statutes in derogation of the common law are to be strictly construed shall have no application to this section. Except as restricted by subsection (b), pursuant to this section, courts shall give maximum effect to the principal of freedom of disposition and to the enforceability of trust instruments.

(b) The terms of a trust prevail over any provision of this chapter except:

(1) The requirements for creating a trust;

(2) The duty of a trustee to act in good faith in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(3) The requirement that a trust and its terms be for the benefit of its beneficiaries as the interests of such beneficiaries are defined under the terms of the trust, and that the trust have a purpose that is lawful and possible to achieve;

(4) The power of the court to modify or terminate a trust under Sections 91-8-410 through 91-8-416;

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in the Family Trust Preservation Act, Section 91-9-501 et seq.;

(6) The power of the court under Section 91-8-702 to require, dispense with, or modify or terminate a bond;

(7) The power of the court under Section 91-8-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

(8) Subject to subsection (d), the duty under Section 91-8-813(b) to notify beneficiaries of an irrevocable trust (including anyone who holds a power of appointment) who have attained twenty-five (25) years of age that the trust has been established as set forth in that Section 91-8-813(b);

(9) Subject to subsection (d), the duty under Section 91-8-813(a)(1) and (2) to keep the beneficiaries (including anyone who holds a power of appointment) informed and to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of the trust;

(10) The effect of an exculpatory term under Section 91-8-1008;

(11) The rights under Sections 91-8-1010 through 91-8-1013 of a person other than a trustee or beneficiary;

(12) Periods of limitation for commencing a judicial proceeding;

(13) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

(14) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 91-8-203 and 91-8-204.

(c) Any purpose enunciated as a material purpose of a trust in that trust's trust instrument shall be treated as a material purpose of that trust for all purposes of this chapter.

(d) Notwithstanding subsection (b)(8) and (9) of this section, the duties of a trustee to give notice, information and reports under Section 91-8-813(a) and (b) may be waived or modified in the trust instrument or by the settlor of the trust, or a trust protector or trust advisor that holds the power to so direct, directs otherwise in a writing delivered to the trustee in any of the following ways:

(1) By waiving or modifying such duties as to all qualified beneficiaries during the lifetime of the settlor or the settlor's spouse;

(2) By specifying a different age at which a beneficiary or class of beneficiaries must be notified under Section 91-8-813(b); or

(3) With respect to one or more of the beneficiaries, by designating a beneficiary surrogate to receive such notice, information and reports who will act in good faith to protect the interests of the beneficiary or beneficiaries.

HISTORY:
Laws, 2014, ch. 421, § 5, Laws, 2016, ch. 396, § 2, eff from and after July 1, 2014.

JUDICIAL DECISIONS

1. Accounting.
In light of Miss. Code Ann. § 91-8-105(a), a trustee of an educational trust did not have to agree to an accounting, and the chancery court could not compel it unless there was some evidence of mismanagement or fraud. While the accounting was not as thorough as it could be, it was sufficient to show that the chancellor did not abuse his discretion in ratifying it. Fuller v. Kelly (In re Fuller), 203 So. 3d 1147, 2016 Miss. App. LEXIS 733 (Miss. Ct. App. 2016).

§ 91-8-106. Common law of trusts; principles of equity.

The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.

HISTORY:
Laws, 2014, ch. 421, § 6, eff from and after July 1, 2014.

§ 91-8-107. Governing law.

(a) The validity, construction and administration of a trust are determined by the law of the jurisdiction designated in the terms of the trust instrument.

(b) In the absence of a controlling designation in the terms of the trust, the laws of the jurisdiction where the trust was executed determine the validity of the trust, construction of the trust instrument and the laws of descent, while the laws of the principal place of administration determine the administration of the trust.

HISTORY:
Laws, 2014, ch. 421, § 7, eff from and after July 1, 2014.

§ 91-8-108. Principal place of administration.

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, the terms of a trust designating the principal place of administration are valid and controlling if:

(1) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction;

(2) All or part of the administration occurs in the designated jurisdiction; administration includes, but is not limited to:

(A) Maintenance of some trust records physically in the designated jurisdiction;

(B) Wholly or partly preparing or arranging for the preparation, either on an exclusive or a nonexclusive basis, in the designated jurisdiction of an income tax return that must be filed for the trust; or

(3) Some or all of the trust assets are deposited in the designated jurisdiction or physical evidence of the assets is held in the designated jurisdiction and the trust is being administered by a person defined in subsection (a)(1). For purposes of this subsection (a)(3), "deposited in the designated jurisdiction," includes assets being held in any checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account or deposit that is located in the designated jurisdiction.

(b) Except as otherwise expressly provided by the terms of a governing instrument specifically addressing the governing law for trust administration or by court order, the laws of this state shall govern the administration of a trust while the trust is administered in this state. Without precluding other means for establishing that a trust is administered in this state, if any of the activities described in subsection (a) occur in this state, the trust is administered in this state.

(c) A trustee shall administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries; however, a trustee shall not be required, in the absence of a court order, to transfer the trust's principal place of administration to another state or to a jurisdiction outside the United States even though such other state or jurisdiction outside the United States could also be appropriate to its purposes, its administration, and the interests of the beneficiaries.

(d) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee may transfer the trust's principal place of administration to another state or to a jurisdiction outside the United States, if the transfer is to a place appropriate to the trust's purposes, its administration, and the interests of the beneficiaries.

(e) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration to another state or to a jurisdiction outside the United States not less than sixty (60) days before initiating the transfer. The notice of proposed transfer must include:

(1) The name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and telephone number at the new location at which the trustee can be contacted;

(3) An explanation of the reasons for the proposed transfer;

(4) The date on which the proposed transfer is anticipated to occur; and

(5) The date, not less than sixty (60) days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(f) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a majority of the qualified beneficiaries described in Section 91-8-103 notify the trustee of an objection to the proposed transfer on or before the date specified in the notice.

(g) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to Section 91-8-704.

HISTORY:
Laws, 2014, ch. 421, § 8, eff from and after July 1, 2014.

§ 91-8-109. Methods and waiver of notice.

(a) Notice to a person under this chapter or the sending of a document to a person under this chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last-known place of residence or place of business, or a properly directed electronic message.

(b) Notice otherwise required under this chapter or a document otherwise required to be sent under this chapter need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this chapter or the sending of a document under this chapter may be waived by the person to be notified or sent the document.

(d) Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

HISTORY:
Laws, 2014, ch. 421, § 9, eff from and after July 1, 2014.

§ 91-8-110. Others treated as qualified beneficiaries.

A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this chapter if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) Is a distributee or permissible distributee of trust income or principal;

(2) Would be a distributee or permissible distributee of trust income or principal if the interests of other distributees or permissible distributees then receiving or eligible to receive distributions terminated on that date without causing the trust to terminate; or

(3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

HISTORY:
Laws, 2014, ch. 421, § 10, eff from and after July 1, 2014.

§ 91-8-111. Nonjudicial settlement agreements.

(a) Except as otherwise provided in subsection (b), the trustee and qualified beneficiaries may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(b) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.

(c) Matters that may be resolved by a nonjudicial settlement agreement include:

(1) The interpretation or construction of the terms of the trust;

(2) The approval of a trustee's report or accounting;

(3) Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) The resignation or appointment of a trustee and the determination of a trustee's compensation;

(5) Transfer of a trust's principal place of administration;

(6) Liability of a trustee for an action relating to the trust;

(7) The extent or waiver of bond of a trustee;

(8) The governing law of the trust; and

(9) The criteria for distribution to a beneficiary where the trustee is given discretion.

(d) Any qualified beneficiary or trustee may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Article 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

HISTORY:
Laws, 2014, ch. 421, § 11, eff from and after
July 1, 2014.

§ 91-8-112. Rules of construction.

The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

HISTORY:
Laws, 2014, ch. 421, § 12, eff from and after
July 1, 2014.

ARTICLE 2.

JUDICIAL PROCEEDINGS.

Sec.
91-8-201. Role of court in administration of trust.
91-8-202. Jurisdiction over trustee and beneficiary.
91-8-203. Subject-matter jurisdiction.
91-8-204. Venue.
91-8-205. Judicial accountings and settlements.

§ 91-8-201. Role of court in administration of trust.

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(b) A trust is not subject to continuing judicial supervision unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including, but not limited to, a proceeding to:

(1) Request instructions;

(2) Determine the existence or nonexistence of any immunity, power, privilege, duty or right;

(3) Approve a nonjudicial settlement;

(4) Interpret or construe the terms of the trust;

(5) Determine the validity of a trust or of any of its terms;

(6) Approve a trustee's report or accounting or compel a trustee to report or account;

(7) Direct a trustee to refrain from performing a particular act or grant to a trustee any necessary or desirable power;

(8) Review the actions or approve the proposed actions of a trustee, including the exercise of a discretionary power;

(9) Accept the resignation of a trustee;

(10) Appoint or remove a trustee;

(11) Determine a trustee's compensation;

(12) Transfer a trust's principal place of administration or a trust's property to another jurisdiction;

(13) Determine the liability of a trustee for an action relating to the trust and compel redress of a breach of trust by any available remedy;

(14) Modify or terminate a trust;

(15) Combine trusts or divide a trust;

(16) Determine liability of a trust for debts of a beneficiary and living settlor;

(17) Determine liability of a trust for debts, expenses of administration, and statutory allowances chargeable against the estate of a deceased settlor;

(18) Determine the liability of a trust for claims, expenses and taxes in connection with the settlement of a trust that was revocable at the settlor's death; and

(19) Ascertain beneficiaries and determine to whom property will pass upon final or partial termination of a trust.

HISTORY:
Laws, 2014, ch. 421, § 13, eff from and after
July 1, 2014.

§ 91-8-202. Jurisdiction over trustee and beneficiary.

(a) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

HISTORY:
Laws, 2014, ch. 421, § 14, eff from and after
July 1, 2014.

§ 91-8-203. Subject-matter jurisdiction.

(a) Except as provided in subsections (b) and (c), the chancery court has exclusive jurisdiction of proceedings in this state brought by a trustee or beneficiary concerning the administration of a trust.

(b) Any other court granted statutory equitable jurisdiction has concurrent jurisdiction with the chancery court in any proceedings in this state brought by a trustee or beneficiary concerning the administration of a trust.

(c) The chancery court has concurrent jurisdiction with other courts of this state in other proceedings involving a trust.

HISTORY:
Laws, 2014, ch. 421, § 15, eff from and after July 1, 2014.

§ 91-8-204. Venue.

(a) Except as otherwise provided in subsection (b), venue for a judicial proceeding involving a trust is in the county of this state in which the trust's principal place of administration is or will be located and, if the trust is created by will and the estate is not yet closed, in the county in which the decedent's estate is being administered.

(b) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a county of this state in which a beneficiary resides, in a county in which any trust property is located, and if the trust is created by will, in the county in which the decedent's estate was or is being administered.

HISTORY:
Laws, 2014, ch. 421, § 16, eff from and after July 1, 2014.

§ 91-8-205. Judicial accountings and settlements.

(a) A trustee may file an accounting of the trustee's administration of a trust in court at any time and seek a partial or final settlement thereof or, upon petition of an interested party, a court may order a trustee to render an accounting of the trustee's administration of a trust and require a partial or final settlement thereof. Notice of such judicial proceeding shall be provided to the trustee and each beneficiary, or representative thereof pursuant to Article 3, as provided by the applicable rules of civil procedure.

(b) A trust accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date upon which the trustee became accountable, or other such date the court may set, which provides reasonable detail of the transactions affecting the administration of the trust, and which adequately discloses the following information:

(1) The accounting must identify the trust, the trustee furnishing the accounting, and the time period covered by the accounting.

(2) The accounting must show all receipts and disbursements occurring during the accounting period. Gains and losses realized during the accounting period must also be shown.

(3) The accounting, to the extent feasible, must identify and value trust assets on hand at the close of the accounting period. For each asset or class of assets reasonably capable of valuation, the accounting shall contain two (2) values, (A) the asset acquisition value or carrying value, and (B) the estimated current value, if feasible. The accounting must identify each known noncontingent liability with an estimated current amount of the liability if known.

(4) To the extent feasible, the accounting must show the significant noncash transactions affecting the assets of the trust, including name changes in investment holdings, adjustments to carrying value, or stock splits.

(5) The accounting must reflect the allocation of receipts and disbursements between income and principal when the allocation affects the interest of any beneficiary of the trust.

(c) Any order or judgment of the court on such accounting and partial or final settlement shall be final and conclusive as to all matters occurring during the accounting period, and appeals therefrom shall and must be taken in the manner provided for from any other final judgment of the court.

HISTORY:

Laws, 2014, ch. 421, § 17, eff from and after July 1, 2014.

Cross References —

Article 3 of this chapter, see §§ 91-8-301 through 91-8-305.

ARTICLE 3.

REPRESENTATION.

Sec.
91-8-301. Representation: basic effect.
91-8-302. Representation by holder of power of appointment.
91-8-303. Representation by fiduciaries and parents.
91-8-304. Representation by person having substantially identical interest.
91-8-305. Appointment of representative.

§ 91-8-301. Representation: basic effect.

(a) Notice to a person who may represent and bind another person under this article has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in Sections 91-8-411 and 91-8-602, a person who under this article may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this article with respect to the termination or modification of a trust under Section 91-8-411(a).

HISTORY:

Laws, 2014, ch. 421, § 18, eff from and after July 1, 2014.

§ 91-8-302. Representation by holder of power of appointment.

To the extent there is no material conflict of interest between the holder of a power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

HISTORY:

Laws, 2014, ch. 421, § 19, eff from and after July 1, 2014.

§ 91-8-303. Representation by fiduciaries and parents.

To the extent there is no material conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A conservator or guardian may represent and bind the estate that the conservator or guardian controls;

(2) A conservator or guardian may represent and bind the ward if a conservator or guardian of the ward's estate has not been appointed;

(3) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) A trustee may represent and bind the beneficiaries of the trust;

(5) A personal representative of a decedent's estate may represent and bind persons interested in the estate;

(6) A parent may represent and bind the person's minor or unborn child if a conservator or guardian for the descendant has not been appointed;

(7) A grandparent may represent the grandparent's grandchild if that grandchild is not already represented by a parent under paragraph (6);

(8) A person designated by the settlor either in the trust instrument or in a writing delivered to the trustee, or designated in a writing delivered to the trustee by a trust protector or trust advisor with power under the terms of the trust instrument to represent the beneficiaries of the trust, may represent and bind the beneficiaries; and

(9) Any person acting in a fiduciary capacity shall exercise all rights and powers granted to a fiduciary under the Revised Uniform Fiduciary Access to Digital Assets Acts created under Chapter 23, Title 91.

HISTORY:

Laws, 2014, ch. 421, § 20; Laws, 2016, ch. 396, § 3; Laws, 2017, ch. 419, § 21, eff from and after July 1, 2017.

Amendment Notes —

The 2017 amendment added (9) and made related stylistic changes.

§ 91-8-304. Representation by person having substantially identical interest.

(a) Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no material conflict of interest between the representative and the person represented.

(b) Unless otherwise represented, whenever survivorship of another person is an express or implied condition of receiving property from a trust, the successor contingent remainder beneficiary may be represented and bound by the presumptive remainder beneficiary upon whose death the rights of the successor contingent remainder beneficiary depend, but only to the extent there is no material conflict of interest between the presumptive remainder beneficiary and the successor contingent remainder beneficiary.

HISTORY:
Laws, 2014, ch. 421, § 21, eff from and after July 1, 2014.

§ 91-8-305. Appointment of representative.

(a) If the court determines that an interest is not represented under this article, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem or other representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A guardian ad litem or other representative may be appointed to represent several persons or interests.

(b) A guardian ad litem or other representative may act on behalf of the individual represented with respect to any matter arising under this chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a guardian ad litem or other representative may consider general benefit accruing to the living members of the individual's family.

HISTORY:
Laws, 2014, ch. 421, § 22, eff from and after July 1, 2014.

ARTICLE 4.

CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST.

Sec.	
91-8-401.	Methods of creating trust.
91-8-402.	Requirements for creation.
91-8-403.	Trusts created in other jurisdictions.
91-8-404.	Trust purposes.
91-8-405.	Charitable purposes; enforcement.
91-8-406.	Creation of trust induced by fraud, duress, or undue influence.
91-8-407.	Evidence of oral trust; trust in land.
91-8-408.	Trust for care of animal.
91-8-409.	Noncharitable trust without ascertainable beneficiary.
91-8-410.	Modification or termination of trust; proceedings for approval or disapproval.
91-8-411.	Modification or termination of noncharitable irrevocable trust by consent.
91-8-412.	Modification or termination because of unanticipated circumstances or inability to administer trust effectively.
91-8-413.	Cy pres.

Sec.	
91-8-414.	Modification or termination of uneconomic trust.
91-8-415.	Reformation to correct mistakes.
91-8-416.	Modification to achieve settlor's tax objectives.
91-8-417.	Combination and division of trusts.

§ 91-8-401. Methods of creating trust.

A trust may be created by:

(1) Transfer of property to another person as trustee or a transfer in the name of the trust during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(2) Declaration by the owner of property that the owner holds identifiable property as trustee;

(3) Exercise of a power of appointment in favor of a trustee;

(4) A court pursuant to its statutory or equitable powers; or

(5) By an agent or attorney-in-fact under a power of attorney that:

(A) Expressly grants authority to create the trust; or

(B) Grants the agent or attorney-in-fact the authority to act in the management and disposition of the principal's property that is as broad or comprehensive as the principal could exercise for himself or herself and that does not expressly exclude the authority to create a trust. An agent or attorney-in-fact may file a petition for the court to determine whether a power of attorney described in this section grants the agent or attorney-in-fact authority that is as broad or comprehensive as that which the principal could exercise for himself or herself.

HISTORY:

Laws, 2014, ch. 421, § 23; Laws, 2016, ch. 396, § 4, eff from and after July 1, 2014.

§ 91-8-402. Requirements for creation.

(a) A trust is created only if:

(1) The settlor has capacity to create a trust;

(2) The settlor indicates an intention to create the trust;

(3) The trust has a definite beneficiary or is:

(A) A charitable trust;

(B) A trust for the care of an animal, as provided in Section 91-8-408; or

(C) A trust for a noncharitable purpose, as provided in Section 91-8-409;

(4) The trustee has duties to perform; and

(5) The same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

(d) A settlor is deemed to have the capacity to create a trust if:

(1) The trust is created by an agent of the settlor under a power of attorney as described in Section 91-8-401(5); and

(2) The settlor had capacity to create a trust at the time the power of attorney was executed.

HISTORY:
Laws, 2014, ch. 421, § 24, eff from and after July 1, 2014.

§ 91-8-403. Trusts created in other jurisdictions.

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

(1) The settlor was domiciled, had a place of abode, or was a national;

(2) A trustee was domiciled or had a place of business; or

(3) Any trust property was located.

HISTORY:
Laws, 2014, ch. 421, § 25, eff from and after July 1, 2014.

§ 91-8-404. Trust purposes.

A trust may be created only to the extent its purposes are lawful and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries as the interests of such beneficiaries are defined under the terms of the trust.

HISTORY:
Laws, 2014, ch. 421, § 26, eff from and after July 1, 2014.

§ 91-8-405. Charitable purposes; enforcement.

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

(c) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

HISTORY:
Laws, 2014, ch. 421, § 27, eff from and after July 1, 2014.

§ 91-8-406. Creation of trust induced by fraud, duress, or undue influence.

A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

HISTORY:

Laws, 2014, ch. 421, § 28, eff from and after July 1, 2014.

§ 91-8-407. Evidence of oral trust; trust in land.

(a) Except as provided in subsection (b) and except as required by a statute other than this chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

(b)(1) No trust of or in any real property can be created except by a written instrument signed by the party who declares or creates such trust (the "settlor"), or by his last will, in writing. Every writing declaring or creating a trust in real property, other than a last will, may be acknowledged and proved as other writing and filed for record with the clerk of the chancery court in which the real property, or part of it, is located, and the filing shall serve as constructive notice of the existence and terms of the trust from and after filing.

(2) In lieu of filing the trust instrument or other writing declaring or creating a trust in real property, there may be filed with the clerk of the chancery court in which the real property, or part of it, is located a memorandum of trust signed by the settlor, trustee, or successor trustee and acknowledged or proved as other writings and the filing of the memorandum of trust shall serve as constructive notice of the existence and terms of the trust from and after filing. The memorandum shall contain substantially all of the following information:

(A) The name of the trust;

(B) The street and mailing address of the office, and the name and street and mailing address and telephone number of the trustee;

(C) The name and street and mailing address and telephone number of the settlor of the trust;

(D) A legally sufficient description of all interests in real property owned by or conveyed to the trust;

(E) The anticipated date of termination of the trust or the event upon which the trust will be terminated; and

(F) The general powers granted to the trustee, which may be by reference to the statutory powers granted to the trustee under the terms of the trust instrument.

The memorandum may also contain the name and street and mailing address and telephone number of any successor trustee. The memorandum of trust may be filed with the clerk of the appropriate chancery court either before or after a deed of conveyance of real property to the trust or trustee, in his capacity as such. The memorandum need not comply with subparagraph (D) if filed before or contemporaneously with a conveyance of any real property to the trust or trustee in his capacity as such, and need not be amended upon a subsequent conveyance of real property to the trust or trustee in his capacity as such, so long as the deed of conveyance is recorded in the appropriate county, and the recording of the deed of conveyance to the trust or trustee, as the case may be, shall constitute compliance with subparagraph (D). In addition, the deed of conveyance may also serve as a memorandum of trust, or an amendment to the memorandum of trust, as the case may be, so long as the deed of conveyance contains the information required for a memorandum of trust as set forth in this subsection (b).

(3) The settlor may amend the memorandum if the trust to which it relates is subject to a power of amendment or revocation by the settlor; otherwise, only the then-serving trustee may amend the memorandum. The memorandum of amendment shall set forth the amendment to the original memorandum with particularity. The amended memorandum of trust may be made effective on a future date, which must be a date certain. The memorandum of amendment may be signed by the creator, trustee or successor trustee, as the case may be, and acknowledged or proved as other writings and filed for record with the clerk of the chancery court where the original memorandum is of record. The filing of the memorandum of amendment shall serve as constructive notice of the existence and terms of the amendment from and after filing.

(4) The provision of Sections 89-5-24 and 89-5-33 shall apply to any trust instrument, memorandum, or amendment that is to be recorded under this subsection (b).

(5) The provisions of this subsection (b) shall have no application to trusts of personal property, or to any trust arising or resulting by implication of law out of a conveyance of land. The failure to file a copy of the trust instrument, memorandum or deed of conveyance shall not affect the validity of the trust or the trust instrument.

(6) A certificate of trust containing the information set forth in Section 91-9-7 that was filed before July 1, 2014, shall be considered constructive notice of the existence and terms of the trust from and after its filing, and the filing of a memorandum of trust under this subsection (b) shall not be necessary.

(c)(1) All property originally brought into the trust or subsequently acquired by purchase or otherwise, on account of the trust, is trust property.

(2) Unless the contrary intention appears, property acquired with trust funds is trust property.

(3) Any estate in real property may be acquired in the trust name. Title so acquired can be conveyed in the trust name or by the trustees, as trustees of the trust.

(4) A conveyance to a trust in the trust name, though without words of inheritance, passes the entire interest in the property of the grantor unless the language of the conveyance reflects an intent to the contrary.

HISTORY:

Laws, 2014, ch. 421, § 29; Laws, 2016, ch. 396, § 5, eff from and after July 1, 2014.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (b)(6). The reference to "Section 91-8-407(b)" was changed to "this subsection (b)." The Joint Committee ratified the correction at its August 5, 2016, meeting.

Editor's Notes —

Section 91-9-7, referenced in this section, was included in former Article 1 of Chapter 9 and related to the filing of a certificate of trust agreement in lieu of an entire trust agreement. It was repealed by § 105 of Chapter 421, Laws of 2014, effective from and after July 1, 2014.

JUDICIAL DECISIONS

ANALYSIS

1. Constructive trust.
2. Express trust.
3. Resulting trust.

1. Constructive trust.

Trial court properly granted a church's motion for summary judgment because no express or implied trust existed between it and a Presbyterian denomination; no constructive trust was implied by law be-cause the church purchased the property at issue, and no evidence existed that the denomination invested any funds into the acquisition of any of the parcels of land. Presbytery of St. Andrew v. First Presbyterian Church PCUSA of Starkville, 240 So. 3d 399, 2018 Miss. LEXIS 163 (Miss. 2018).

2. Express trust.

Trial court properly granted a church's motion for summary judgment because no express or implied trust existed between it and a Presbyterian denomination; no traditional express trust nor any legally enforceable and separate traditional trust instrument existed or existed that would operate to vest a beneficial interest in and over the legally titled property of the church to the denomination because no reference existed in any deed to creation of a trust relationship. Presbytery of St. Andrew v. First Presbyterian Church PCUSA of Starkville, 240 So. 3d 399, 2018 Miss. LEXIS 163 (Miss. 2018).

3. Resulting trust.

Trial court properly granted a church's motion for summary judgment because no express or implied trust existed between it and a Presbyterian denomination; there was no evidence of a resulting trust because when the church was incorporation no intention to create a trust or create an express trust relationship existed, and the church opted out of a trust provision placed in the constitution when the denomination was formed. Presbytery of St. Andrew v. First Presbyterian Church PCUSA of Starkville, 240 So. 3d 399, 2018 Miss. LEXIS 163 (Miss. 2018).

§ 91-8-408. Trust for care of animal.

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one (1) animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. In addition, a person having a demonstrated interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

HISTORY:
Laws, 2014, ch. 421, § 30, eff from and after July 1, 2014.

§ 91-8-409. Noncharitable trust without ascertainable beneficiary.

Except as otherwise provided in Section 91-8-408, Section 41-43-51 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than twenty-one (21) years;

(2) A trust authorized by this section may be enforced by a person appointed under the terms of the trust, or if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

HISTORY:
Laws, 2014, ch. 421, § 31; Laws, 2016, ch. 396, § 6, eff from and after July 1, 2014.

§ 91-8-410. Modification or termination of trust; proceedings for approval or disapproval.

(a) In addition to the methods of termination prescribed by Sections 91-8-411 through 91-8-414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under Sections 91-8-411 through 91-8-416, or trust combination or division under Section 91-8-417, may be commenced by a trustee or beneficiary. The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 91-8-413.

(c) Nothing in this section or this chapter is intended to create or imply a duty for a trustee to make or seek approval of a modification, termination, combination or division, and a trustee is not liable for not making or seeking approval of a modification, termination, combination or division.

HISTORY:
Laws, 2014, ch. 421, § 32, eff from and after July 1, 2014.

§ 91-8-411. Modification or termination of noncharitable irrevocable trust by consent.

(a) During the settlor's lifetime, a noncharitable irrevocable trust may be modified or terminated by the trustee upon consent of all qualified beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust if the settlor does not object to the proposed modification or termination. The trustee shall notify the settlor of the proposed modification or termination not less than sixty (60) days before initiating the modification or termination. The notice of modification or termination must include:

(1) An explanation of the reasons for the proposed modification or termination;

(2) The date on which the proposed modification or termination is anticipated to occur; and

(3) The date, not less than sixty (60) days after the giving of notice, by which the settlor must notify the trustee of an objection to the proposed modification or termination.

(b) Following the settlor's death, a noncharitable irrevocable trust may be terminated upon consent of all of the qualified beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the qualified beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(c) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the qualified beneficiaries.

(d) If not all of the qualified beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

(1) If all of the qualified beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) The interests of a qualified beneficiary who does not consent will be adequately protected.

(e) Solely for purposes of this section, the term "noncharitable irrevocable trust" refers to a trust that is not revocable by the settlor with respect to which:

(1) No federal or state income, gift, estate or inheritance tax charitable deduction was allowed upon transfers to the trust; and

(2) The value of all interests in the trust owned by charitable organizations does not exceed five percent (5%) of the value of the trust.

(f) Notwithstanding subsection (a), the trustee may seek court approval of a modification or termination.

HISTORY:

Laws, 2014, ch. 421, § 33; Laws, 2016, ch. 396, § 7, eff from and after July 1, 2014.

§ 91-8-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

HISTORY:
Laws, 2014, ch. 421, § 34, eff from and after July 1, 2014.

§ 91-8-413. Cy pres.

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, obsolete or ineffective:

(1) The trust does not fail, in whole or in part;

(2) The trust property does not revert to the settlor or the settlor's successors in interest; and

(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner that fulfills as nearly as possible the settlor's charitable intent and purposes.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

(1) The trust property is to revert to the settlor and the settlor is still living; or

(2) Fewer than twenty-one (21) years have elapsed since the date of the trust's creation.

HISTORY:
Laws, 2014, ch. 421, § 35, eff from and after July 1, 2014.

§ 91-8-414. Modification or termination of uneconomic trust.

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than One Hundred Fifty Thousand Dollars ($150,000.00) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property to or for the benefit of the beneficiaries, in such shares as the trustee, or the court in a court proceeding, determines, after taking into account the interests of income and remainder beneficiaries so as to conform as nearly as possible to the intention of the settlor, but a trust that qualified for the marital deduction for tax purposes shall only be distributed to the spouse of the settlor for whom the trust was created.

(d) This section does not apply to an easement for conservation or preservation.

(e) This section shall not limit the right of a trustee, acting alone, to terminate a trust in accordance with applicable provisions of the governing instrument.

HISTORY:
Laws, 2014, ch. 421, § 36, eff from and after
July 1, 2014.

§ 91-8-415. Reformation to correct mistakes.

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

HISTORY:
Laws, 2014, ch. 421, § 37, eff from and after
July 1, 2014.

§ 91-8-416. Modification to achieve settlor's tax objectives.

To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

HISTORY:
Laws, 2014, ch. 421, § 38, eff from and after
July 1, 2014.

§ 91-8-417. Combination and division of trusts.

(a) After notice to the qualified beneficiaries, a trustee may combine two (2) or more trusts into a single trust or divide a trust into two (2) or more separate trusts, if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust. In addition to any other combination or division the result of which does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust, a combination or division pursuant to subsection (d) of this section shall not be considered as impairing the rights of any beneficiary or adversely affecting the achievement of the purposes of the trust. If the trusts to be combined or divided have different trustees, the trustees may negotiate the terms of the combined or divided trusts, including which trusts will be the surviving trust or trusts, who will be the trustee or trustees of the surviving trust or trusts and any other matter relating to the operation of the surviving trust or trusts.

(b) In addition to combining two (2) or more trusts into a single trust or dividing a trust into two (2) or more separate trusts, a trustee, after notice to the qualified beneficiaries, may segregate by allocation to a separate account or trust a specific amount from, a portion of, or a specific asset included in the trust property of any trust to reflect a disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirement, to make federal tax elections, to reduce potential generation-skipping transfer tax liability, or for any other tax planning purposes or other reasons.

(c) A separate trust created by severance or segregation must be treated as a separate trust for all purposes from the effective date in which the severance or segregation is effective. The effective date of the severance or segregation may be retroactive. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, the trustee may consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts or accounts created.

(d) A trust or account created by consolidation, severance, or segregation under this section shall not be considered as impairing the rights of a beneficiary if the trust is held on terms and conditions that are substantially equivalent to the terms of the trust before consolidation, severance, or segregation so that the aggregate interests of each beneficiary are substantially equivalent to the beneficiary's interests in the trust or trusts before consolidation, severance, or segregation. In determining whether a beneficiary's aggregate interests are substantially equivalent, the trustee shall consider the economic value of those interests to the extent they can be valued, considering actuarial factors as appropriate. If a beneficiary's interest cannot be valued with any reasonable degree of certainty because of the nature of the trust property, the terms of the trust, or other reasons, the trustee shall base the determination upon such other factors as are reasonable and appropriate under the facts and circumstances applicable to that particular trust, including the purposes of the trust. However, the terms of any trust before consolidation, severance or segregation which permit qualification of that trust for an applicable federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in the consolidated trust or in each of the separate trusts or accounts created by severance or segregation.

(e) A trustee who acts in good faith is not liable to any person for taking into consideration differences in federal tax attributes and other pertinent factors in administering trust property of any separate account or trust, in making tax elections, and making distributions pursuant to the terms of the separate trust.

(f) Income earned on a consolidated or severed or segregated amount, portion, or specific asset after the consolidation or severance is effective passes with that amount, portion or specific asset.

(g) This section applies to all trusts whenever created, whether before, on, or after July 1, 2014, and whether the trusts are inter vivos or testamentary, are created by the same or different instruments, by the same or different persons and without regard to where created or administered.

(h) This section does not limit the right of a trustee acting in accordance with the applicable provisions of the governing instrument to divide or consolidate trusts.

(i) Nothing contained in this section shall be construed as granting to any trustee a general power of appointment over any trust not otherwise expressly granted in the trust instrument.

HISTORY:
Laws, 2014, ch. 421, § 39, eff from and after July 1, 2014.

ARTICLE 5.

CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS [RESERVED].

ARTICLE 6.

REVOCABLE TRUSTS.

Sec.
91-8-601. Capacity of settlor of revocable trust.
91-8-602. Revocation or amendment of revocable trust.
91-8-603. Settlor's powers; powers of withdrawal.
91-8-604. Limitation on action contesting validity of revocable trust; distribution of trust property.

§ 91-8-601. Capacity of settlor of revocable trust.

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. To be effective as a post-death disposition of property transferred during the transferor's life or by the transferor's will to a trust of which the transferor is the settlor or deemed to be the settlor, neither a revocable nor an irrevocable trust existing on or executed after July 1, 2014, has to be executed with the formalities of a will.

HISTORY:
Laws, 2014, ch. 421, § 40, eff from and after July 1, 2014.

§ 91-8-602. Revocation or amendment of revocable trust.

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection (a) does not apply to a trust created under an instrument executed before July 1, 2014.

(b) If a revocable trust is created or funded by more than one (1) settlor:

(1) To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution;

(3) At the death of one (1) settlor, each surviving settlor shall have the right to revoke the trust as to the surviving settlor's portion of the trust as determined by the type of property in accordance with subsection (b) (1) or (2); and

(4) Upon the revocation or amendment of the trust by fewer than all of the settlors or upon the death of one (1) of the settlors, the trustee shall promptly notify the other settlors of the revocation, amendment or death.

(c) The settlor may revoke or amend a revocable trust:

(1) By substantial compliance with a method provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(A) A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

(B) Any other method manifesting clear and convincing evidence of the settlor's intent; however, a written revocable trust may only be amended and revoked by a later written instrument delivered to the trustee.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs. However, with respect to community property under subsection (b) (1), the trustee shall deliver the property one-half (½) to each spouse unless the trust instrument specifically states otherwise.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.

(f) A conservator or guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

HISTORY:
Laws, 2014, ch. 421, § 41, eff from and after July 1, 2014.

§ 91-8-603. Settlor's powers; powers of withdrawal.

(a) While a trust is revocable rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one (1) settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust.

(c) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

HISTORY:
Laws, 2014, ch. 421, § 42, eff from and after July 1, 2014.

§ 91-8-604. Limitation on action contesting validity of revocable trust; distribution of trust property.

(a) A person may commence a judicial proceeding to contest the validity of all or part of the terms of a trust that was revocable at the settlor's death within the earlier of:

(1) Two (2) years after the settlor's death; or

(2) One hundred and twenty (120) days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is subject to liability for doing so only if:

(1) The trustee knows of a pending judicial proceeding contesting the validity of all or part of the terms of the trust; or

(2) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty (60) days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined by a court proceeding to be invalid, in whole or in part, is liable to return to the court any distribution received for proper distribution to the extent that the invalidity applies to the distribution. If the beneficiary refuses to return the distribution after being ordered by the court, the beneficiary shall be liable for all costs incurred for recovery of the distribution.

HISTORY:
Laws, 2014, ch. 421, § 43, eff from and after July 1, 2014.

ARTICLE 7.

OFFICE OF TRUSTEE.

Sec.	
91-8-701.	Accepting or declining trusteeship.
91-8-702.	Trustee's bond.
91-8-703.	Cotrustees.
91-8-704.	Vacancy in trusteeship; appointment of successor.
91-8-705.	Resignation of trustee.
91-8-706.	Removal of trustee.
91-8-707.	Delivery of property by former trustee.
91-8-708.	Compensation of trustee, trust advisor and trust protector.
91-8-709.	Reimbursement of expenses.
91-8-710.	Directed trusts.
91-8-711.	Directed trusts; accepting or declining fiduciary appointment.
91-8-712.	Directed trusts; fiduciary's bond.
91-8-713.	Vacancy; directed trusts.
91-8-714.	Directed trusts; resignation of fiduciary.
91-8-715.	Directed trusts; removal of fiduciary.

§ 91-8-701. Accepting or declining trusteeship.

(a) Except as otherwise provided in subsection (c), a person designated as trustee accepts the trusteeship:

(1) By substantially complying with a method of acceptance provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

HISTORY:
Laws, 2014, ch. 421, § 44, eff from and after July 1, 2014.

§ 91-8-702. Trustee's bond.

(a) A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(c) A state or national bank, savings institution, or trust company authorized to exercise fiduciary powers and regulated by the Office of the Comptroller of the Currency, Office of Thrift Supervision, the Mississippi Department of Banking and Consumer Finance, or equivalent state banking supervisors need not give bond, even if required by the terms of the trust.

HISTORY:

Laws, 2014, ch. 421, § 45, eff from and after July 1, 2014.

§ 91-8-703. Cotrustees.

(a) Cotrustees who are unable to reach a unanimous decision after consultation among all the cotrustees may act by majority decision.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(c) A cotrustee must participate in the performance of a trustee's function and consult with the other cotrustees unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may delegate to a cotrustee the performance of a function other than a function that the terms of the trust instrument expressly require the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

(1) Prevent a cotrustee from committing a serious breach of trust; and

(2) Compel a cotrustee to redress a serious breach of trust.

(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

(i) A trustee, trust advisor and trust protector shall keep each cotrustee, trust advisor, trust protector and any other fiduciary reasonably informed about the administration of the trust, to the extent the trustee, trust advisor or trust protector has knowledge that each such cotrustee, trust advisor, trust protector or other fiduciary does not have knowledge of the trustee's, trust advisor's or trust protector's actions, or regarding other material information or the availability of such information, related to the administration of the trust that would be reasonably necessary for each cotrustee, trust advisor, trust protector or other fiduciary to perform his or her duties as a trustee, trust advisor, trust protector or other fiduciary of the trust.

HISTORY:

Laws, 2014, ch. 421, § 46; Laws, 2016, ch. 396, § 8, eff from and after July 1, 2014.

§ 91-8-704. Vacancy in trusteeship; appointment of successor.

(a) A vacancy in a trusteeship occurs if:

(1) A person designated as trustee rejects the trusteeship;

(2) A person designated as trustee cannot be identified or does not exist;

(3) A trustee resigns;

(4) A trustee is disqualified or removed;

(5) A trustee dies; or

(6) A conservator or guardian is appointed for an individual serving as trustee.

(b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust to act as successor trustee;

(2) By a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) By a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust to act as successor trustee;

(2) By a person selected by the unanimous agreement of the charitable organizations expressly designated to receive distributions under the terms of the trust if the Attorney General does not affirmatively object within thirty (30) days of receipt of notice of the person selected; or

(3) By a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

HISTORY:

Laws, 2014, ch. 421, § 47, eff from and after July 1, 2014.

§ 91-8-705. Resignation of trustee.

(a) A trustee may resign:

(1) Upon at least thirty (30) days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

(2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

HISTORY:
Laws, 2014, ch. 421, § 48, eff from and after July 1, 2014.

§ 91-8-706. Removal of trustee.

(a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

(1) The trustee has committed a serious breach of trust;

(2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 91-8-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

HISTORY:
Laws, 2014, ch. 421, § 49, eff from and after July 1, 2014.

§ 91-8-707. Delivery of property by former trustee.

(a) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall, within a reasonable time, deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.

HISTORY:
Laws, 2014, ch. 421, § 50, eff from and after July 1, 2014.

§ 91-8-708. Compensation of trustee, trust advisor and trust protector.

(a) If the terms of a trust do not specify the trustee's, trust advisor's, or trust protector's compensation, and if the settlor, if living, or otherwise a majority of the qualified beneficiaries as defined in Section 91-8-103, have not otherwise agreed with the trustee, trust advisor, or trust protector, a trustee, trust advisor, or trust protector is entitled to compensation that is reasonable under the circumstances.

(b) If the terms of a trust specify the trustee's, trust advisor's, or trust protector's compensation, the trustee, trust advisor, or trust protector is entitled to be compensated as specified in the trust, but the court may allow more or less compensation if:

(1) The duties of the trustee, trust advisor, or trust protector are substantially different from those contemplated when the trust was created; or

(2) The compensation specified by the terms of the trust would be unreasonably low or high.

(c) Factors for the court to consider in deciding upon a trustee's, trust advisor's, or trust protector's compensation shall include the size of the trust, the nature and number of the assets, the income produced, the time and responsibility required, the expertise required, any management or sale of real property or closely held business interests, any involvement in litigation to protect trust property, and other relevant factors.

(d) Subject to the court's authority as provided in subsection (b), regardless of its form of entity, the fees set forth in the published fee schedule of a trustee, trust advisor, or trust protector that is regulated by the Mississippi Department of Banking and Consumer Finance, the equivalent regulatory agency of another state, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision shall be presumed to be reasonable, unless otherwise provided by the terms of the trust.

HISTORY:
Laws, 2014, ch. 421, § 51, eff from and after July 1, 2014.

§ 91-8-709. Reimbursement of expenses.

(a) A trustee, trust advisor, or trust protector is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

(1) Expenses that were properly incurred in the administration of the trust, including the defense or prosecution of any action, whether successful

or not, unless the trustee is determined to have willfully or wantonly committed a material breach of trust; and

(2) To the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee, trust advisor, or trust protector or by a person named in Section 91-8-701(c)(1) of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

HISTORY:
Laws, 2014, ch. 421, § 52, eff from and after
July 1, 2014.

§ 91-8-710. Directed trusts.

If the terms of the trust require a trustee, trust advisor, or trust protector to follow the direction of a trust advisor or trust protector, and the trustee, trust advisor, or trust protector acts in accordance with the direction, then the trustee, trust advisor, or trust protector so directed shall be treated as an excluded fiduciary.

HISTORY:
Laws, 2014, ch. 421, § 53, eff from and after
July 1, 2014.

§ 91-8-711. Directed trusts; accepting or declining fiduciary appointment.

(a) A trust advisor, trust protector, or other fiduciary other than a cotrustee, the cotrustee already being provided for in Section 91-8-701(a), may accept its appointment as the respective fiduciary in a like manner as provided for a trustee under Section 91-8-701(a).

(b) A trust advisor, trust protector, or other fiduciary other than a cotrustee, the cotrustee already being provided for in Section 91-8-701(b), may reject its appointment as the respective fiduciary in a like manner as provided for a trustee under Section 91-8-701(b).

(c) A trust advisor, trust protector, or other fiduciary other than a cotrustee, the cotrustee already being provided for in Section 91-8-701(c), may, without accepting its appointment as the respective fiduciary, carry out the appropriate activities relative to the respective fiduciary as are provided for a trustee under Section 91-8-701(c).

HISTORY:
Laws, 2014, ch. 421, § 54, eff from and after
July 1, 2014.

§ 91-8-712. Directed trusts; fiduciary's bond.

(a) Section 91-8-702 applies to trust advisors, trust protectors, or other fiduciaries other than cotrustees, the cotrustees already being provided for in Section 91-8-702.

(b) When exercising its powers under this section, the court shall consider the powers, duties, and liabilities relative to the respective fiduciaries other than a cotrustee and whether any of the respective fiduciaries are excluded fiduciaries.

HISTORY:
Laws, 2014, ch. 421, § 55, eff from and after
July 1, 2014.

§ 91-8-713. Vacancy; directed trusts.

(a) Except as otherwise provided by the terms of the trust upon obtaining knowledge of a vacancy in the office of trust advisor or trust protector, the trustee shall be vested with any fiduciary power or duty that otherwise would be vested in the trustee but that by the terms of the trust was vested in the trust advisor or trust protector, until such time that the vacancy in the office of trust advisor or trust protector, as applicable, is filled.

(b) The vacancy shall be filled in the same manner as would a vacancy in trusteeship that is required to be filled, either as provided by Section 91-8-704(c) if the trust is a noncharitable trust, or as provided by Section 91-8-704(d) if the trust is a charitable trust. Section 91-8-704(e) shall also apply relative to trust advisors and trust protectors in the same manner as that subsection does to trustees and vacancies in trusteeship.

(c) Notwithstanding subsection (a), a trustee shall not be liable for failing to exercise or assume any power or duty held by a trust advisor or trust protector and conferred upon the trustee by subsection (a) for the one-hundred-twenty-day period immediately following the date the trustee obtains knowledge of the vacancy.

HISTORY:
Laws, 2014, ch. 421, § 56, eff from and after
July 1, 2014.

§ 91-8-714. Directed trusts; resignation of fiduciary.

(a) A trust advisor, trust protector, or other fiduciary other than a cotrustee, a cotrustee's resignation already being provided for in Section 91-8-705, may resign its appointment as the respective fiduciary in a like manner as provided for a trustee under Section 91-8-705.

(b) When exercising its powers under this section relative to resignation, the court shall consider the powers, duties, and liabilities relative to the respective fiduciaries other than a cotrustee and whether any of the respective fiduciaries are excluded fiduciaries.

HISTORY:
Laws, 2014, ch. 421, § 57, eff from and after
July 1, 2014.

§ 91-8-715. Directed trusts; removal of fiduciary.

(a) A trust advisor, trust protector, or other fiduciary other than a cotrustee, a cotrustee's removal already being provided for in Section 91-8-706, may be removed as the respective fiduciary in a like manner as provided for a trustee under Section 91-8-706.

(b) When exercising its powers under this section relative to removal of the respective fiduciary, the court shall consider the powers, duties, and liabilities relative to the respective fiduciaries other than a cotrustee and whether any of the respective fiduciaries are excluded fiduciaries.

HISTORY:
Laws, 2014, ch. 421, § 58, eff from and after July 1, 2014.

ARTICLE 8.

DUTIES AND POWERS OF TRUSTEE.

Sec.

91-8-801. Duty to administer trust.
91-8-802. Duty of loyalty.
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91-8-815. General powers of trustee.
91-8-816. Specific powers of trustee.
91-8-817. Distribution upon termination.

§ 91-8-801. Duty to administer trust.

Upon acceptance of a trusteeship, the trustee shall administer the trust until such time as the trust terminates or a successor trustee is appointed and all assets are delivered in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

HISTORY:
Laws, 2014, ch. 421, § 59, eff from and after July 1, 2014.

§ 91-8-802. Duty of loyalty.

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 91-8-1012 or as may otherwise be allowed under Mississippi law, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) The transaction was authorized by the terms of the trust;

(2) The transaction was approved by the court;

(3) The beneficiary did not commence a judicial proceeding within the time allowed by Section 91-8-1005;

(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 91-8-1009; or

(5) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) The trustee's spouse;

(2) The trustee's descendants, siblings, parents, or their spouses;

(3) An agent or attorney of the trustee; or

(4) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(e) In addition to all other permissible investments and delegatable duties listed in this title, so long as they are fairly priced and in accordance with the interest of the beneficiaries and the interests of the fiduciary's appointment and otherwise comply with the Mississippi Uniform Prudent Investor Act or Article 12 of this chapter, a fiduciary may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment, as well as delegate to an affiliate or other agent associated with the fiduciary and, upon satisfaction of the conditions stated in subsection (g), the fiduciary may receive fiduciary compensation from the account at the same rate as the fiduciary would otherwise be entitled to be compensated. These activities shall occur without any presumption of a conflict between personal and fiduciary interests of the trustee or other fiduciary.

(f) As used in this section:

(1) "Affiliate" means any corporation or other entity that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with the fiduciary.

(2) "Affiliated investment" means an investment for which the fiduciary or an affiliate of the fiduciary acts as adviser, administrator, distributor, placement agent, underwriter, broker or in any other capacity for which it

receives or has received a fee or commission from the investment or an investment acquired or disposed of in a transaction for which the fiduciary or an affiliate of the fiduciary receives or has received a fee or commission. "Affiliated investment" also means an investment in an insurance contract purchased from an insurance agency owned by, or affiliated with, the fiduciary, or any of its affiliates.

(3) "Delegate to an affiliate or associated agent" means a proper delegation of any duty of the fiduciary to any person or entity that is affiliated with, or associated with, the fiduciary. The action of doing any of the above shall be known as a "delegation to an affiliate or associated agent."

(4) "Fee or commission" means compensation paid to a fiduciary or an affiliate thereof on account of its services to or on behalf of an investment.

(5) For purposes of this section, "fiduciary" means any fiduciary as defined in Section 91-8-103, as well as any other fiduciary.

(6) "Investment" shall mean any security as defined in Section 2(a)(1) of the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of Section 2(i) of the Commodity Exchange Act, or any other asset permitted for fiduciary accounts pursuant to the terms of the Mississippi Uniform Prudent Investor Act or by the terms of the governing instrument, including by way of illustration and not limitation: shares or interests in a public or private investment fund, including, but not limited to, a public or private investment fund organized as a limited partnership, limited liability company, statutory or common-law business trust, real estate investment trust, joint venture or other general or limited partnership, or an open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940.

(g) A fiduciary seeking compensation pursuant to subsection (e) shall, as is applicable relative to the fiduciary's particular appointment, disclose either: to those persons entitled to be kept informed about the administration of a trust under Section 91-8-813(a), subject to the provisions of Sections 91-8-813(d) and 91-8-105(d); to each principal in an agency relationship; or to all current recipients of statements of any other fiduciary account not described above; all fees or commissions paid or to be paid by the account, or received or to be received by an affiliate arising from such affiliated investment or delegation to an affiliate or associated agent. The disclosure required under this subsection (g) may be given either in a copy of the prospectus or any other disclosure document prepared for the affiliated investment under federal or state securities laws or in a written summary that includes all fees or commissions received or to be received by the fiduciary or any affiliate of the fiduciary and an explanation of the manner in which such fees or commissions are calculated, either as a percentage of the assets invested or by some other method. The disclosure shall be made at least annually unless there has been no increase in the rate at which fees or commissions are calculated since the most recent disclosure. Notwithstanding this subsection (g), no such disclosure is required if the governing instrument or a court order expressly authorizes the fiduciary to invest the fiduciary account in affiliated investments or to perform the delegation to an affiliate or associated agent.

(h) A fiduciary that has complied with subsection (g), whether by making the applicable disclosure or by relying on the terms of a governing instrument or court order, shall have full authority to administer an affiliated investment, including the authority to vote proxies thereon, without regard to the affiliation between the fiduciary and the investment or the fiduciary and delegatee, as the case may be.

(i) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(j) The following transactions, if fairly priced and in accordance with the interest of the beneficiaries and the purposes of the trust, are not presumed to be affected by a conflict between the trustee's personal and fiduciary interest if any investment made pursuant to the transaction otherwise complies with the Mississippi Prudent Investor Act:

(1) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee, or any of its affiliates;

(2) Payment of reasonable compensation to the trustee, or any of its affiliates;

(3) A transaction between a trust and another trust, decedent's estate, guardianship, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) A deposit of trust money in a regulated financial-service institution operated by the trustee or an affiliate;

(5) An advance by the trustee of money for the protection of the trust;

(6) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliates, provides services in a capacity other than as a trustee provided that any investment made pursuant to the transaction otherwise complies with the Mississippi Prudent Investor Act;

(7) The placing of securities transactions by a trustee through a securities broker that is part of the same company as the trustee, is owned by the trustee, or is affiliated with the trustee;

(8) Any loan from the trustee or its affiliate;

(9) An investment in an insurance contract purchased from an insurance agency owned by, or affiliated with the trustee, or any of its affiliates; or

(10) A delegation and any transaction made pursuant to the delegation from a trustee to an agent that is affiliated or associated with the trustee.

(k) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

HISTORY:
Laws, 2014, ch. 421, § 60, eff from and after July 1, 2014.

Cross References —
Mississippi Uniform Prudent Investor Act, see § 91-8-901 and § 91-9-601 et seq.

Article 12 of this chapter, see §§ 91-8-1201 through 91-8-1206.

Federal Aspects—
Section 2(a)(1) of the Securities Act of 1933, see 15 U.S.C. § 77b(a)(1).

Section 2(i) of the Commodity Exchange Act, see 7 U.S.C. § 2(i).

The Investment Company Act of 1940, see 15 U.S.C. § 80a-1 et seq.

JUDICIAL DECISIONS

1. Applicability.
Trustee's withdrawals from separate irrevocable trusts were done before the enactment of Mississippi Uniform Trust Code, Miss. Code Ann. §§ 91-8-101 to 91-8-1206. Provisions from that Code could not be applied retroactively to any acts made by the trustee prior to that date when the chancery court entered its amended final judgment finding that the trustee breached a fiduciary duty of loyalty to the other beneficiaries of the trusts. Cassibry v. Cassibry, 217 So. 3d 698, 2017 Miss. App. LEXIS 40 (Miss. Ct. App. 2017).

§ 91-8-803. Impartiality.

If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests and the purposes of the trust.

HISTORY:
Laws, 2014, ch. 421, § 61, eff from and after July 1, 2014.

§ 91-8-804. Prudent administration.

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

HISTORY:
Laws, 2014, ch. 421, § 62, eff from and after July 1, 2014.

§ 91-8-805. Costs of administration.

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

HISTORY:
Laws, 2014, ch. 421, § 63, eff from and after July 1, 2014.

§ 91-8-806. Trustee's skills.

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

HISTORY:
Laws, 2014, ch. 421, § 64, eff from and after July 1, 2014.

§ 91-8-807. Delegation by trustee.

(a) A trustee may delegate duties and powers that a prudent trustee could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care, skill, and caution to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action or inaction of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

HISTORY:
Laws, 2014, ch. 421, § 65, eff from and after July 1, 2014.

§ 91-8-808. Powers to direct.

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust or contrary to the normal practice of the trustee in regard to the action requested.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) If a person holds a power to direct pursuant to Article 12 of this chapter, that person is a trust advisor, trust protector, or both. The power holder is subject to all the provisions of Article 12, including any duties prescribed by Article 12 and any provisions that make the power holder a fiduciary. Any trustee or other person that under Article 12 is relieved of any duty or any liability, or is otherwise protected under Article 12, shall be so relieved and otherwise protected.

HISTORY:
Laws, 2014, ch. 421, § 66, eff from and after July 1, 2014.

Cross References —
Article 12 of this chapter, see §§ 91-8-1201 through 91-8-1206.

§ 91-8-809. Control and protection of trust property.

A trustee shall take reasonable steps to take control of and protect the trust property.

HISTORY:
Laws, 2014, ch. 421, § 67, eff from and after July 1, 2014.

§ 91-8-810. Recordkeeping and identification of trust property.

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two (2) or more separate trusts.

HISTORY:
Laws, 2014, ch. 421, § 68, eff from and after July 1, 2014.

§ 91-8-811. Enforcement and defense of claims.

(a) A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

(b) A trustee may abandon or assign any claim that it believes is unreasonable to enforce to one or more of the beneficiaries of the trust holding the claim.

HISTORY:
Laws, 2014, ch. 421, § 69, eff from and after July 1, 2014.

§ 91-8-812. Collecting trust property.

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee. No successor trustee appointed after the examination of the accounts of a trustee or the waiver of the examination by the beneficiaries shall be responsible for the acts and omissions of the prior trustee.

HISTORY:
Laws, 2014, ch. 421, § 70, eff from and after July 1, 2014.

§ 91-8-813. Duty to inform and report.

(a)(1) A trustee shall keep the beneficiaries of the trust that are current mandatory or permissible distributees of trust income or principal, or both, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

(2) Unless unreasonable under the circumstances, a trustee shall respond in a reasonable amount of time to a qualified beneficiary's request for information related to the administration of the trust. Additionally, a qualified beneficiary shall reimburse the trustee for any reasonable expenses incurred in responding to requests for information.

(3) The requirements of subsection (a) shall also apply to the benefit of anyone who, in a capacity other than that of a fiduciary, holds a power of appointment.

(b) The trustee of an irrevocable or nongrantor trust within sixty (60) days after the acceptance and funding of a trust, excluding nominal funding for the trust to have corpus or the depositing of insurance policies on the life of a living person, shall notify each current income beneficiary, each vested ultimate beneficiary of a remainder interest and anyone who, in a capacity other than that of a fiduciary, holds a power of appointment, that the trust has been established.

(1) The required notice shall:

(A) Be sent by first-class mail or personal delivery; and

(B) Consist of either a complete copy of the document establishing the trust together with the trustee's name, address and telephone number or an abstract of the trust, as the trustee, in the trustee's absolute discretion, may choose.

(2) The abstract shall contain:

(A) The name, address and telephone number of each trustee; and

(B) If for a current income beneficiary:

(i) The number of other current income beneficiaries;

(ii) Whether distributions of income are required or discretionary; and

(iii) Whether distributions of principal are permitted and, if so, for what purpose or purposes; and

(C) If for a remainder beneficiary:

(i) The number of other remainder beneficiaries; and

(ii) The conditions that must be met before the beneficiary's share is distributable.

(D) If for anyone who, in a capacity other than that of a fiduciary, holds a power of appointment, all of the information required by subsection (b) necessary or beneficial for that person to effectively determine whether or not to exercise that power of appointment.

(c) Upon the termination of an interest of any one or more of the current income beneficiaries:

(1) The trustee shall similarly notify the income beneficiaries who are takers of the terminated interest of their interest by sending or delivering them the notice required in subsection (b); and

(2) If at that time the period described in subsection (b) has lapsed, the trustee shall similarly notify anyone who, in a capacity other than that of a fiduciary, holds a power of appointment by sending or delivering to the person the notice required in subsection (b).

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given. Anyone who, in a capacity other than that of a fiduciary, holds a power of appointment has the same power as provided a beneficiary in this subsection to waive reports and other information and to withdraw a waiver previously given.

(e) Subsections (a) and (b) shall not apply to the extent that those provisions are waived or modified in accordance with Section 91-8-105(d).

(f) Subsection (a)(1) and subsection (b) do not apply to a trust created under a trust agreement that became irrevocable before July 1, 2014. Trust law in effect before July 1, 2014, regarding the subject matter of subsection (a)(1) and subsection (b) shall continue to apply to those trusts.

(g) If the trustee of a trust is bound by any written confidentiality restrictions with respect to an asset of a trust, a trustee may require that any beneficiary who is eligible to receive information pursuant to this or any other section of this chapter about the asset shall agree in writing to be bound by the confidentiality restrictions that bind the trustee before receiving the information from the trustee.

(h) A trust advisor, trust protector, or other fiduciary designated by the terms of the trust shall keep each excluded fiduciary designated by the terms of the trust reasonably informed about:

(1) The administration of the trust with respect to any specific duty or function being performed by the trust advisor, trust protector, or other fiduciary to the extent that the duty or function would normally be performed by the excluded fiduciary or to the extent that providing the information to the excluded fiduciary is reasonably necessary for the excluded fiduciary to perform its duties; and

(2) Any other material information that the excluded fiduciary would be required to disclose to the specified beneficiaries under subsection (a) without regard to whether the terms of the trust relieve the excluded fiduciary from providing the information to qualified beneficiaries. Neither the performance nor the failure to perform of a trust advisor, trust protector, or other fiduciary designated by the terms of the trust as provided in this subsection shall affect the limitation on the liability of any excluded fiduciary provided by Article 12 of this chapter.

HISTORY:
Laws, 2014, ch. 421, § 71, eff from and after July 1, 2014.

§ 91-8-814. Exercise of powers over discretionary and other interests; tax savings.

(a) Relative to exercise of powers over discretionary and other interests:

(1) "Improper motive" means to demonstrate action such as the following:

(A) A trustee refusing to make or limiting distributions to beneficiaries other than the trustee due to the trustee's self-interest when the trustee also holds a beneficial interest subject to a discretionary interest; or

(B) A trustee making a distribution in excess of an ascertainable standard to himself or herself as beneficiary when the trustee is restricted by an ascertainable standard in the trust.

(2) Unless otherwise provided in the trust:

(A) If the settlor's spouse is named as a beneficiary, the settlor is still living and the trust is classified as a support trust, then the trustee shall consider the resources of the settlor's spouse, including the settlor's obligation of support, before making a distribution; and

(B) In all other cases, unless otherwise provided in the trust, the trustee need not consider the beneficiary's resources in determining whether a distribution should be made.

(b) The following provisions apply only to discretionary interests:

(1) A discretionary interest is neither a property interest nor an enforceable right; it is a mere expectancy;

(2) A court may review a trustee's distribution discretion only if the trustee acts dishonestly, acts with an improper motive, or fails to act, if under a duty to do so;

(3) A reasonableness standard shall not be applied to the exercise of discretion by the trustee with regard to a discretionary interest;

(4) Other than for the three (3) circumstances listed in subsection (b)(2), a court has no jurisdiction to review the trustee's discretion or to force a distribution; and

(5) Absent express language in the trust instrument to the contrary, if the distribution language in a discretionary interest permits unequal distributions between beneficiaries or distributions to the exclusion of other beneficiaries, the trustee may distribute all of the accumulated, accrued, or undistributed income and principal to one (1) beneficiary in the trustee's discretion.

(c) The following provisions apply only to mandatory or support interests:

(1) A beneficiary of a mandatory or a support interest has an enforceable right to a distribution pursuant to a court's review;

(2) A trustee's distribution decision may be reviewed for unreasonableness, dishonesty, improper motivation, or failure to act, if under a duty to do so; and

(3) In the case of a support interest, nothing in this section shall raise a beneficiary's support interest to the level of a property interest.

(d) Unless otherwise provided in subsection (f), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and

(2) A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(e) A power that is limited or prohibited by subsection (d) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(f) Subsection (d) shall not apply to:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b) (5) or 2523(e) of the Internal Revenue Code, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor; or

(3) A trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code.

HISTORY:

Laws, 2014, ch. 421, § 72; Laws, 2016, ch. 396, § 9, eff from and after July 1, 2014.

§ 91-8-815. General powers of trustee.

(a) A trustee, without authorization by the court, may exercise:

(1) Powers conferred by the terms of the trust; and

(2) Except as limited by the terms of the trust:

(A) All powers over the trust property which an unmarried competent owner has over individually owned property;

(B) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

(C) Any other powers conferred by this chapter.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this article.

HISTORY:

Laws, 2014, ch. 421, § 73, eff from and after July 1, 2014.

§ 91-8-816. Specific powers of trustee.

(a) Any references contained in a will or trust incorporating by reference the powers enumerated in Section 91-9-101 et seq. will incorporate by reference the powers contained in this section.

(b) Unless the terms of the instrument expressly provide otherwise and without limiting the authority conferred by Section 91-8-815, a trustee may:

(1) Collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) Acquire or sell property, for cash or on credit, at public or private sale;

(3) Exchange, partition, or otherwise change the character of trust property;

(4) Deposit trust money in an account in a regulated financial-service institution;

(5) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(7) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

(A) Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

(B) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(C) Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

(D) Deposit the securities with a depository or other regulated financial-service institution;

(8) With respect to an interest in real property, construct or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(9) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;

(12) Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) With respect to possible liability for violation of environmental law:

(A) Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(C) Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(D) Compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(16) Exercise elections with respect to federal, state, and local taxes, including allocating capital gains to distributable net income;

(17) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, where the trustee has a lien on future distributions for repayment of those loans;

(19) Pledge trust property to guarantee loans made by others to the beneficiary;

(20) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) Paying it to the conservator or guardian of the beneficiary's estate or, if there is no conservator or guardian of the beneficiary's estate, to the conservator or guardian of the beneficiary;

(B) Paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act, and, for that purpose, creating a custodianship or custodial trust;

(C) If the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(D) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

(22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation and basis for income tax purposes;

(23) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) On termination of the trust, exercise the powers appropriate to windup the administration of the trust and distribute the trust property to the persons entitled to it;

(27) Employ persons, including attorneys, auditors, investment advisors or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary; and

(28)(A) A trustee may insure the life of any person in which the trustee of the trust has an insurable interest as set forth in Section 83-5-251.

(B) A trustee may retain any life insurance policy contributed to a trust by a settlor, or purchased by the trustee upon the request of the settlor, as an asset of the trust without regard to any lack of diversification caused thereby and without regard to the terms and conditions of the life insurance policy. The trustee shall not be liable for lack of diversification to any beneficiary of a trust for the trustee's retention of the life insurance policy.

(C) With respect to a life insurance policy owned by the trust a trustee may:

(i) Borrow funds from any party, including an insurance company, for the purpose of paying premiums on any policy of insurance owned by the trust and enter into a "split dollar" or other similar arrangement;

(ii) Collaterally assign any policy to a creditor of the trust;

(iii) Exercise any and all rights under any life insurance policy, including the power to pay, forego or adjust the amount of any premium payments, adjust the type and amount of death benefit, receive or apply dividends to premiums or purchase additional insurance, and allocate policy values among any subaccounts available under any variable or similar policy; and

(iv) With the consent of the insured, to sell any policy to a third party in a life settlement or viatical settlement transaction.

HISTORY:

Laws, 2014, ch. 421, § 74, eff from and after July 1, 2014.

Cross References —

Uniform Transfers to Minors Act, see § 91-20-1 et seq.

§ 91-8-817. Distribution upon termination.

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty (30) days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection. For the purpose of determining the date a proposed distribution was sent, if exact confirmation is unavailable it can be assumed it was received five (5) days after the date of mailing.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) It was induced by improper conduct of the trustee; or

(2) The beneficiary, at the time of the release, did not know of the material facts relating to the alleged breach and the trustee had actual knowledge of the facts relating to the alleged breach.

HISTORY:

Laws, 2014, ch. 421, § 75, eff from and after July 1, 2014.

ARTICLE 9.

UNIFORM PRUDENT INVESTOR ACT.

Sec.
91-8-901. Prudent Investor Act incorporated by reference.

§ 91-8-901. Prudent Investor Act incorporated by reference.

Title 91, Chapter 9, Article 13, the Mississippi Uniform Prudent Investor Act, is incorporated in this chapter by reference.

HISTORY:
Laws, 2014, ch. 421, § 76, eff from and after July 1, 2014.

ARTICLE 10.

LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE.

Sec.
91-8-1001. Remedies for breach of trust.
91-8-1002. Damages for breach of trust.
91-8-1003. Damages in absence of breach.
91-8-1004. Attorney's fees and costs.
91-8-1005. Limitation of action against trustee by a beneficiary, a trustee, trust advisor or trust protector.
91-8-1006. Reliance on trust instrument.
91-8-1007. Event affecting administration or distribution.
91-8-1008. Exculpation of trustee.
91-8-1009. Beneficiary's consent, release, or ratification.
91-8-1010. Limitation on personal liability of trustee.
91-8-1011. Interest as general partner.
91-8-1012. Protection of person dealing with trustee.
91-8-1013. Certification of trust.
91-8-1014. Enforcement of no-contest, in terrorem or forfeiture provisions.

§ 91-8-1001. Remedies for breach of trust.

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) Compel the trustee to perform the trustee's duties;

(2) Enjoin the trustee from committing a breach of trust;

(3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) Order a trustee to account;

(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) Suspend the trustee;

(7) Remove the trustee as provided in Section 91-8-706;

(8) Reduce or deny compensation to the trustee;

(9) Subject to Section 91-8-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) Order any other appropriate relief whether provided elsewhere in this chapter, available at common law or under equity principles.

HISTORY:
Laws, 2014, ch. 421, § 77, eff from and after July 1, 2014.

§ 91-8-1002. Damages for breach of trust.

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for:

(1) The greater of:

(A) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(B) The profit the trustee made by reason of the breach; and

(2) Any measure of damages otherwise provided by law.

(b) Except as otherwise provided in this subsection (b), if more than one (1) trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

HISTORY:
Laws, 2014, ch. 421, § 78, eff from and after July 1, 2014.

§ 91-8-1003. Damages in absence of breach.

Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

HISTORY:
Laws, 2014, ch. 421, § 79, eff from and after July 1, 2014.

§ 91-8-1004. Attorney's fees and costs.

(a) In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

(b) In a nonjudicial proceeding involving the administration of a trust, the trustee may pay fees, other reasonable costs, and expenses from trust assets where all of the parties to the proceeding agree in writing.

(c) In a mediation or arbitration proceeding involving the administration of a trust, the mediator or arbitrator may award fees, other reasonable costs, and expenses against the assets of the trust.

HISTORY:
Laws, 2014, ch. 421, § 80, eff from and after July 1, 2014.

§ 91-8-1005. Limitation of action against trustee by a beneficiary, a trustee, trust advisor or trust protector.

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or beneficiary's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within three (3) years after the first to occur of:

(1) The removal, resignation, or death of the trustee;

(2) The termination of the beneficiary's interest in the trust; or

(3) The termination of the trust.

(d) A trustee may not commence a proceeding against a cotrustee or a former trustee for breach of trust more than one (1) year after the date the trustee or a representative of the trustee was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(e) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trustee or the trustee's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(f) If subsection (d) does not apply, a judicial proceeding by a trustee against a cotrustee or former trustee for breach of trust must be commenced within three (3) years after the first to occur of:

(1) The removal, resignation, or death of the cotrustee or a former trustee;

(2) The termination of the beneficiary's interest in the trust; or

(3) The termination of the trust.

(g) A trust advisor or trust protector may not commence a proceeding against a trustee or a former trustee for breach of trust more than one (1) year after the date the trust advisor or trust protector or the respective representative of each was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(h) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trust advisor or trust protector or the respective representative of each knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(i) If subsection (g) does not apply, a judicial proceeding by a trust advisor or trust protector against a trustee or former trustee for breach of trust must be commenced within three (3) years after the first to occur of:

(1) The removal, resignation, or death of the trustee or a former trustee;

(2) The termination of the beneficiary's interest in the trust; or

(3) The termination of the trust.

(j) Notwithstanding subsections (d) through (i), no trustee, trust advisor, or trust protector may commence a proceeding against a trustee or a former trustee if, under subsections (a) through (c) of this section, none of the beneficiaries may commence a proceeding against the cotrustee or former trustee for the breach of trust.

HISTORY:

Laws, 2014, ch. 421, § 81, eff from and after July 1, 2014.

Editor's Notes —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in a statutory reference in (j) by substituting "subsections (a) through (c) of this section" for "Section 91-8-1005(a) through (c)." The Joint Committee ratified the correction at its July 24, 2014, meeting.

§ 91-8-1006. Reliance on trust instrument.

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

HISTORY:

Laws, 2014, ch. 421, § 82, eff from and after July 1, 2014.

§ 91-8-1007. Event affecting administration or distribution.

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

HISTORY:

Laws, 2014, ch. 421, § 83, eff from and after July 1, 2014.

§ 91-8-1008. Exculpation of trustee.

(a) A provision of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) Except for provisions intended to provide protection for carrying out a stated purpose in the trust instrument, an exculpatory provision drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory provision is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

HISTORY:
Laws, 2014, ch. 421, § 84, eff from and after
July 1, 2014.

§ 91-8-1009. Beneficiary's consent, release, or ratification.

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not know of the material facts relating to the breach and the trustee had actual knowledge of the facts relating to the alleged breach.

HISTORY:
Laws, 2014, ch. 421, § 85, eff from and after
July 1, 2014.

§ 91-8-1010. Limitation on personal liability of trustee.

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

(b) Except as otherwise provided in subsection (a) or (c), the debts, obligations and liabilities incurred by a trustee by reason of the ownership, management, or control of trust property in the trustee's fiduciary capacity, shall be enforceable solely against the trust and its property, without any obligation or liability personally being borne by any trustee of the trust.

(c) Except as otherwise limited by state law, a trustee is personally liable for torts committed in the course of administering a trust only if the trustee is personally at fault.

(d) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

HISTORY:
Laws, 2014, ch. 421, § 86, eff from and after
July 1, 2014.

§ 91-8-1011. Interest as general partner.

(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Uniform Partnership Act, Title 79, Chapter 13, Mississippi Code of 1972, or the Mississippi Limited Partnership Act, Title 79, Chapter 14, Mississippi Code of 1972.

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee.

(d) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

HISTORY:

Laws, 2014, ch. 421, § 87, eff from and after July 1, 2014.

Cross References —

Uniform Partnership Act, see § 79-13-101 et seq.

Mississippi Limited Partnership Act, see § 79-14-101 et seq.

§ 91-8-1012. Protection of person dealing with trustee.

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without actual knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith assists a trustee or deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without actual knowledge that the trusteeship has terminated, is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

HISTORY:

Laws, 2014, ch. 421, § 88; Laws, 2016, ch. 396, § 10, eff from and after July 1, 2014.

§ 91-8-1013. Certification of trust.

(a) Instead of furnishing a copy of the trust instrument to any person to evidence the existence and validity of the trust, the trustee may furnish to the person a certification of trust, signed by the trustee or trustees having signature authority as identified in paragraph (6) of this subsection, attested by a notary public, and shall contain the following:

(1) An affirmation of the current existence of the trust and the date on which the trust came into existence;

(2) The identity of the settlor or settlors;

(3) The identity and address of the currently acting trustee or trustees and may contain the identity and address of the named successor trustee or trustees or a statement that no successor is named;

(4) The administrative or managerial powers of the trustee in a pending transaction or relevant to the request;

(5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) When there are multiple trustees or multiple successor trustees, the signature authority of the trustees indicating whether all or less than all of the currently acting trustees are required to sign in order to exercise various powers of the trustee;

(7) Where there are successor trustees designated, a statement detailing the conditions for their succession or a statement that a third party may rely on the authority of one or more successors without proof of their succession;

(8) The trust's Taxpayer Identification Number, whether a social security number or Employer Identification Number, but only if the trust's identification number is essential to the transaction for which the request for the trust document is made;

(9) The name in which title to trust property may be taken; and

(10) A statement that, to the best of the trustee's knowledge, the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(b) The certification of trust shall not be required to contain the dispositive provisions of a trust that set forth the distribution of the trust estate.

(c) The trustee offering the certification of trust may provide copies of all or any part of the trust document and amendments, if any. Nothing in this section is intended to require or imply an obligation to provide dispositive provisions of the trust or a copy of the entire trust documents and amendments.

(d) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting. A person who does not have actual knowledge that the facts contained in the certification of trust are incorrect may assume without inquiry the existence of the facts contained in the certification. Actual knowledge shall not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the trust certification. Nothing contained in this section shall limit the rights of the beneficiaries of the trust against the trustee. Any person relying on the certification of trust shall be indemnified from the assets of the trust to the extent of the share of the trust attributable to the beneficiary or beneficiaries bringing any action against the person for any costs, damage, attorney fees, or other expenses incurred in defending any action against the person arising for the transaction to which a certification of trust related.

(e) A person's failure to request a certification of trust does not affect the protections provided that person in this section. No inference that the person has not acted in good faith or that the person was negligent may be drawn from the failure of the person to request a certification of trust. Nothing in this section is intended to create an implication that a person is liable for acting in reliance on a certification of trust under circumstances where the requirements of this section are not satisfied.

(f) Nothing in this section shall be construed to require a third party, when presented with a trust certificate, to enter into a contract with a trustee relating to trust assets or obligations, or to preclude a third party from demanding as a precondition to any contract that the trustee provide additional information in order to clarify any ambiguities or inconsistencies in the trust certificate.

(g) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

HISTORY:

Laws, 2014, ch. 421, § 89; Laws, 2016, ch. 396, § 18, eff from and after July 1, 2014.

§ 91-8-1014. Enforcement of no-contest, in terrorem or forfeiture provisions.

(a) For the purposes of this section, "no-contest provision" includes a "no-contest provision," "in terrorem provision" or "forfeiture provision" of a trust instrument. A "no-contest provision" means a provision that, if given effect, would reduce or eliminate the interest of any beneficiary of the trust who, directly or indirectly, initiates or otherwise pursues:

(1) Any action to contest the validity of the trust or the terms of the trust;

(2) Any action to set aside or vary the terms of the trust;

(3) Any action to challenge the acts of the trustee or other fiduciary of the trust in the performance of the trustee's or other fiduciary's duties as described in the terms of the trust; or

(4) Any other act or proceedings to frustrate or defeat the settlor's intent as expressed in the terms of the trust.

(b) With regard to whether the beneficiary sought, received or relied upon legal counsel, a no-contest provision shall be enforceable according to the express terms of the no-contest provision without regard to the beneficiary's good or bad faith in taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision unless probable cause exists for the beneficiary taking such action on the grounds of:

(1) Fraud;

(2) Duress;

(3) Revocation;

(4) Lack of testamentary capacity;

(5) Undue influence;

(6) Mistake;

(7) Forgery; or

(8) Irregularity in the execution of the trust instrument.

(c) Subsection (b) shall not apply to:

(1) Any action brought solely to challenge the acts of the trustee or other fiduciary of the trust to the extent that the trustee or other fiduciary has committed a breach of fiduciary duties or breach of trust;

(2) Any action brought by the trustee or any other fiduciary serving under the terms of the trust, unless the trustee or other fiduciary is a beneficiary against whom the no-contest provision is otherwise enforceable;

(3) Any agreement among the beneficiaries and any other interested persons in settlement of a dispute or resolution of any other matter relating to the trust, including, without limitation, any nonjudicial settlement agreement;

(4) Any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision;

(5) Any action brought by a beneficiary or on behalf of any such beneficiary for a construction or interpretation of the terms of the trust; or

(6) Any action brought by the Attorney General for a construction or interpretation of a charitable trust or a trust containing a charitable interest if a provision exists in a trust purporting to penalize a charity or charitable interest for contesting the trust if probable cause exists for instituting proceedings.

(d) Pursuant to this section, courts shall enforce the settlor's intent as reflected in a no-contest provision to the greatest extent possible.

HISTORY:

Laws, 2014, ch. 421, § 90, eff from and after July 1, 2014.

ARTICLE 11.

MISCELLANEOUS PROVISIONS.

Sec.
91-8-1101. Uniformity of application and construction.
91-8-1102. Electronic records and signatures.
91-8-1103. Severability clause.
91-8-1104 and 91-8-1105. [Reserved].
91-8-1106. Application to existing relationships.

Sec.
91-8-1107. Alter ego.
91-8-1108. Dominion and control over a trust.
91-8-1109. Protection of special needs trusts and other similar trusts for disabled persons.

§ 91-8-1101. Uniformity of application and construction.

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY:
Laws, 2014, ch. 421, § 91, eff from and after July 1, 2014.

§ 91-8-1102. Electronic records and signatures.

The provisions of this chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 USC Section 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

HISTORY:
Laws, 2014, ch. 421, § 92, eff from and after July 1, 2014.

§ 91-8-1103. Severability clause.

If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

HISTORY:
Laws, 2014, ch. 421, § 93, eff from and after July 1, 2014.

§§ 91-8-1104 and 91-8-1105. [Reserved].

§ 91-8-1106. Application to existing relationships.

(a) Except as otherwise provided in this chapter:

(1) This chapter applies to all trusts created before, on, or after July 1, 2014;

(2) This chapter applies to all judicial proceedings concerning trusts commenced on or after July 1, 2014;

(3) This chapter applies to judicial proceedings concerning trusts commenced before July 1, 2014, unless the court finds that application of a

particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;

(4) Any rule of construction or presumption provided in this chapter applies to trust instruments executed before July 1, 2014, unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) An act done before July 1, 2014, is not affected by this chapter.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before July 1, 2014, that statute continues to apply to the right even if it has been repealed or superseded.

HISTORY:
Laws, 2014, ch. 421, § 94, eff from and after July 1, 2014.

JUDICIAL DECISIONS

1. Applicability.
Trustee's withdrawals from separate irrevocable trusts were done before the enactment of Mississippi Uniform Trust Code, Miss. Code Ann. §§ 91-8-101 to 91-8-1206. Provisions from that Code could not be applied retroactively to any acts made by the trustee prior to that date when the chancery court entered its amended final judgment finding that the trustee breached a fiduciary duty of loyalty to the other beneficiaries of the trusts. Cassibry v. Cassibry, 217 So. 3d 698, 2017 Miss. App. LEXIS 40 (Miss. Ct. App. 2017).

§ 91-8-1107. Alter ego.

(a) Absent clear and convincing evidence, no settlor of an irrevocable trust may be deemed to be the alter ego of a trustee of such trust.

(b) None of the following factors, by themselves or in combination, may be considered sufficient evidence for a court to conclude that the settlor controls a trustee, or is the alter ego of a trustee of such trust:

(1) Any combination of the factors listed in Section 91-8-1108 regarding dominion and control over a trust;

(2) Isolated occurrences where the settlor has signed checks, made disbursements, or executed other documents related to the trust as a trustee, a trust advisor or a trust protector, when in fact the settlor was not a trustee, trust advisor or trust protector;

(3) Making any requests for distributions on behalf of beneficiaries; or

(4) Making any requests to the trustee to hold, purchase, or sell any trust property.

HISTORY:
Laws, 2014, ch. 421, § 95, eff from and after July 1, 2014.

§ 91-8-1108. Dominion and control over a trust.

In the event a person challenges a settlor's or a beneficiary's influence over a trust, none of the following factors, alone or in combination, shall enter into a determination that dominion and control over a trust exists:

(1) The settlor or a beneficiary is serving as a trustee, a trust advisor, a trust protector, or other fiduciary as described in this Title 91;

(2) The settlor or a beneficiary holds an unrestricted power to remove or replace a trustee, a trust advisor, a trust protector, or other fiduciary;

(3) The settlor or a beneficiary is a trust administrator, a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or holds any other managerial function relative to any type of entity specified in this section, or relative to any other type of entity not so specified, and part or all of the trust property consists of an interest in such entity;

(4) A person related by blood or adoption to the settlor or a beneficiary is appointed as a trustee, a trust advisor, a trust protector, or other fiduciary;

(5) The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend is appointed as a trustee, a trust advisor, a trust protector, or other fiduciary;

(6) A business associate is appointed as a trustee, a trust advisor, a trust protector, or other fiduciary;

(7) A beneficiary holds any power of appointment over any or all of the trust property;

(8) The settlor holds a power to substitute property of equivalent value for property held by the trust, regardless of whether such power is:

(A) Held in a fiduciary or nonfiduciary capacity;

(B) Exercisable with or without the approval of any person in a fiduciary capacity; or

(C) Exercisable with or without the approval of any person having an interest adverse to such settlor;

(9) A trustee, a trust advisor, a trust protector or other fiduciary has the power to loan trust property to the settlor for less than a full and adequate rate of interest or without adequate security;

(10) Any language relative to the power to make any distribution provides for any discretion relative to such distribution;

(11) The trust has only one (1) beneficiary eligible for current distributions; or

(12) The beneficiary is serving as a cotrustee, or as a trust advisor or trust protector under Article 12, or as any other fiduciary.

HISTORY:

Laws, 2014, ch. 421, § 96, eff from and after July 1, 2014.

Cross References —

Article 12 of this chapter, see §§ 91-8-1201 through 91-8-1206.

§ 91-8-1109. Protection of special needs trusts and other similar trusts for disabled persons.

Notwithstanding the provisions of this chapter that may otherwise be applicable to a trust, no provision thereof shall apply to any special needs trust, supplemental needs trust, or other similar trust established for a person with a disability as a beneficiary, including, without limitation, any trust established pursuant to the provisions of 42 USC Section 1396(p)(d)(4)A or C, as amended from time to time, or other similar federal or state statute, to the extent that the provision would disqualify the trust beneficiary at any time from eligibility for public needs-based assistance benefits for which the beneficiary would otherwise qualify.

HISTORY:
Laws, 2014, ch. 421, § 97, eff from and after July 1, 2014.

ARTICLE 12.

TRUST ADVISORS AND TRUST PROTECTORS.

Sec.	
91-8-1201.	Powers of trust advisors and trust protectors.
91-8-1202.	Trust advisors and trust protectors as fiduciaries.
91-8-1203.	Trust advisor and trust protector subject to court jurisdiction.
91-8-1204.	No duty to review actions of trustee, trust advisor, or trust protector.
91-8-1205.	Fiduciary's liability for action or inaction of trustee, trust advisor, and trust protector.
91-8-1206.	Limitation of action against trust advisor or trust protector.

§ 91-8-1201. Powers of trust advisors and trust protectors.

(a) A trust protector or trust advisor is any person, and may be a committee of more than one (1) person, other than a trustee, who under the terms of the trust has a power or duty with respect to a trust, including, but not limited to, one or more of the following powers:

(1) The power to modify or amend the trust instrument to achieve favorable tax status or respond to changes in any applicable federal, state, or other tax law affecting the trust, including, but not limited to, any rulings, regulations, or other guidance implementing or interpreting such laws;

(2) The power to amend or modify the trust instrument to take advantage of changes in the rule against perpetuities, laws governing restraints on alienation, or other state laws restricting the terms of the trust, the distribution of trust property, or the administration of the trust;

(3) The power to appoint a successor trust protector or trust advisor;

(4) The power to review and approve a trustee's trust reports or accountings;

(5) The power to change the governing law or principal place of administration of the trust;

(6) The power to remove and replace any trust advisor or trust protector for the reasons stated in the trust instrument;

(7) The power to remove a trustee, cotrustee, or successor trustee, for the reasons stated in the trust instrument, and appoint a successor;

(8) The power to consent to a trustee's or cotrustee's action or inaction in making distributions to beneficiaries;

(9) The power to increase or decrease any interest of the beneficiaries in the trust, to grant a power of appointment to one or more trust beneficiaries, or to terminate or amend any power of appointment granted in the trust;

(10) The power to perform a specific duty or function that would normally be required of a trustee or cotrustee;

(11) The power to advise the trustee or cotrustee concerning any beneficiary;

(12) The power to consent to a trustee's or cotrustee's action or inaction relating to investments of trust assets;

(13) The power to direct the acquisition, disposition, or retention of any trust investment;

(14) The power to terminate all or part of a trust;

(15) The power to veto or direct all or part of any trust distribution;

(16) The power to borrow money with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(17) The power to make loans out of trust property, including, but not limited to, loans to a beneficiary on terms and conditions, including without interest, considered to be fair and reasonable under the circumstances;

(18) The power to vote proxies and exercise all other rights of ownership relative to securities and business entities held by the trust;

(19) The power to select one or more investment advisors, managers or counselors, including, but not limited to, a trustee, and delegate to them any of its powers;

(20) The power to direct the trustee with respect to any additional powers and discretions over investment and management of trust assets provided in the trust instrument;

(21) The power to receive notices, information, and reports otherwise required to be provided to a beneficiary under Section 91-8-813(a) and (b);

(22) The power to represent and bind a beneficiary under Section 91-8-303(8) to the extent there is not material conflict of interest between the trust protector or trust advisor and the beneficiary; and

(23) The power to designate someone to represent and bind a beneficiary under Section 91-8-303(8) to the extent there is no material conflict of interest between the person designated and the beneficiary.

(b) The exercise of a power by a trust advisor or a trust protector shall be exercised in the sole and absolute discretion of the trust advisor or trust protector and shall be binding on all other persons.

(c) Any power of a trust advisor or trust protector to directly or indirectly modify a trust may be granted notwithstanding the provisions of Sections 91-8-410 through 91-8-412 and 91-8-414.

(d) An excluded fiduciary may continue to follow the direction of a trust protector or trust advisor upon the incapacity or death of the grantor of a trust to the extent provided in the trust instrument.

(e) Notwithstanding anything in this section to the contrary, no modification, amendment, or grant of a power of appointment with respect to a trust, all of whose beneficiaries are charitable organizations, may authorize a trust protector or trust advisor to grant a beneficial interest in the trust to any noncharitable interest or purpose.

HISTORY:
Laws, 2014, ch. 421, § 98; Laws, 2016, ch. 396, § 11, eff from and after July 1, 2014.

§ 91-8-1202. Trust advisors and trust protectors as fiduciaries.

(a) A trust advisor or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to the trust advisor or trust protector. In exercising any power or refraining from exercising any power, a trust advisor or trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) A trust advisor or trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.

HISTORY:
Laws, 2014, ch. 421, § 99, eff from and after July 1, 2014.

§ 91-8-1203. Trust advisor and trust protector subject to court jurisdiction.

By accepting appointment to serve as a trust advisor or trust protector, the trust advisor or the trust protector submits personally to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor or trust protector may be made a party to any action or proceeding relating to a decision, action, or inaction of the trust advisor or trust protector.

HISTORY:
Laws, 2014, ch. 421, § 100, eff from and after July 1, 2014.

§ 91-8-1204. No duty to review actions of trustee, trust advisor, or trust protector.

(a) Whenever, pursuant to the terms of a trust, an excluded fiduciary is to follow the direction of a trustee, trust advisor, or trust protector with respect to investment decisions, distribution decisions, or other decisions of the nonexcluded fiduciary, then, except to the extent that the terms of the trust provide otherwise, the excluded fiduciary shall have no duty to:

(1) Review, evaluate, perform investment reviews, suitability reviews, inquiries, or investigations, or in any other way monitor the conduct of the trustee, trust advisor, or trust protector;

(2) Make recommendations or evaluations or in any way provide advice to the trustee, trust advisor, or trust protector or consult with the trustee, trust advisor, or trust protector; or

(3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the excluded fiduciary would or might have exercised the excluded fiduciary's own discretion in a manner different from the manner directed by the trustee, trust advisor, or trust protector.

(b) Absent provisions in the trust instrument to the contrary, the actions of the excluded fiduciary pertaining to matters within the scope of the trustee, trust advisor, or trust protector's authority, including, but not limited to, confirming that the trustee, trust advisor, or trust protector's directions have been carried out and recording and reporting actions taken at the trustee, trust advisor, or trust protector's direction or other information pursuant to Section 91-8-813, shall be deemed to be administrative actions taken by the excluded fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under the terms of the trust; those administrative actions, as well as any communications made by the excluded fiduciary to the trust advisor, trust protector, or any of their agents or persons they have selected to provide services to the trust, shall not be deemed to constitute an undertaking by the excluded fiduciary to monitor the trustee, trust advisor, or trust protector or otherwise participate in actions within the scope of the trustee's, trust advisor's, or trust protector's authority.

HISTORY:
Laws, 2014, ch. 421, § 101, eff from and after July 1, 2014.

§ 91-8-1205. Fiduciary's liability for action or inaction of trustee, trust advisor, and trust protector.

An excluded fiduciary is not liable, either individually or as a fiduciary, for:

(1) Any loss resulting from compliance with a direction of a trustee, trust advisor, or trust protector, including, but not limited to, any loss from the trustee, trust advisor, or trust protector breaching fiduciary responsibilities or acting beyond the trustee's, trust advisor's, or trust protector's scope of authority;

(2) Any loss resulting from any action or inaction of a trustee, trust advisor, or trust protector; or

(3) Any loss that results from the failure of a trustee, trust advisor, or trust protector to take any action proposed by the excluded fiduciary where the action requires the authorization of the trustee, trust advisor, or trust protector, if an excluded fiduciary who had a duty to propose the action timely sought but failed to obtain the authorization.

HISTORY:
Laws, 2014, ch. 421, § 102, eff from and after July 1, 2014.

§ 91-8-1206. Limitation of action against trust advisor or trust protector.

(a) A beneficiary may not commence a proceeding against a trust advisor or trust protector for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(b) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the beneficiary's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trust advisor or trust protector for breach of trust must be commenced within three (3) years after the first to occur of:

(1) The removal, resignation, or death of the trust advisor or trust protector;

(2) The termination of the beneficiary's interest in the trust; or

(3) The termination of the trust.

(d) A trustee may not commence a proceeding against a trust advisor or trust protector for breach of trust more than one (1) year after the date the trustee or a representative of the trustee was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(e) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trustee or the trustee's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(f) If subsection (d) does not apply, a judicial proceeding by a trustee against a trust advisor or trust protector for breach of trust must be commenced within three (3) years after the first to occur of:

(1) The removal, resignation, or death of the trust advisor or trust protector;

(2) The termination of the beneficiary's interest in the trust; or

(3) The termination of the trust.

(g) A trust advisor or trust protector may not commence a proceeding against another trust advisor or another trust protector for breach of trust more than one (1) year after the date the trust advisor or trust protector or the respective representative of each was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(h) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trust advisor or trust protector or the respective representative of each knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(i) If subsection (g) does not apply, a judicial proceeding by a trust advisor or trust protector against another trust advisor or another trust protector for breach of trust must be commenced within three (3) years after the first to occur of:

(1) The removal, resignation, or death of the other trust advisor or other trust protector;

(2) The termination of the beneficiary's interest in the trust; or

(3) The termination of the trust.

(j) Notwithstanding subsections (d) through (i), no trustee, trust advisor, or trust protector may commence a proceeding against a trust advisor or trust protector or another trust advisor or another trust protector if, under either subsections (a) through (c) or Section 91-8-1005(a) through (c), none of the beneficiaries may commence a proceeding against the trust advisor or trust protector for such breach of trust.

HISTORY:

Laws, 2014, ch. 421, § 103, eff from and after July 1, 2014.

CHAPTER 9.

TRUSTS AND TRUSTEES

Article 1.	Trusts — General Provisions [Repealed].	91-9-1
Article 3.	Uniform Trustees' Powers [Repealed].	91-9-101
Article 5.	Resignation and Succession of Trustees [Repealed].	91-9-201
Article 7.	Removal of Trustees [Repealed].	91-9-301
Article 9.	Administration of Private Foundation Trusts, Charitable Trusts, and Split-Interest Trusts.	91-9-401
Article 11.	Family Trust Preservation Act of 1998.	91-9-501
Article 13.	Uniform Prudent Investor Act.	91-9-601
Article 15.	Mississippi Qualified Disposition in Trust Act.	91-9-701

ARTICLE 1.

TRUSTS — GENERAL PROVISIONS.

Sec.
91-9-1 through 91-9-9. Repealed.

§§ 91-9-1 through 91-9-9. Repealed.

Repealed by Laws, 2014, ch. 421, § 105, effective from and after July 1, 2014.

§ 91-9-1. [Codes, 1857, ch. 44, art. 5; 1871, § 2896; 1880, § 1296; 1892, § 4230; 1906, § 4780; Hemingway's 1917, § 3124; 1930, § 3348; 1942, § 269; Laws, 1993, ch. 507, § 2, eff from and after July 1, 1993.]

§ 91-9-2. [Laws, 2002, ch. 393, § 1; Laws, 2003, ch. 442, § 1, eff from and after July 1, 2003.]

§ 91-9-3. [Codes, 1857, ch. 44, art. 6; 1871, § 2897; 1880, § 1297; 1892, § 4231; 1906, § 4781; Hemingway's 1917, § 3125; 1930, § 3349; 1942, § 270; Laws, 1993, ch. 507, § 3, eff from and after July 1, 1993.]

§ 91-9-5. [Codes, 1942, § 1273-10; Laws, 1960, ch. 217, § 10; Laws, 1996, ch. 400, § 44, eff from and after passage (approved March 19, 1996).]

§ 91-9-7. [Laws, 1993, ch. 507, § 1; Laws, 2001, ch. 425, § 1, eff from and after July 1, 2001.]

§ 91-9-9. [Laws, 1994, ch. 589, § 1; reenacted and amended, Laws, 1999, ch. 374, § 3; reenacted and amended, Laws, 2002, ch. 613 , § 1; Laws, 2006, ch. 474, § 18; Laws, 2008, ch. 452, § 3, eff from and after passage (approved Apr. 8, 2008.)]

Editor's Notes —

Former § 91-9-1, which was included in former Article 1 of Chapter 9, related to the creation of trusts and confidences.

Former § 91-9-2, which was included in former Article 1 of Chapter 9, authorized trusts to take title to real property.

Former § 91-9-3, which was included in former Article 1 of Chapter 9, required all grants, assignments or transfers of trusts to be in writing.

Former § 91-9-5, which was included in former Article 1 of Chapter 9, related to the filing or producing vouchers by trustees.

Former § 91-9-7, which was included in former Article 1 of Chapter 9, related to the filing of a certificate of trust agreement in lieu of an entire trust agreement.

Former § 91-9-9, which was included in former Article 1 of Chapter 9, provided additional powers, remedies and rights to fiduciaries with respect to compliance with environmental laws. For present similar provisions, see § 91-8-816.

ARTICLE 3.

UNIFORM TRUSTEES' POWERS.

Sec.
91-9-101 through 91-9-119. Repealed.

§§ 91-9-101 through 91-9-119. Repealed.

Repealed by Laws, 2014, ch. 421, § 106, effective from and after July 1, 2014.

§ 91-9-101. [Codes, 1942, § 672-130; Laws, 1966, ch. 372, § 10, eff from and after June 30, 1966.]

§ 91-9-103. [Codes, 1942, § 672-121; Laws, 1966, ch. 372, § 1; Laws, 2006, ch. 474, § 19, eff from and after July 1, 2006.]

§ 91-9-105. [Codes, 1942, § 672-122; Laws, 1966, ch. 372, § 2, eff from and after June 30, 1966.]

§ 91-9-107. [Codes, 1942, § 672-123; Laws, 1966, ch. 372, § 3; Laws, 1990, ch. 547, § 1; Laws, 1994, ch. 589, § 2; Laws, 1999, ch. 374, § 4; Laws, 2001, ch. 471, § 1; Laws, 2002, ch. 616 , § 1; Laws, 2006, ch. 474, § 20; Laws, 2008, ch. 452, § 4, eff from and after passage (approved Apr. 8, 2008.)]

§ 91-9-109. [Codes, 1942, § 672-124; Laws, 1966, ch. 372, § 4, eff from and after June 30, 1966.]

§ 91-9-111. [Codes, 1942, § 672-125; Laws, 1966, ch. 372, § 5, eff from and after June 30, 1966.]

§ 91-9-113. [Codes, 1942, § 672-126; Laws, 1966, ch. 372, § 6, eff from and after June 30, 1966.]

§ 91-9-115. [Codes, 1942, § 672-127; Laws, 1966, ch. 372, § 7, eff from and after June 30, 1966.]

§ 91-9-117. [Codes, 1942, § 672-128; Laws, 1966, ch. 372, § 8, eff from and after June 30, 1966.]

§ 91-9-119. [Codes, 1942, § 672-129; Laws, 1966, ch. 372, § 9, eff from and after June 30, 1966.]

Editor's Notes —

Former § 91-9-101, which was included in former Article 3 of Chapter 9, provided the short title for Article 3.

Former § 91-9-103, which was included in former Article 3 of Chapter 9, provided definitions for words used in Article 3. Definitions can now be found in § 91-8-103.

Former § 91-9-105, which was included in former Article 3 of Chapter 9, provided that trustees have all powers conferred by Article 3 unless limited in the trust instrument.

Former § 91-9-107, which was included in former Article 3 of Chapter 9, related to trustee powers conferred by Article 3. For present similar provisions, see § 91-8-816.

Former § 91-9-109, which was included in former Article 3 of Chapter 9, prohibited a trustee from transferring his/her office or delegate the administration of the trust to another.

Former § 91-9-111, which was included in former Article 3 of Chapter 9, related to the power of the court to, under certain circumstances, remove restrictions on trustee's power that would otherwise be placed on the trustee by the trust of former Article 3 of Chapter 9.

Former § 91-9-113, which was included in former Article 3 of Chapter 9, related to powers exercisable by joint trustees. For present similar provisions, see § 91-8-703.

Former § 91-9-115, which was included in former Article 3 of Chapter 9, provided protections for third persons dealing with or assisting a trustee. For present similar provisions, see § 91-8-1012.

Former § 91-9-117, which was included in former Article 3 of Chapter 9, related to the applicability of former Article 3.

Former § 91-9-119, which was included in former Article 3 of Chapter 9, provided for uniformity of interpretation of former Article 3. For similar provisions relating to uniformity of application and construction of Chapter 8, Title 91, see § 91-8-1101.

Cross References —

References contained in a will or trust incorporating by reference the powers enumerated in former §§ 91-9-101 through 91-9-119 (former Article 3) incorporate by reference the powers contained in § 91-8-816, see § 91-8-816.

ARTICLE 5.

RESIGNATION AND SUCCESSION OF TRUSTEES.

Sec.
91-9-201 through 91-9-213. Repealed.

§§ 91-9-201 through 91-9-213. Repealed.

Repealed by Laws, 2014, ch. 421, § 107, effective from and after July 1, 2014.

§ 91-9-201. [Codes, 1942, § 672-151; Laws, 1966, ch. 373, § 1, eff from and after passage (approved May 6, 1966).]

§ 91-9-203. [Codes, 1942, § 672-152; Laws, 1966, ch. 373, § 2, eff from and after passage (approved May 6, 1966).]

§ 91-9-205. [Codes, 1942, § 672-153; Laws, 1966, ch. 373, § 3, eff from and after passage (approved May 6, 1966).]

§ 91-9-207. [Codes, 1942, § 672-154; Laws, 1966, ch. 373, § 4, eff from and after passage (approved May 6, 1966).]

§ 91-9-209. [Codes, 1942, § 672-155; Laws, 1966, ch. 373, § 5, eff from and after passage (approved May 6, 1966).]

§ 91-9-211. [Codes, 1942, § 672-156; Laws, 1966, ch. 373, § 6, eff from and after passage (approved May 6, 1966).]

§ 91-9-213. [Codes, 1942, § 672-157; Laws, 1966, ch. 373, § 7, eff from and after passage (approved May 6, 1966).]

Editor's Notes —

Former § 91-9-201, which was included in former Article 5 of Chapter 9, provided for the applicability of Article 5 and defined trustee.

Former § 91-9-203, which was included in former Article 5 of Chapter 9, related to the resignation of a trustee and appointment of a successor. For present similar provisions, see § 91-8-704 (vacancy in trusteeship and appointment of a successor) and § 91-8-705 (resignation of trustee).

Former § 91-9-205, which was included in former Article 5 of Chapter 9, provided for a trustee accounting and discharge of the trustee.

Former § 91-9-207, which was included in former Article 5 of Chapter 9, related to the title, right and powers of a successor trustee.

Former § 91-9-209, which was included in former Article 5 of Chapter 9, related to beneficiary under disability.

Former § 91-9-211, which was included in former Article 5 of Chapter 9, provided for determining jurisdiction as it relates to trusts. For present provisions relating to jurisdiction and judicial proceedings, see §§ 91-8-201 through 91-8-205.

Former § 91-9-213, which was included in former Article 5 of Chapter 9, provided that the general powers of the courts were not affected by the provisions of former Article 5.

ARTICLE 7.

REMOVAL OF TRUSTEES.

Sec.
91-9-301 through 91-9-305. Repealed.

§§ 91-9-301 through 91-9-305. Repealed.

Repealed by Laws, 2014, ch. 421, § 108, effective from and after July 1, 2014.

§ 91-9-301. [Codes, 1942, § 1273-01; Laws, 1960, ch. 221, § 1, eff from and after passage (approved March 31, 1960).]

§ 91-9-303. [Codes, 1942, § 1273-02; Laws, 1960, ch. 221, § 2, from and after passage (approved March 31, 1960).]

§ 91-9-305. [Codes, 1942, § 1273-03; Laws, 1960, ch. 221, § 3, eff from and after passage (approved March 31, 1960).]

Editor's Notes —

Former § 91-9-301, which was included in former Article 7 of Chapter 9, defined certain words and phrases used in the article.

Former § 91-9-303, which was included in former Article 7 of Chapter 9, provided proceedings for the removal of trustees and the appointment of successors. For present similar provisions, see §§ 91-8-704 through 91-8-706.

Former § 91-9-305, which was included in former Article 7 of Chapter 9, related to the powers of the chancery court in removal proceedings. For present provisions relating to judicial proceedings, see §§ 91-8-201 through 91-8-205.

ARTICLE 9.

ADMINISTRATION OF PRIVATE FOUNDATION TRUSTS, CHARITABLE TRUSTS, AND SPLIT-INTEREST TRUSTS.

Sec.
91-9-401. Prohibited acts.
91-9-403. Distribution of amounts to avoid tax liability.
91-9-405. Applicability of Sections 91-9-401 and 91-9-403 when contrary to trust instrument.
91-9-407. Amendment of trust instrument to exclude application of Sections 91-9-401 and 91-9-403.
91-9-409. Rights and powers of courts and attorney general.
91-9-411. References to United States Internal Revenue Code.

§ 91-9-401. Prohibited acts.

In the administration of any trust which is a "private foundation," as defined in Section 509 of the United States Internal Revenue Code, a "charitable trust," as defined in Section 4947(a)(1) of the United States Internal Revenue Code, or a "split-interest trust," as defined in Section 4947(a)(2) of the United States Internal Revenue Code, the following acts shall be prohibited:

(a) Engaging in any act of "self-dealing," as defined in Section 4941(d) of the United States Internal Revenue Code, which would give rise to any liability for the tax imposed by Section 4941(a) of the United States Internal Revenue Code;

(b) Retaining any "excess business holdings," as defined in Section 4943(c) of the United States Internal Revenue Code, which would give rise to any liability for the tax imposed by Section 4943(a) of the United States Internal Revenue Code;

(c) Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of Section 4944 of the United States Internal Revenue Code, so as to give rise to any liability for the tax imposed by Section 4944(a) of the United States Internal Revenue Code; and

(d) Making any "taxable expenditures," as defined in Section 4945(d) of the United States Internal Revenue Code, which would give rise to any liability for the tax imposed by Section 4945(a) of the United States Internal Revenue Code.

This section shall not apply either to those split-interest trusts or to amounts thereof which are not subject to the prohibitions applicable to private foundations by reason of the provisions of Section 4947 of the United States Internal Revenue Code.

HISTORY:

Codes, 1942, § 672-201; Laws, 1972, ch. 423, § 1, eff from and after passage (approved April 28, 1972).

Editor's Notes —

Laws, 1972, ch. 423 § 6, provides as follows:

"SECTION 6. Because the requirements of the Federal Tax Reform Act of 1969 require charitable nonprofit foundations, whether trusts or corporations, to change their governing instruments to comply with said federal act or the state to adopt legislation which complies in lieu of each trust or corporation changing its instrument and because failure to comply by the deadline set in said federal act will result in the loss of tax exemption by such trusts and corporations, the immediate effectiveness of this act is necessary to relieve nonprofit corporations and trusts of the concern about changing their governing instruments and retaining the tax exempt status for such Mississippi organizations; therefore, this act shall take effect and be in force from and after its passage."

Cross References —

Similar provisions applicable to private foundations, see § 79-11-51.

Federal Aspects—

Sections 509, 4941, 4943, 4944, 4945, and 4947 of the United States Internal Revenue Code, referred to in this section, can be found codified at 26 USCS §§ 509, 4941, 4943 through 4945, and 4947.

RESEARCH REFERENCES

ALR.

Enforceability of contractual right, in which fiduciary has interest, to purchase property of estate or trust. 6 A.L.R.4th 786.

Validity, as for a charitable purpose, of trust for publication or distribution of particular books or writings. 34 A.L.R.4th 419.

Am. Jur.

34 Am. Jur. 2d, Federal Taxation ¶ 8047.

§ 91-9-403. Distribution of amounts to avoid tax liability.

In the administration of any trust which is a "private foundation," as defined in Section 509 of the United States Internal Revenue Code, or which is a "charitable trust," as defined in Section 4947(a)(1) of the United States Internal Revenue Code, there shall be distributed, for the purposes specified in the trust instrument, for each taxable year, amounts at least sufficient to avoid liability for the tax imposed by Section 4942(a) of the United States Internal Revenue Code.

HISTORY:

Codes, 1942, § 672-202; Laws, 1972, ch. 423, § 2, eff from and after passage (approved April 28, 1972).

Cross References —

Similar provisions applicable to private foundations, see § 79-11-53.

Federal Aspects—

Sections 509, 4942(a), and 4947(a)(1) of the United States Internal Revenue Code, referred to in this section, can be found codified at 26 USCS §§ 509, 4942(a), and 4947(a)(1).

§ 91-9-405. Applicability of Sections 91-9-401 and 91-9-403 when contrary to trust instrument.

The provisions of Sections 91-9-401 and 91-9-403 shall not apply to any trust to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the instrument governing such trust and that the same may not properly be changed to conform to such sections. The trustee shall not be held liable to anyone for any payments made under Section 91-9-403 prior to such determination.

HISTORY:

Codes, 1942, § 672-203; Laws, 1972, ch. 423, § 3, eff from and after passage (approved April 28, 1972).

Cross References —

Similar provisions applicable to private foundations, see § 79-11-55.

§ 91-9-407. Amendment of trust instrument to exclude application of Sections 91-9-401 and 91-9-403.

The trustees of any trust which is a "private foundation" (as defined in Section 509 of the United States Internal Revenue Code), a "charitable trust" (as defined in Section 4947(a)(1) of the United States Internal Revenue Code) or a "split-interest trust" (as defined in Section 4947(a)(2) of the United States Internal Revenue Code) may, without judicial proceedings, amend the governing instrument of such trust expressly to exclude the application of Sections 91-9-401 and 91-9-403, or any portion thereof, by executing a written amendment to such trust and filing a duplicate original of such amendment with the secretary of state of the State of Mississippi, whereupon such section or sections, or any portion thereof, as the case may be, shall not apply to such trust. Neither the trustees nor the trust shall be liable to anyone for any payments made under Section 91-9-403 prior to such amendment.

HISTORY:

Codes, 1942, § 672-203; Laws, 1972, ch. 423, § 3, eff from and after passage (approved April 28, 1972).

Cross References —

Similar provisions applicable to private foundations, see § 79-11-57.

Federal Aspects—

Sections 509 and 4947 of the United States Internal Revenue Code, referred to in this section, can be found codified at 26 USCS §§ 509 and 4947.

§ 91-9-409. Rights and powers of courts and attorney general.

Nothing in Sections 91-9-401 through 91-9-411 shall impair the rights and powers of the courts or the attorney general of this state with respect to any trust.

HISTORY:

Codes, 1942, § 672-204; Laws, 1972, ch. 423, § 4, eff from and after passage (approved April 28, 1972).

Cross References —

Similar provisions applicable to private foundations, see § 79-11-59.

§ 91-9-411. References to United States Internal Revenue Code.

All references to sections of the United States Internal Revenue Code shall be to such law as it exists as of April 28, 1972.

HISTORY:

Codes, 1942, § 672-205; Laws, 1972, ch. 423, § 5, eff from and after passage (approved April 28, 1972).

ARTICLE 11.

FAMILY TRUST PRESERVATION ACT OF 1998.

Sec.	
91-9-501.	Definitions.
91-9-503.	Beneficiary's interests not subject to transfer; restrictions on transfers and enforcements of money judgments.
91-9-505.	Trust monies designated for education or support of beneficiary; restrictions on transfers and enforcements of money judgments.
91-9-507.	Trust monies designated for payments in trustee's discretion; restrictions and liability on payments to transferees or creditors; beneficiary's right to compel payments by trustee.
91-9-509.	Settlor as beneficiary of own trust; invalid restraint on transfers; payments for education or support at trustee's discretion; maximum amount accessible by transferees or creditors.
91-9-511.	Application of act; date of trust creation.

§ 91-9-501. Definitions.

The following words and phrases shall have the meanings ascribed herein unless the context clearly indicates otherwise:

(a) "Trust" means the following:

(i) An express trust, private or charitable, with additions thereto, wherever and however created; or

(ii) A trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust.

(b) "Trust" excludes the following:

(i) Constructive trusts, other than those described in paragraph (a)(ii) of this section, and resulting trusts;

(ii) Guardianships and conservatorships;

(iii) Executors and administrators of decedent's estates;

(iv) Totten trust accounts;

(v) Custodial arrangements pursuant to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of any state;

(vi) Business trusts that are taxed as partnerships or corporations;

(vii) Investment trusts subject to regulation under the laws of this state or any other jurisdiction;

(viii) Common trust funds;

(ix) Voting trusts;

(x) Security arrangements;

(xi) Transfers in trust for purpose of suit or enforcement of a claim of right;

(xii) Liquidation trusts; or

(xiii) Any arrangement under which a person is nominee or escrowee for another.

(c) "Trustee" means an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

(d) "Trust instrument" means a written instrument which creates, defines or determines a trust, including, but not limited to, a last will and testament of a decedent.

HISTORY:

Laws, 1998, ch. 460, § 1, eff from and after passage (approved March 23, 1998).

§ 91-9-503. Beneficiary's interests not subject to transfer; restrictions on transfers and enforcements of money judgments.

Except as provided in Section 91-9-509, if the trust instrument provides that a beneficiary's interest in income or principal or both of a trust is not subject to voluntary or involuntary transfer, the beneficiary's interest in income or principal or both under the trust may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary.

HISTORY:

Laws, 1998, ch. 460, § 2; Laws, 2014, ch. 513, § 13; Laws, 2016, ch. 396, § 12, eff from and after July 1, 2014.

§ 91-9-505. Trust monies designated for education or support of beneficiary; restrictions on transfers and enforcements of money judgments.

Except as provided in Section 91-9-509, if the trust instrument provides that the trustee shall pay income or principal or both of a trust for the education or support of a beneficiary, the beneficiary's interest in income or principal or both under the trust, to the extent the income or principal or both is necessary for the education or support of the beneficiary, may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary. This section shall not be applied or construed to limit or otherwise diminish a restraint on transfer that is valid under Section 91-9-503.

HISTORY:
Laws, 1998, ch. 460, § 3; Laws, 2014, ch. 513, § 14; Laws, 2016, ch. 396, § 18, eff from and after July 1, 2014.

§ 91-9-507. Trust monies designated for payments in trustee's discretion; restrictions and liability on payments to transferees or creditors; beneficiary's right to compel payments by trustee.

(1) Except as provided in Section 91-9-509, if the trust instrument provides that the trustee shall pay to or for the benefit of a beneficiary so much of the income or principal or both of a trust as the trustee in the trustee's discretion sees fit to pay, a transferee or creditor of the beneficiary may not compel the trustee to pay any amount from the trust that may be paid only in the exercise of the trustee's discretion. This subsection shall not be applied or construed to limit or otherwise diminish a restraint on transfer that is valid under Section 91-9-503.

(2) If the trustee has knowledge of a transfer of a beneficiary's interest in a trust or has been served with process in a proceeding for garnishment or attachment or the like by a judgment creditor seeking to reach a beneficiary's interest in a trust, and the trustee pays to or for the benefit of the beneficiary any part of the income or principal of the trust that may be paid only in the exercise of the trustee's discretion, the trustee is liable to the transferee or creditor to the extent that the payment to or for the benefit of the beneficiary impairs the right of the transferee or creditor. This subsection does not apply if the beneficiary's interest in the trust is subject to a restraint on transfer that is valid under Section 91-9-503.

(3) This section applies regardless of whether the trust instrument provides a standard for the exercise of the trustee's discretion.

(4) Nothing in this section limits any right the beneficiary may have to compel the trustee to pay to or for the benefit of the beneficiary all or part of the income or principal of a trust.

HISTORY:
Laws, 1998, ch. 460, § 4; Laws, 2014, ch. 513, § 15; Laws, 2016, ch. 396, § 14, eff from and after July 1, 2014.

§ 91-9-509. Settlor as beneficiary of own trust; invalid restraint on transfers; payments for education or support at trustee's discretion; maximum amount accessible by transferees or creditors.

(1) Except as provided in Sections 91-9-701 through 91-9-723, if the settlor is a beneficiary of a trust created by the settlor and the settlor's interest in the trust is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or

creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust.

(2) Except as provided in Sections 91-9-701 through 91-9-723, if the settlor is a beneficiary of a trust created by the settlor and the trust instrument provides that the trustee shall pay income or principal, or both, of the trust for the education or support of the beneficiary, or gives the trustee discretion to determine the amount of income or principal, or both, of the trust to be paid to or for the benefit of the settlor, a transferee or creditor of the settlor may reach the maximum amount of the trust that the trustee could pay to or for the benefit of the settlor under the trust instrument, not exceeding the amount of the settlor's proportionate contribution to the trust.

HISTORY:

Laws, 2016, ch. 396, § 15, eff from and after July 1, 2014.

Editor's Notes —

A former § 91-9-509 [Laws, 1998, ch. 460, § 5, effective from and after passage (approved March 23, 1998); Repealed by Laws, 2014, ch. 513, § 16, effective from and after July 1, 2014.] provided for situations when a settlor is beneficiary of a settlor-created trust.

§ 91-9-511. Application of act; date of trust creation.

Sections 91-9-501 through 91-9-511 shall apply to trusts created, defined or determined in trust instruments executed at any time whether before, on or after March 23, 1998.

HISTORY:

Laws, 1998, ch. 460, § 6, eff. from and after passage (approved March 23, 1998).

ARTICLE 13.

UNIFORM PRUDENT INVESTOR ACT.

Sec.
91-9-601. Prudent investor rule.
91-9-603. Standard of care; portfolio strategy; risk and return.
91-9-605. Diversification.
91-9-607. Duties at inception of trusteeship.
91-9-609. Loyalty.
91-9-611. Impartiality.
91-9-613. Investment costs.
91-9-615. Reviewing compliance.
91-9-617. Delegation of investment and management.
91-9-619. Language invoking standard of article.
91-9-621. Application to existing trusts.
91-9-623. Uniformity of application and construction.
91-9-625. Short title.
91-9-627. Severability.

§ 91-9-601. Prudent investor rule.

(a) Except as otherwise provided in subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

HISTORY:

Laws, 2006, ch. 474, § 1, eff from and after July 1, 2006.

Cross References —

Investment trusts, see § 79-15-1 et seq.

Fiduciary investments, see § 91-13-1 et seq.

§ 91-9-603. Standard of care; portfolio strategy; risk and return.

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(1) General economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and the appreciation of capital;

(6) Other resources of the beneficiaries;

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this article.

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

HISTORY:

Laws, 2006, ch. 474, § 2, eff from and after July 1, 2006.

§ 91-9-605. Diversification.

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

HISTORY:
Laws, 2006, ch. 474, § 3, eff from and after July 1, 2006.

§ 91-9-607. Duties at inception of trusteeship.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this article.

HISTORY:
Laws, 2006, ch. 474, § 4, eff from and after July 1, 2006.

§ 91-9-609. Loyalty.

A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

HISTORY:
Laws, 2006, ch. 474, § 5, eff from and after July 1, 2006.

JUDICIAL DECISIONS

1. Duty of loyalty.

Trustee's withdrawals or "loans" from separate irrevocable trusts constituted a breach of his duty of loyalty as a fiduciary because his withdrawals depleted the trusts and proximately caused injury to the other beneficiaries of the trusts. Moreover, it could not be determined that a beneficiary gave the trustee permission to make withdrawals from one of the trusts before the death of the beneficiary. Cassibry v. Cassibry, 217 So. 3d 698, 2017 Miss. App. LEXIS 40 (Miss. Ct. App. 2017).

§ 91-9-611. Impartiality.

If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

HISTORY:
Laws, 2006, ch. 474, § 6, eff from and after July 1, 2006.

§ 91-9-613. Investment costs.

In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

HISTORY:
Laws, 2006, ch. 474, § 7, eff from and after July 1, 2006.

§ 91-9-615. Reviewing compliance.

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

HISTORY:
Laws, 2006, ch. 474, § 8, eff from and after July 1, 2006.

§ 91-9-617. Delegation of investment and management.

(a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) The investment agent shall comply with the scope and terms of the delegation and shall exercise the delegated function with reasonable care, skill and caution and shall be liable to the trust for failure to do so. An investment agent who represents that he has special investment skills shall exercise those skills.

(c) A trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

(e) A cofiduciary may delegate investment and management functions to another cofiduciary if the delegating cofiduciary reasonably believes that the other cofiduciary has greater investment skills than the delegating cofiduciary with respect to those functions. The delegating cofiduciary shall not be responsible for the investment decisions or actions of the other cofiduciary to which the investment functions are delegated if the delegating cofiduciary exercises reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the other cofiduciary's actions in order to monitor the cofiduciary's performance and compliance with the scope and specific terms of the delegation.

(f) Investment in a mutual fund is not a delegation of investment function, and neither the mutual fund nor its advisor is an investment agent.

HISTORY:
Laws, 2006, ch. 474, § 9, eff from and after July 1, 2006.

§ 91-9-619. Language invoking standard of article.

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this article: “Investments permissible by law for investment of trust funds,” “legal investments,” “authorized investments,” “using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital,” “prudent man rule,” “prudent trustee rule,” “prudent person rule,” and “prudent investor rule.”

HISTORY:
Laws, 2006, ch. 474, § 10, eff from and after July 1, 2006.

§ 91-9-621. Application to existing trusts.

This article applies to trusts existing on and created after its effective date. As applied to trusts existing on its effective date, this article governs only decisions or actions occurring after that date.

HISTORY:
Laws, 2006, ch. 474, § 11, eff from and after July 1, 2006.

§ 91-9-623. Uniformity of application and construction.

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among the states enacting it.

HISTORY:
Laws, 2006, ch. 474, § 12, eff from and after July 1, 2006.

§ 91-9-625. Short title.

Sections 91-9-601 through 91-9-627 may be cited as the “Mississippi Uniform Prudent Investor Act.”

HISTORY:
Laws, 2006, ch. 474, § 13, eff from and after July 1, 2006.

§ 91-9-627. Severability.

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

HISTORY:
Laws, 2006, ch. 474, § 14, eff from and after July 1, 2006.

ARTICLE 15.

MISSISSIPPI QUALIFIED DISPOSITION IN TRUST ACT.

Sec.	
91-9-701.	Short title.
91-9-703.	Definitions.
91-9-705.	Qualified affidavit; contents.
91-9-707.	Claims or actions against property subject to qualified disposition; claims or actions against trustees.
91-9-709.	Transferor's powers and rights.
91-9-711.	Avoidance of qualified disposition.
91-9-713.	Spendthrift restriction.
91-9-715.	Qualified trustees; advisors.
91-9-717.	Investment advisors; service.
91-9-719.	Failure to meet requirements; qualified trustees.
91-9-721.	Revocation.
91-9-723.	Application of article.

§ 91-9-701. Short title.

This article shall be known and may be cited as the Mississippi Qualified Disposition in Trust Act.

HISTORY:
Laws, 2014, ch. 513, § 1, eff from and after July 1, 2014.

§ 91-9-703. Definitions.

As used in this article, unless the context otherwise requires:

(a) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(b) "Creditor" means, with respect to a transferor, a person who has a claim.

(c) "Debt" means liability on a claim.

(d) "Disposition" means a transfer, conveyance or assignment of property, including a change in the legal ownership of property occurring upon the substitution of one (1) trustee for another or the addition of one or more new trustees. "Disposition" also includes the exercise of a power so as to cause a transfer of property to a trustee or trustees, but shall not include the release or relinquishment of an interest in property that, until the release or relinquishment, was the subject of a qualified disposition.

(e) "Investment advisor" means a person given authority by the terms of a qualified disposition trust to direct, consent to or disapprove a trustee's actual or proposed investment decision.

(f) "Investment decision" means the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of or rights in investments.

(g) "Person" means an individual, a corporation, an organization, or other legal entity.

(h) "Property" includes real property, personal property, and interests in real or personal property.

(i) "Qualified affidavit" means a sworn affidavit signed by the transferor before making a qualified disposition. In the event of a disposition by a transferor who is a trustee, the affidavit shall be signed by the transferor who made the original disposition to the trustee, or a predecessor trustee, in a form that meets the requirements of subsection (n)(2) and (3) of this section and shall state facts as of the time of the original disposition.

(j) "Qualified disposition" means a disposition by or from a transferor to a qualified trustee or qualified trustees, with or without consideration, by means of a qualified disposition trust, after the transferor executes a qualified affidavit.

(k) "Qualified trustee" means a person who:

(1) In the case of a natural person, is a resident of this state, or, in all other cases, is authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the Mississippi Department of Banking and Consumer Finance, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision or any successor to them;

(2) Maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition, maintains records for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of required income tax returns for the trust, or otherwise materially participates in the administration of the trust; and

(3) Is not the transferor.

(*l*) "Spouse" or "former spouse" means only persons to whom the transferor was legally married at, or before, the time the qualified disposition is made.

(m) "Transferor" means a person who, directly or indirectly, makes a disposition or causes a disposition to be made in such person's capacity:

(1) As an owner of property;

(2) As a holder of a power of appointment that authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate or the creditors of the holder's estate; or

(3) As a trustee.

(n) "Qualified disposition trust" means a trust instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition, which instrument:

(1) Expressly incorporates the law of this state to govern the validity, construction and administration of the trust;

(2) Is irrevocable; and

(3) Provides that the interest of the transferor or other beneficiary in the trust property or the income from the trust property may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute the property or income from the property to the beneficiary.

HISTORY:
Laws, 2014, ch. 513, § 2; Laws, 2016, ch. 396, § 16, eff from and after July 1, 2014.

§ 91-9-705. Qualified affidavit; contents.

A qualified affidavit shall state that:

(a) The transferor has full right, title, and authority to transfer the assets to the trust;

(b) The transfer of the assets to the trust will not render the transferor insolvent;

(c) The transferor does not intend to defraud a creditor by transferring the assets to the trust;

(d) The transferor does not have any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit;

(e) The transferor is not involved in any administrative proceedings, except for those administrative proceedings identified on an attachment to the affidavit;

(f) The transferor does not contemplate filing for relief under the provisions of the federal bankruptcy code;

(g) The assets being transferred to the trust were not derived from unlawful activities; and

(h) The transferor is a named insured of a general liability insurance policy and, if applicable, a professional liability insurance policy, with policy limits of at least One Million Dollars ($1,000,000.00) for each respective policy.

HISTORY:
Laws, 2014, ch. 513, § 3, eff from and after July 1, 2014.

§ 91-9-707. Claims or actions against property subject to qualified disposition; claims or actions against trustees.

(a) Notwithstanding any law to the contrary, no action of any kind, including, but not limited to, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for the avoidance of a qualified disposition, unless the action is brought pursuant to the provisions of the Uniform Fraudulent Transfer Act, Section 15-3-101 et seq., and unless the qualified disposition was also made with actual intent to defraud the creditor.

(b)(1) Notwithstanding Section 15-3-115, a creditor's claim under subsection (a) shall be extinguished:

(A) If the person is a creditor when the qualified disposition to a qualified disposition trust is made, unless the action is commenced within the later of two (2) years after the qualified disposition is made or six (6) months after the person discovers or reasonably should have discovered the qualified disposition; or

(B) If the person becomes a creditor after the qualified disposition to a qualified disposition trust is made, unless the action is commenced within two (2) years after the qualified disposition is made;

(2) If subsection (b) (1) applies:

(A) A person shall be deemed to have discovered the existence of a qualified disposition to a qualified disposition trust at the time any public record is made of any transfer of property relative to the qualified disposition, including, but not limited to, the conveyance of real property that is recorded in the office of the chancery clerk of the county in which the property is located or the filing of a financing statement under Chapter 9, Title 75, Mississippi Code of 1972, or the equivalent recording or filing of either with the appropriate person or official under the laws of a jurisdiction other than this state; and

(B) No creditor shall bring an action with respect to property that is the subject of a qualified disposition unless that creditor proves by clear and convincing evidence that the settlor's transfer of the property was made with the intent to defraud that specific creditor.

(c) For purposes of this article, a qualified disposition that is made by means of a disposition by a transferor who is a trustee shall be deemed to have been made as of the time, whether before, on, or after July 1, 2014, the property that is the subject of the qualified disposition was originally transferred to the transferor acting in the capacity of trustee, or any predecessor trustee, in a form that meets the requirements of Section 91-9-703(n)(2) and (3).

(d) Notwithstanding any law to the contrary, a creditor, including a creditor whose claim arose before or after a qualified disposition, or any other person shall have only the rights with respect to a qualified disposition as are provided in this section and Section 91-9-711, and neither a creditor nor any other person shall have any claim or cause of action against the trustee, an advisor of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution, or funding of a trust that is the subject of a qualified disposition. For purposes of this section, counseling, drafting, preparation, execution or funding of a trust that is the subject of a qualified disposition includes the counseling, drafting, preparation, execution and funding of a limited partnership or a limited liability company if interests in the limited partnership or limited liability company are subsequently transferred to the trust that is the subject of a qualified disposition.

(e) Notwithstanding any law to the contrary, no action of any kind, including, but not limited to, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against a trustee or an advisor of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution or funding of a trust that is the subject of a qualified disposition, if, as of the date the action is brought, an action by a creditor with respect to the qualified disposition would be barred under this section.

(f) In circumstances where more than one (1) qualified disposition is made by means of the same qualified disposition trust, then:

(1) The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim with respect to a prior qualified disposition is extinguished as provided in subsection (b); and

(2) Any distribution to a beneficiary shall be deemed to have been made from the latest qualified disposition.

(g) If, in any action brought against a trustee of a trust that is the result of a qualified disposition, a court takes any action whereby the court declines to apply the law of this state in determining the effect of a spendthrift provision of the trust, the trustee of the trust shall immediately upon the court's action and without the further order of any court, cease in all respects to be trustee of the trust and a successor trustee shall succeed as trustee in accordance with the terms of the trust or, if the trust does not provide for a successor trustee and the trust would otherwise be without a trustee, a court of this state, upon the application of any beneficiary of the trust, shall appoint a successor trustee upon the terms and conditions it determines to be consistent with the purposes of the trust and this article. Upon the trustee's ceasing to be trustee, the trustee shall have no power or authority other than to convey the trust property to the successor trustee named in the trust in accordance with this section.

(h) A trust that is the subject of a qualified disposition shall be subject to this section whether or not the transferor retains any or all of the powers and rights described in Section 91-9-709 or serves as an investment advisor pursuant to Section 91-9-717.

(i)(1) Notwithstanding any provision of subsection (a) or (b) to the contrary, the limitations on actions by creditors in law or equity shall not apply and the creditors' claims shall not be extinguished if the transferor is indebted on account of an agreement, judgment, or order of a court for the payment of one or more of the following:

(A) To any person to whom the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of the transferor's spouse, former spouse or children, or for a division or distribution of property in favor of the transferor's spouse or former spouse, but only to the extent of such debt;

(B) To any person who suffers death, personal injury, or property damage on or before the date of a qualified disposition by a transferor, if the death, personal injury, or property damage is at any time determined to have been caused, in whole or in part, by the tortious act or omission of either the transferor or by another person for whom the transferor is or was vicariously liable, but only to the extent of the claim against the transferor or other person for whom the transferor is or was vicariously liable;

(C) To the State of Mississippi or any political subdivision thereof, including, but not limited to, court-ordered restitution in a criminal matter; or

(D) To any creditor in an amount not to exceed One Million Five Hundred Thousand Dollars ($1,500,000.00) if the transferor failed to maintain a One Million Dollar ($1,000,000.00) umbrella policy as required by subsection (l).

(2)(A) A claim provided under this subsection (i) shall be asserted against a trustee only:

(i) Upon a final nonappealable determination of a Mississippi court or a fully domesticated, final nonappealable order of a court of another state that the debt is past due; and

(ii) After the court has determined that the claimant has made reasonable attempts to collect the debt from any other sources of the transferor or that any attempt would be futile.

(B) Nothing in this subsection (i)(2) shall be construed to prohibit the court from making the findings required in subsection (i)(2)(A) in the same proceeding and order.

(j) Subsection (i) shall not apply to any claim for forced heirship, legitime or elective share.

(k) In addition to provisions of subsection (j), to the extent subsection (j) applies to the laws of any foreign country:

(1) Neither a qualified disposition trust nor any disposition made subject to the terms of the qualified disposition trust is subject to the laws of any foreign country, nor is any such qualified disposition trust or the disposition void, voidable, liable to be set aside, or defective in any manner for any reason including, but not limited to:

(A) The law of any foreign country prohibits or does not recognize the concept of a qualified disposition trust; or

(B) The qualified disposition trust or disposition avoids or defeats any right, claim, or interest conferred by the law of a foreign country upon any person by reason of a personal relationship to the settlor or by way of heirship rights or contravenes any rule or law of a foreign country or any foreign country's judicial or administrative order or action intended to recognize, protect, enforce, or give effect to the right, claim, or interest.

(2) Relative to any foreign country or any interest in property arising or originating under the laws of any foreign country:

(A) No form of forced heirship, legitime, forced share or any similar heirship rights or form of transmission or transfer of property from a decedent or from a living person, or any restrictions on transmission or transfer of property from a decedent or a living person is recognized by this state; or

(B) No heirship rights described in subsection (k) (2) (A) conferred under the law of a foreign country shall constitute an obligation or liability, the transfer, conveyance or devise of which, would violate Chapter 3, Title 15, Mississippi Code of 1972; and

(C) Subsection (k) (1) shall apply to all realty or other forms of immovable property physically in this state, as well as to all personal or movable property wherever situated if owned by a qualified disposition trust containing a state jurisdiction provision designating that the law of this state controls the qualified disposition trust;

(3) No judgment or other holding of any judicial body of any foreign country, including, but not limited to, any court, administrative body or other entity or organization purportedly having the power to make judicial or administrative decisions of any foreign country, shall be recognized or enforced or give rise to any equitable forms of relief, including, but not limited to, estoppel, to the extent the judgment or other holding concerns a qualified disposition trust containing a state jurisdiction provision designating that the law of this state controls the qualified disposition trust or to the extent the judgment or other holding concerns property held by the qualified disposition trust.

(4) Subsection (a) applies in addition to all other provisions of this article.

(*l*) The transferor shall obtain a general liability policy and, if applicable, a professional liability policy, and each policy must have a policy limit of at least One Million Dollars ($1,000,000.00). Policy premiums must be paid by the transferor.

HISTORY:
Laws, 2014, ch. 513, § 4; Laws, 2016, ch. 396, § 17, eff from and after July 1, 2014.

§ 91-9-709. Transferor's powers and rights.

A transferor shall have only the powers and rights conferred by the qualified disposition trust. The powers and rights conferred by the qualified disposition trust upon the transferor are personal powers and rights that may not be exercised by a creditor or any other person, except as expressly permitted by the trust. Except as permitted by Sections 91-9-717 and 91-9-721, the transferor shall have no rights or authority with respect to the corpus of the trust or the income from the trust, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void.

HISTORY:
Laws, 2014, ch. 513, § 5, eff from and after July 1, 2014.

§ 91-9-711. Avoidance of qualified disposition.

(a) A qualified disposition shall be avoided only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided, together with costs, including attorneys' fees, that the court may allow.

(b) In the event any qualified disposition shall be avoided as provided in subsection (a), then:

(1) If the court is satisfied that a qualified trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:

(A) The qualified trustee shall have a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorneys' fees, properly incurred by the qualified trustee in the defense of the action or proceedings to avoid the qualified disposition;

(B) The qualified disposition shall be avoided subject to the proper fees, costs, preexisting rights, claims and interests of the qualified trustee and of any predecessor qualified trustee that has not acted in bad faith; and

(C) For purposes of this subsection (b)(1), it shall be presumed that the qualified trustee did not act in bad faith merely by accepting the property; and

(2) If the court is satisfied that a beneficiary of a trust has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of the beneficiary to retain any distribution made upon the exercise of a trust power or discretion vested in the qualified trustee or qualified trustees, which power or discretion was properly exercised prior to the creditor's commencement of an action to avoid the qualified disposition. For purposes of this subsection (b)(2), it shall be presumed that the beneficiary, including a beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

(c) A disposition by a trustee that is not a qualified trustee to a trustee that is a qualified trustee shall not be treated as other than a qualified disposition solely because the trust instrument fails to meet the requirements of Section 91-9-703(n)(1).

(d) In the case of a disposition to more than one (1) trustee, a disposition that is otherwise a qualified disposition shall not be treated as other than a qualified disposition solely because not all of the recipient trustees are qualified trustees.

HISTORY:

Laws, 2014, ch. 513, § 6, eff from and after July 1, 2014.

§ 91-9-713. Spendthrift restriction.

A spendthrift provision as described in Section 91-9-703(n)(3) shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of Section 541(c)(2) of the Bankruptcy Code, codified in 11 USCS, Section 541(c)(2), or any successor provision.

HISTORY:
Laws, 2014, ch. 513, § 7, eff from and after July 1, 2014.

§ 91-9-715. Qualified trustees; advisors.

(a) For purposes of this article, neither the transferor nor any other natural person who is a nonresident of this state nor an entity that is not authorized by the law of this state to act as a trustee or whose activities are not subject to supervision as provided in Section 91-9-703(k)(1) shall be considered a qualified trustee; however, nothing in this article shall preclude a transferor from appointing one (1) or more advisors, including, but not limited to:

(1) Advisors who have authority under the terms of the trust instrument to remove and appoint qualified trustees or trust advisors;

(2) Advisors who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust; and

(3) Investment advisors, whether or not the advisors would meet the requirements imposed by Section 91-9-703(k).

(b) For purposes of subsection (a), "advisor" includes a trust "protector" or any other person who, in addition to a qualified trustee, holds one or more trust powers.

HISTORY:
Laws, 2014, ch. 513, § 8, eff from and after July 1, 2014.

§ 91-9-717. Investment advisors; service.

A person may serve as an investment advisor notwithstanding that the person is the transferor of the qualified disposition, but the person may not otherwise serve as advisor to a trust that is a qualified disposition trust except with respect to the retention of the veto right permitted by Section 91-9-721(a).

HISTORY:
Laws, 2014, ch. 513, § 9, eff from and after July 1, 2014.

§ 91-9-719. Failure to meet requirements; qualified trustees.

If a qualified trustee of a qualified disposition trust ceases to meet the requirements of Section 91-9-703(k)(1), and there remains no trustee that meets the requirements, the qualified trustee shall be deemed to have resigned as of the time of that cessation, and thereupon the successor qualified trustee provided for in the qualified disposition trust shall become a qualified trustee of the qualified disposition trust, or in the absence of any successor qualified trustee provided for in the qualified disposition trust, then a court of this state shall, upon application of any interested party, appoint a successor qualified trustee.

HISTORY:
Laws, 2014, ch. 513, § 10, eff from and after July 1, 2014.

§ 91-9-721. Revocation.

A qualified disposition trust shall not be deemed revocable on account of its inclusion of one or more of the following:

(a) A transferor's power to veto a distribution from the trust;

(b) A power of appointment, other than a power to appoint to the transferor, the transferor's creditors, the transferor's estate or the creditors of the transferor's estate, exercisable by will or other written instrument of the transferor effective only upon the transferor's death;

(c) The transferor's potential or actual receipt of income, including rights to the income retained in the trust;

(d) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as those terms are defined in Section 664 of the Internal Revenue Code of 1986, codified in 26 USCS Section 664, and any successor provision;

(e) The transferor's receipt each year of an amount specified in the trust instrument, the amount not to exceed five percent (5%) of the initial value of the trust or its value determined, from time to time, pursuant to the trust;

(f) The transferor's potential or actual receipt or use of principal if the potential or actual receipt or use of principal would be the result of a qualified trustee's or qualified trustees' acting:

(1) In the qualified trustee's or qualified trustees' discretion. For purposes of this section, a qualified trustee is presumed to have discretion with respect to the distribution of principal unless the discretion is expressly denied to the trustee by the terms of the trust;

(2) Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a power to consume, invade, or appropriate property for the benefit of the transferor, unless the power of the transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code of 1986, codified in 26 USCS Section 2041(b)(1)(A) or 26 USCS Section 2514(c)(1), as in effect on July 1, 2014, or as later amended; or

(3) At the direction of an advisor described in Section 91-9-715 who is acting:

(i) In the advisor's discretion; or

(ii) Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a power to consume, invade, or appropriate property for the benefit of the transferor, unless the power of the transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code of 1986, 26 USCS Section 2041(b)(1)(A) or 26 USCS Section 2514(c)(1), as in effect on July 1, 2010, or as later amended;

(g) The transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor; however, the right shall not include the appointment of a person who is a related or subordinate party with respect to the transferor within the meaning of Section 672(c) of the Internal Revenue Code of 1986, 26 USCS Section 672(c), and any successor provision;

(h) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of the term as described in Section 2702(c) of the Internal Revenue Code of 1986, codified in 26 USCS Section 2702(c), and any successor provision;

(i) The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if the potential or actual receipt of income or principal is pursuant to a provision in the qualified disposition trust that expressly permits a distribution to the transferor as reimbursement for the taxes and if the distribution would be the result of a qualified trustee's or qualified trustees' acting:

(1) In the qualified trustee's or qualified trustees' discretion or pursuant to a mandatory direction in the qualified disposition trust; or

(2) At the direction of an advisor described in Section 91-9-717, who is acting in the advisor's discretion;

(j) The ability, whether pursuant to direction in the qualified disposition trust or discretion of a qualified trustee to pay, after the death of the transferor, all or any part of the debts of the transferor outstanding at the time of the transferor's death, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate; and

(k) A qualified trustee's or qualified trustees' authority to make distributions to pay taxes in lieu of or in addition to the power to make a distribution for taxes pursuant to subsection (c), (f), (i), or (j) by direct payment to the taxing authorities.

HISTORY:

Laws, 2014, ch. 513, § 11, eff from and after July 1, 2014.

§ 91-9-723. Application of article.

This article shall apply to qualified dispositions and dispositions by transferors who are trustees made on or after July 1, 2014.

HISTORY:

Laws, 2014, ch. 513, § 12, eff from and after July 1, 2014.

CHAPTER 11.

FIDUCIARY SECURITY TRANSFERS

Sec.
91-11-1. Citation of chapter.
91-11-3. Definitions.
91-11-5. Registration in name of fiduciary.
91-11-7. Assignment by fiduciary.
91-11-9. Evidence of appointment or incumbency.
91-11-11. Adverse claims.
91-11-13. Non-liability of corporation and transfer agent.
91-11-15. Non-liability of third persons.
91-11-17. Territorial application.
91-11-19. Tax obligations.
91-11-21. Uniformity of interpretation.

§ 91-11-1. Citation of chapter.

This chapter may be cited as the Uniform Act for Simplification of Fiduciary Security Transfers.

HISTORY:

Codes, 1942, § 5359-41; Laws, 1960, ch. 266, § 11, eff from and after passage (approved May 11, 1960).

Editor's Notes —

Attention is called to the fact that the Mississippi Uniform Commercial Code does not repeal Code 1942, §§ 5359-31 through 5359-43, inclusive [now Code 1972, §§ 91-11-1 through 91-11-21, inclusive], it being expressly provided that if there is any inconsistency between these sections and the article of the Uniform Commercial Code relating to investment securities, the provisions of these sections control. See § 75-10-104(2) of the Uniform Commercial Code.

Cross References —

Regulation of transfer of investment securities under the Uniform Commercial Code, see § 75-8-101 et seq.

Applicability of Mississippi Rules of Civil Procedure to proceedings which are subject to the provisions of Title 91, see Miss. R. Civ. P. 81.

Comparable Laws from other States —

Alabama Code, §§ 8-6-70 through 8-6-80.

Georgia Code Annotated, §§ 53-12-320 through 53-12-330.

Louisiana Revised Statutes Annotated, §§ 9:3831 through 9:3840.

RESEARCH REFERENCES

ALR.

Rights, duties, and liability of corporation in connection with transfer of stock of infant or incompetent. 3 A.L.R.2d 881.

Rights, duties, and liability of corporation in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Am. Jur.

Am. Jur. 2d Desk Book, Doc. No. 129, Jurisdictions adopting Uniform Law for Simplification of Fiduciary Security Transfers.

Practice References.

Bickel and Flannery, Living Trusts: Forms and Practice (Matthew Bender).

Burke, Friel, and Gagliardi, Modern Estate Planning, Second Edition (Matthew Bender).

Christensen, International Estate Planning, Second Edition (Matthew Bender).

Mobley, Robinson and Hedrick, Pritchard on the Law of Wills and Administration of Estates, Seventh Edition (Michie).

Rapkin, Planning for Large Estates (Matthew Bender).

Schoenblum, Estate Planning Forms and Clauses with CD Rom (Matthew Bender).

Wyatt, Trust Administration and Taxation (Matthew Bender).

LexisNexis® CD – Estate Planning Package (CD-ROM) (LexisNexis).

Murphy's Will Clauses: Annotations and Forms with Tax Effects (Matthew Bender).

§ 91-11-3. Definitions.

In this chapter, unless the context otherwise requires:

(a) "Assignment" includes any written stock power, bond power, bill of sale, deed, declaration of trust, or other instrument of transfer.

(b) "Claim of beneficial interest" includes a claim of any interest by a decedent's legatee, distributee, heir, or creditor, a beneficiary under a trust, a ward, a beneficial owner of a security registered in the name of a nominee, a minor owner of a security registered in the name of a custodian, or a claim of any similar interest, whether the claim is asserted by the claimant or by a fiduciary or by any other authorized person on his behalf, and includes a claim that the transfer would be in breach of fiduciary duties.

(c) "Corporation" means a private or public corporation, association, or trust issuing a security.

(d) "Fiduciary" means an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian, or nominee.

(e) "Person" includes an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(f) "Security" includes any share of stock, bond, debenture, note, or other security issued by a corporation which is registered as to ownership on the books of the corporation.

(g) "Transfer" means a change on the books of a corporation in the registered ownership of a security.

(h) "Transfer agent" means a person employed or authorized by a corporation to transfer securities issued by the corporation.

HISTORY:
Codes, 1942, § 5359-31; Laws, 1960, ch. 266, § 1, eff from and after passage (approved May 11, 1960).

§ 91-11-5. Registration in name of fiduciary.

A corporation or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship. Thereafter the corporation and its transfer agent may assume without inquiry that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longer acting as such with respect to the particular security.

HISTORY:
Codes, 1942, § 5359-32; Laws, 1960, ch. 266, § 2, eff from and after passage (approved May 11, 1960).

§ 91-11-7. Assignment by fiduciary.

Except as otherwise provided in this chapter, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary:

(a) may assume without inquiry that the assignment, even though to the fiduciary himself or to his nominee, is within his authority and capacity and is not in breach of his fiduciary duties;

(b) may assume without inquiry that the fiduciary has complied with any controlling instrument and with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and

(c) is not charged with notice of and is not bound to obtain or examine any court record or any recorded or unrecorded document relating to the fiduciary relationship or the assignment, even though the record or document is in its possession.

HISTORY:
Codes, 1942, § 5359-33; Laws, 1960, ch. 266, § 3, eff from and after passage (approved May 11, 1960).

RESEARCH REFERENCES

Am. Jur.
22 Am. Jur. Pl & Pr Forms (Rev), Sales and Use Taxes, Form 23 (Complaint, petition, or declaration – For damages resulting from breach of fiduciary duties – Against securities exchange broker – By client).

§ 91-11-9. Evidence of appointment or incumbency.

A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall obtain the following evidence of appointment or incumbency:

(a) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty (60) days before the transfer; or

(b) In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the corporation or transfer agent to be responsible or, in the absence of such document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate. Corporations and transfer agents may adopt standards with respect to evidence of appointment or incumbency under this subsection (b) provided such standards are not manifestly unreasonable. Neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to this subsection (b) except to the extent that the contents relate directly to the appointment or incumbency.

HISTORY:
Codes, 1942, § 5359-34; Laws, 1960, ch. 266, § 4, eff from and after passage (approved May 11, 1960).

§ 91-11-11. Adverse claims.

(1) A person asserting a claim of beneficial interest adverse to the transfer of a security pursuant to an assignment by a fiduciary may give the corporation or transfer agent written notice of the claim. The corporation or transfer agent is not put on notice unless the written notice identifies the claimant, the registered owner, and the issue of which the security is a part, provides an

address for communications directed to the claimant, and is received before the transfer. Nothing in this chapter relieves the corporation or transfer agent of any liability for making or refusing to make the transfer after it is so put on notice, unless it proceeds in the manner authorized in subsection (2).

(2) As soon as practicable after the presentation of a security for transfer pursuant to an assignment by a fiduciary, a corporation or transfer agent which has received notice of a claim of beneficial interest adverse to the transfer may send notice of the presentation by registered or certified mail to the claimant at the address given by him. If the corporation or transfer agent so mails such a notice, it shall withhold the transfer for thirty days after the mailing and shall then make the transfer unless restrained by a court order.

HISTORY:
Codes, 1942, § 5359-35; Laws, 1960, ch. 266, § 5, eff from and after passage (approved May 11, 1960).

§ 91-11-13. Non-liability of corporation and transfer agent.

A corporation or transfer agent incurs no liability to any person by making a transfer or otherwise acting in a manner authorized by this chapter.

HISTORY:
Codes, 1942, § 5359-36; Laws, 1960, ch. 266, § 6, eff from and after passage (approved May 11, 1960).

§ 91-11-15. Non-liability of third persons.

(1) No person who participates in the acquisition, disposition, assignment, or transfer of a security by or to a fiduciary, including a person who guarantees the signature of the fiduciary, is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves such a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were being or were to be used wrongfully for the individual benefit of the fiduciary, or that the transaction was otherwise in breach of duty.

(2) If a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of this chapter incurs no liability.

(3) This section does not impose any liability upon the corporation or its transfer agent.

HISTORY:
Codes, 1942, § 5359-37; Laws, 1960, ch. 266, § 7, eff from and after passage (approved May 11, 1960).

§ 91-11-17. Territorial application.

(1) The rights and duties of a corporation and its transfer agents in registering a security in the name of a fiduciary, or in making a transfer of a security pursuant to an assignment by a fiduciary, are governed by the law of the jurisdiction under whose laws the corporation is organized.

(2) This chapter applies to the rights and duties of a person other than the

corporation and its transfer agents with regard to acts and omissions in this state in connection with the acquisition, disposition, assignment, or transfer of a security by or to a fiduciary, and of a person who guarantees in this state the signature of a fiduciary in connection with such a transaction.

HISTORY:
Codes, 1942, § 5359-38; Laws, 1960, ch. 266, § 8, eff from and after passage (approved May 11, 1960).

§ 91-11-19. Tax obligations.

This chapter does not affect any obligation of a corporation or transfer agent with respect to estate, inheritance, succession, or other taxes imposed by the laws of this state.

HISTORY:
Codes, 1942, § 5359-39; Laws, 1960, ch. 266, § 9, eff from and after passage (approved May 11, 1960).

§ 91-11-21. Uniformity of interpretation.

This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

HISTORY:
Codes, 1942, § 5359-40; Laws, 1960, ch. 266, § 10, eff from and after passage (approved May 11, 1960).

CHAPTER 13.

FIDUCIARY INVESTMENTS

Sec.

91-13-1. Investment by fiduciaries of funds held in trust.
91-13-3. Authority to prudently invest in all property.
91-13-5. "Legal investment" construed.
91-13-6. Federally insured accounts and certificates of deposit as legal investments.
91-13-7. General powers of courts not affected.
91-13-8. Direct obligations of United States of America to include interests in certain open-end or closed-end management type investment company or investment trust.
91-13-9. Application of chapter.
91-13-11. Tennessee Valley Authority bonds and obligations as legal investments.

§ 91-13-1. Investment by fiduciaries of funds held in trust.

All trustees, guardians, and other fiduciaries in this state, unless prohibited by the will, deed, or trust instrument of the testator or other person establishing the trust, agency, or fiduciary relationship, or unless by any such instrument another mode of investment is prescribed, may, in addition to methods of investment now authorized by law, invest all funds held in trust or for investment as provided in this chapter.

HISTORY:

Codes, 1942, § 421.5; Laws, 1956, ch. 212, §§ 1-7.

Cross References —

Bonds of bank as legal investments; authorized investments by bank, see § 31-25-51.

Student loan revenue bonds as legal investments and securities, see § 37-145-69.

Investment in bonds; bonds as security for deposits, see § 57-10-257.

Purchase of farm credit securities by executors, trustees, administrators and guardians, etc., see § 75-69-5.

Powers of trustees of investment trusts, see § 79-15-9.

Savings accounts as legal investments and as security for bonds, see Savings Associations Law, § 81-12-1 et seq.

Fiduciaries accounts in savings associations, see § 81-12-139.

Savings accounts as legal investments and as security for bonds, see Savings Bank Law, § 81-14-1 et seq.

Fiduciary not to use funds; investment by fiduciary bank in time certificates of deposit, see § 91-7-253.

Other sections derived from same 1942 code section, see §§ 91-13-3, 91-13-5, 91-13-7, 91-13-9.

Federally insured accounts and certificates of deposit as legal investments, see § 91-13-6.

Direct obligations of United States of America to include interests in certain open-end or close-end management type investment company or investment trust, see § 91-13-8.

Tennessee Valley Authority bonds and obligations as legal investments, see § 91-13-11.

Applicability of Mississippi Rules of Civil Procedure to proceedings which are subject to the provisions of Title 91, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

This section does not mandate that an executor invest estate funds; instead, the executor "may" invest estate funds. McNeil v. Hester, 753 So. 2d 1057, 2000 Miss. LEXIS 23 (Miss. 2000).

RESEARCH REFERENCES

Practice References.

Bickel, Living Trusts: Forms and Practice (Matthew Bender).

Burke, Friel, and Gagliardi, Modern Estate Planning, Second Edition (Matthew Bender).

Christensen, International Estate Planning, Second Edition (Matthew Bender).

Mobley, Robinson and Hedrick, Pritchard on the Law of Wills and Administration of Estates, Seventh Edition (Michie).

Rapkin, Planning for Large Estates (Matthew Bender).

Schoenblum, Estate Planning Forms and Clauses with CD Rom (Matthew Bender).

Wyatt, Trust Administration and Taxation (Matthew Bender).

LexisNexis® CD – Estate Planning Package (CD-ROM) (LexisNexis).

Murphy's Will Clauses: Annotations and Forms with Tax Effects (Matthew Bender).

§ 91-13-3. Authority to prudently invest in all property.

In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property held in fiduciary capacity, the fiduciary shall exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property, real, personal, or mixed, and every kind of investment, specifically including, but not by way of limitation, shares or interests in common trust funds, securities of any open-end or closed-end management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended and, in addition, bonds, preferred stocks, or common stocks listed on a national securities exchange registered with the securities and exchange commission, which men of prudence, discretion, and intelligence acquire or retain for their own account. Within the limitations of the foregoing standard, a fiduciary may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.

HISTORY:

Codes, 1942, § 421.5; Laws, 1956, ch. 212, §§ 1-7.

Cross References —

Bonds issued for the support of the Institute for Technology Development as legal investments, see § 31-29-17.

Housing and slum clearance bonds as legal investment, see § 43-33-39.

Bonds of home owners' loan corporation as legal investments, see § 43-33-201.

FHA insured mortgages as legal investments, see § 43-33-303.

Bonds of flood and damage control districts as legal investments, see § 51-35-337.

Bonds of Business Finance Corporation as legal investments, see § 57-10-257.

Bonds issued under state ports and harbors law as legal investments, see § 59-5-63.

Farm credit securities as legal investments, see § 75-69-5.

Other sections derived from same 1942 code section, see §§ 91-13-1, 91-13-5, 91-13-7, 91-13-9.

Federal Aspects—

The Federal Investment Company Act of 1940, referred to in this section, is codified at 15 USCS § 80a-1 et seq.

JUDICIAL DECISIONS

1. In general.

Even though an estate lost money, there was no breach of fiduciary duty on the part of an administratrix under Miss. Code Ann. § 91-13-3 because, other than filing a petition to consolidate certain stocks, she relied on the estate's professionals in making decisions. Moreover, she was not a guarantor of the estate's assets. Longmire v. Harveston (In re Estate of McGee), 982 So. 2d 428, 2007 Miss. App. LEXIS 703 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 237 (Miss. 2008).

Although there is no per se duty to place estate funds in an interest-bearing account, the failure to so place estate funds can constitute an imprudent management of estate funds. McNeil v. Hester, 753 So. 2d 1057, 2000 Miss. LEXIS 23 (Miss. 2000).

RESEARCH REFERENCES

ALR.

Measure of trustee's liability for breach of trust in selling investment property, or changing investments, in good faith. 58 A.L.R.2d 674.

Authorization by trust instrument of investment of trust funds in nonlegal investments. 78 A.L.R.2d 7.

Am. Jur.

1 Am. Jur. Proof of Facts 2d, Fiduciary's Breach of Investment Duties, § 12 et seq. (proof of breach of investment duty).

§ 91-13-5. "Legal investment" construed.

Whenever the express terms or limitations set forth in any will, agreement, court order, or other instrument use the terms "legal investment" or "authorized investment" or words of similar import, such words shall be conclusively presumed to mean any investment authorized or permitted by Section 91-13-3.

HISTORY:

Codes, 1942, § 421.5; Laws, 1956, ch. 212, §§ 1-7.

Cross References —

Bonds issued for the support of the Institute for Technology Development as legal investments, see § 31-29-17.

Investments in county industrial development authority bonds, see § 57-31-27.

Other sections derived from same 1942 code section, see §§ 91-13-1, 91-13-3, 91-13-7, 91-13-9.

§ 91-13-6. Federally insured accounts and certificates of deposit as legal investments.

All trustees, guardians, administrators, executors and other fiduciaries may, without court order, if not prohibited by the instrument, judgment, decree or order establishing the fiduciary relationship, invest or deposit funds held in a fiduciary capacity in time certificates of deposit, savings accounts or other interest-bearing accounts of (a) any state or national bank (including itself, if such fiduciary be a bank) whose main office is located in the state and the deposits of which are insured by the Federal Deposit Insurance Corporation, or (b) any state or federal savings and loan association (including itself, if such fiduciary be a savings and loan association) whose main office is located in the state and the deposits of which are insured by the Federal Savings and Loan Insurance Corporation.

HISTORY:
Laws, 1982, ch. 364, § 1, eff from and after July 1, 1982.

§ 91-13-7. General powers of courts not affected.

Nothing contained in this chapter shall be construed to limit the power of a court of competent jurisdiction to permit a fiduciary to take any action authorized, or to restrain a fiduciary from taking any action prohibited by a decree of such court, notwithstanding the permissions or restrictions contained in any written instrument under which such fiduciary is acting.

HISTORY:
Codes, 1942, § 421.5; Laws, 1956, ch. 212, §§ 1-7.

Cross References —
Other sections derived from same 1942 code section, see §§ 91-13-1, 91-13-3, 91-13-5, 91-13-9.

§ 91-13-8. Direct obligations of United States of America to include interests in certain open-end or closed-end management type investment company or investment trust.

All trustees, guardians, administrators, executors and other fiduciaries, whenever a governing instrument or order directs, requires, authorizes or permits investment in direct obligations of the United States of America, may invest in such obligations either directly or in the form of securities of, or other interests in, any open-end or closed-end management type investment company or investment trust registered under the provisions of 15 U.S.C. Section 80(a)-1 et seq., provided that the portfolio of such investment company or investment trust is limited to direct obligations of the United States of America and to repurchase agreements fully collateralized by direct obligations of the United States of America, and that such investment company or investment trust takes delivery of the collateral for any repurchase agreement, either directly or through an authorized custodian. This section shall not be construed to apply to the investment of any public funds; provided, however, that this section shall be construed to apply to the investment of public funds deposited with a bank trustee acting in a fiduciary capacity in connection with the sale and redemption of bonds, notes and other certificates of indebtedness, notwithstanding Section 31-19-5, Mississippi Code of 1972.

HISTORY:
Laws, 1989, ch. 572, § 1, eff from and after July 1, 1989.

Federal Aspects—
Regulation of investment companies, see 15 USCS § 80a-1 et seq.

OPINIONS OF THE ATTORNEY GENERAL

Section 91-13-8 authorizes the investment of county bond proceeds in a money market mutual fund by a bank trustee, if the money market mutual fund is an open-end or closed-end management type investment company or investment trust registered under the provisions of 15 U.S.C. Section 80(a)-1 et seq. 2006 Miss. Op. Att'y Gen. 313.

§ 91-13-9. Application of chapter.

Fiduciaries acting under authority heretofore or hereafter granted shall be subject to the provisions of this chapter.

The powers granted by this chapter to trustees, guardians, and other fiduciaries shall be in addition to the powers existing by virtue of other laws heretofore enacted authorizing investments by fiduciaries.

HISTORY:
Codes, 1942, § 421.5; Laws, 1956, ch. 212, §§ 1-7.

Cross References —
Other sections derived from same 1942 code section, see §§ 91-13-1, 91-13-3, 91-13-5, 91-13-7.

§ 91-13-11. Tennessee Valley Authority bonds and obligations as legal investments.

All bonds and other obligations issued by the Tennessee Valley Authority under the provisions of the Tennessee Valley Authority Act of 1933, as heretofore or hereafter amended, shall be legal investments for trustees and other fiduciaries, for the public employees' retirement system of Mississippi, and for banks, savings banks, trust companies, building and loan associations, and insurance companies organized under the laws of the State of Mississippi. Such bonds and obligations shall be legal securities which may be deposited with and shall be received by all public officers and bodies of this state and all municipalities and political subdivisions for the purpose of securing the deposit of public funds.

HISTORY:
Codes, 1942, § 421.7; Laws, 1962, ch. 179.

Cross References —
Investments by board of trustees of public employees retirement system of Mississippi, see § 25-11-121.

State depositories generally, see § 27-105-1 et seq.

Investments by insurance companies generally, see § 83-19-51.

CHAPTER 15.

RELEASE OF POWERS OF APPOINTMENT

Sec.	
91-15-1.	Citation of chapter.
91-15-3.	Definitions.
91-15-5.	Right to release.
91-15-7.	Manner of effecting release.
91-15-9.	Release heretofore made.
91-15-11.	Right of release not exclusive.
91-15-13.	Delivery of release as notice.
91-15-15.	Recordation as notice.
91-15-17.	Manner of recording release.
91-15-19.	Release not invalid for failure to comply with certain sections.
91-15-21.	Controlling effect of chapter.

§ 91-15-1. Citation of chapter.

This chapter may be cited as the "release of power of appointment law."

HISTORY:
Codes, 1942, § 671-71; Laws, 1946, ch. 405, § 1.

Cross References —
Applicability of Mississippi Rules of Civil Procedure to proceedings which are subject to the provisions of Title 91, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
Code 1942, § 672-71 et seq. do not apply to the transfer of an interest in property which is owned absolutely and unqualifiedly by the person undertaking to release the power. Bishop v. United States, 338 F. Supp. 1336, 1970 U.S. Dist. LEXIS 11277 (N.D. Miss. 1970), aff'd, 468 F.2d 950 (5th Cir. Miss. 1972), aff'd, 1972 U.S. App. LEXIS 10892 (5th Cir. 1972).

RESEARCH REFERENCES

Am. Jur.
62 Am. Jur. 2d, Powers of Appointment and Alienation § 55.

CJS.
72 C.J.S., Powers § 11.

Practice References.
Bickel and Flannery, Living Trusts: Forms and Practice (Matthew Bender).

Burke, Friel, and Gagliardi, Modern Estate Planning, Second Edition (Matthew Bender).

Christensen, International Estate Planning, Second Edition (Matthew Bender).

Mobley, Robinson and Hedrick, Pritchard on the Law of Wills and Administration of Estates, Seventh Edition (Michie).

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Schoenblum, Estate Planning Forms and Clauses with CD Rom (Matthew Bender).

Wyatt, Trust Administration and Taxation (Matthew Bender).

LexisNexis® CD – Estate Planning Package (CD-ROM) (LexisNexis).

Murphy's Will Clauses: Annotations and Forms with Tax Effects (Matthew Bender).

§ 91-15-3. Definitions.

When used in this chapter, unless the context otherwise requires:

(a) "Power" includes any power to appoint or designate to whom property shall go, any power to invade property, any power to alter, amend, or revoke any instrument under which an estate or trust is held or created or to terminate any right or interest thereunder, and any power remaining where one or more partial releases have heretofore or hereafter been made with respect to a power, whether heretofore or hereafter created or reserved, whether vested, contingent, or conditional, and whether classified in law or known as a power in gross, a power appendant, a power appurtenant, a collateral power, a general, special, or limited power, exclusive or nonexclusive power, or otherwise, and irrespective of when, in what manner, or in whose favor it may be exercised.

(b) "Donee" means any person, whether resident or nonresident of this state, who, either alone or with another, has the right to exercise a power.

(c) "Objects" when used in connection with a power means the person in whose favor the power may be exercised.

(d) "Property" when used in connection with a power means any and all property, whether real or personal, any and all interest in property, and any and all income from property, which is subject to the power, and includes any part of the property, any part of the interest in property, and any part of the income from property.

(e) "Release" means renunciation, relinquishment, surrender, refusal to accept, extinguishment, and any other form of release.

HISTORY:
Codes, 1942, § 672-72; Laws, 1946, ch. 405, § 2.

RESEARCH REFERENCES

Am. Jur.
62 Am. Jur. 2d, Powers of Appointment and Alienation §§ 1, 2, 9, 33.

CJS.
72 C.J.S., Powers § 2 et seq.

§ 91-15-5. Right to release.

Unless the instrument creating the power specifically provides to the contrary, the donee of a power, whether now existing or hereafter created, may:

(a) At any time completely release his power.

(b) At any time or times release his power: (one) as to any property which is subject thereto; (two) as to any one or more of the objects thereof; or (three) so as to limit in any other respect the extent to which it may be exercised.

HISTORY:
Codes, 1942, § 672-73; Laws, 1946, ch. 405, § 3.

RESEARCH REFERENCES

Am. Jur.
62 Am. Jur. 2d, Powers of Appointment and Alienation §§ 1-3, 6, 7, 90, 91.

CJS.
72 C.J.S., Powers § 6, 7.

§ 91-15-7. Manner of effecting release.

A release of a power, whether partial or complete, shall be valid and effective with or without a consideration when the donee executes an instrument evidencing an intent to make the release, signed and acknowledged in the manner prescribed for the execution of deeds, and delivers the instrument or causes it to be delivered, either:

(a) To an adult person who may take any of the property which is subject to the power in the event of its non-exercise, or to one in whose favor it may be exercised after such partial release; or

(b) To any trustee or any co-trustee of the property which is subject to the power; or

(c) By filing the same for recordation in the chancery clerk's office in the county and judicial district thereof in which any of the property is located, or in which either the donee or the trustee in control of the property resides, or in which the trustee has its principal office, or in which the instrument creating the power is probated or recorded.

HISTORY:
Codes, 1942, § 672-74; Laws, 1946, ch. 405, § 4.

RESEARCH REFERENCES

Am. Jur.
62 Am. Jur. 2d, Powers of Appointment and Alienation §§ 52, 57, 90, 91.

§ 91-15-9. Release heretofore made.

A release of a power executed prior to April 10, 1946, shall have the same effect as if this chapter had been in effect at the time the release was executed and delivered.

HISTORY:
Codes, 1942, § 672-75; Laws, 1946, ch. 405, § 5.

§ 91-15-11. Right of release not exclusive.

The rights and means provided in this chapter for the release of a power are not exclusive, but are in addition to all other rights and means of a donee to release a power in whole or in part.

HISTORY:
Codes, 1942, § 672-76; Laws, 1946, ch. 405, § 6.

RESEARCH REFERENCES

Am. Jur.
62 Am. Jur. 2d, Powers of Appointment and Alienation §§ 52, 57.

§ 91-15-13. Delivery of release as notice.

Any fiduciary or other person, association, or corporation having the possession or control of any property subject to a power of appointment shall be deemed to have notice of a release of the power when the original or a copy of the release is delivered to such fiduciary or other person, association, or corporation.

HISTORY:
Codes, 1942, § 672-77; Laws, 1946, ch. 405, § 7.

§ 91-15-15. Recordation as notice.

Any purchaser or mortgagee of real property subject to a power of appointment, who is without actual notice, shall be deemed to have notice of a release of the power when the original or duplicate original is filed for record in the chancery clerk's office in the county and judicial district thereof in which the particular real property so purchased or mortgaged is located, and when the deed, will, or other instrument creating the power, or a duly attested copy thereof, is recorded in the same office, and an appropriate notation is entered on the margin of the will or deed book where the instrument creating the power is recorded, referring to the deed book and page where the release is recorded.

HISTORY:
Codes, 1942, § 672-78; Laws, 1946, ch. 405, § 8.

Cross References —
Recording of instruments generally, see § 89-5-1 et seq.

Method of recording and indexing instruments, see §§ 89-5-25, 89-5-33.

§ 91-15-17. Manner of recording release.

Clerks of chancery courts are authorized and directed to record releases of powers of appointment in the books provided for the recordation of deeds, to index the same in the current and general indexes, the name of the donee being entered on the grantor index, and to charge therefor at the rate applicable to deeds.

HISTORY:
Codes, 1942, § 672-79; Laws, 1946, ch. 405, § 9.

Cross References —
Fees for recording instruments, see § 25-7-9.

§ 91-15-19. Release not invalid for failure to comply with certain sections.

No release shall be invalid or ineffective because of failure to comply with either Section 91-15-13 or Section 91-15-15.

HISTORY:
Codes, 1942, § 672-80; Laws, 1946, ch. 405, § 10.

§ 91-15-21. Controlling effect of chapter.

In so far as the provisions of this chapter may conflict with other laws or parts thereof, the provisions of this chapter shall control.

HISTORY:
Codes, 1942, § 672-81; Laws, 1946, ch. 405, § 11.

CHAPTER 17.

MISSISSIPPI PRINCIPAL AND INCOME ACT OF 2013

Sec.
91-17-1 through 91-17-31. Repealed.

Article 1.	Definitions and Fiduciary Duties.	91-17-101
Article 2.	Decedent's Estate or Terminating Income Interest.	91-17-201
Article 3.	Apportionment at Beginning and End of Income Interest.	91-17-301
Article 4.	Allocation of Receipts During Administration of Trust.	91-17-401
Article 5.	Allocation of Disbursements During Administration of Trust.	91-17-501
Article 6.	Miscellaneous Provisions.	91-17-601

§§ **91-17-1 through 91-17-31. Repealed.**

Repealed by Laws, 2012, ch. 351, § 2, effective from and after January 1, 2013.

§ 91-17-1. [Codes, 1942, § 672-186; Laws, 1966, ch. 371, § 16, eff from and after January 1, 1967.]

§ 91-17-3 [Codes, 1942, § 672-171; Laws, 1966, ch. 371, § 1, eff from and after January 1, 1967.]

§ 91-17-5 [Codes, 1942, § 672-172; Laws, 1966, ch. 371, § 2, eff from and after January 1, 1967.]

§ 91-17-7 [Codes, 1942, § 672-173; Laws, 1966, ch. 371, § 3, eff from and after January 1, 1967.]

§ 91-17-9 [Codes, 1942, § 672-174; Laws, 1966, ch. 371, § 4, eff from and after January 1, 1967.]

§ 91-17-11 [Codes, 1942, § 672-175; Laws, 1966, ch. 371, § 5, eff from and after January 1, 1967.]

§ 91-17-13 [Codes, 1942, § 672-176; Laws, 1966, ch. 371, § 6, eff from and after January 1, 1967.]

§ 91-17-15 [Codes, 1942, § 672-177; Laws, 1966, ch. 371, § 7, eff from and after January 1, 1967.]

§ 91-17-17 [Codes, 1942, § 672-178; Laws, 1966, ch. 371, § 8, eff from and after January 1, 1967.]

§ 91-17-19 [[Codes, 1942, § 672-179; Laws, 1966, ch. 371, § 9, eff from and after January 1, 1967.]

§ 91-17-21 [Codes, 1942, § 672-180; Laws, 1966, ch. 371, § 10, eff from and after January 1, 1967.]

§ 91-17-23 [Codes, 1942, § 672-181; Laws, 1966, ch. 371, § 11, eff from and after January 1, 1967.]

§ 91-17-25 [Codes, 1942, § 672-183; Laws, 1966, ch. 371, § 12, eff from and after January 1, 1967.]

§ 91-17-27 [Codes, 1942, § 672-183; Laws, 1966, ch. 371, § 13, eff from and after January 1, 1967.]

§ 91-17-29 [Codes, 1942, § 672-184; Laws, 1966, ch. 371, § 14, eff from and after January 1, 1967.]

§ 91-17-31 [Codes, 1942, § 672-185; Laws, 1966, ch. 371, § 15, eff from and after January 1, 1967.]

Editor's Note —

Former § 91-17-1 provided the short title for the chapter.

Former § 91-17-3 provided definitions of terms used in the chapter.

Former § 91-17-5 related to the duties of trustees as to receipts and expenditures.

Former § 91-17-7 defined income and principal.

Former § 91-17-9 related to an income beneficiary's right to income and its apportionment.

Former § 91-17-11 related to income earned during administration of decedent's estate.

Former § 91-17-13 related to corporate distributions.

Former § 91-17-15 related to bond premium and discount.

Former §n 91-17-17 related to business and farming operations.

Former § 91-17-19 related to the disposition of receipts from taking natural resources from land.

Former §n 91-17-21 related to receipts from taking the timber from the land.

Former § 91-17-23 related to other property subject to depletion.

Former § 91-17-25 related to underproductive property.

Former § 91-17-27 related to charges against income and principal.

Former § 91-17-29 related to the application of chapter.

Former § 91-17-31 related to uniformity of interpretation.

ARTICLE 1.

DEFINITIONS AND FIDUCIARY DUTIES.

Sec.
91-17-101. Short title.
91-17-102. Definitions.
91-17-103. Fiduciary duties; general principles.
91-17-104. Trustee's power to adjust.
91-17-105. Judicial control of discretionary power.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-101. Short title.

This chapter may be cited as the Mississippi Principal and Income Act of 2013.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-102. Definitions.

In this chapter:

(1) "Accounting period" means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a

calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

JUDICIAL DECISIONS

ANALYSIS

I. Under current law.

1.-5. [Reserved for future use.]

II. Under former § 91-17-3.

6. In general.

I. Under current law.

1.-5. [Reserved for future use.]

II. Under former § 91-17-3.

6. In general.

Uniform Principal and Income Law controls over common law, when seeking definitions of terms in trust instruments. Hynson v. Jeffries, 697 So. 2d 792, 1997 Miss. App. LEXIS 544 (Miss. Ct. App. 1997).

§ 91-17-103. Fiduciary duties; general principles.

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 and 3, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under Section 91-17-104(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

JUDICIAL DECISIONS

ANALYSIS

I. Under current law.

1.-5. [Reserved for future use.]

II. Under former § 91-17-5.

6. In general.

I. Under current law.

1.-5. [Reserved for future use.]

II. Under former § 91-17-5.

6. In general.

Uniform Principal and Income Law applied to marital deduction trust that contained producing oil and gas properties, and royalties from those minerals were to be divided between principal and income in accordance with statute's provisions. Hynson v. Jeffries, 697 So. 2d 792, 1997 Miss. App. LEXIS 544 (Miss. Ct. App. 1997).

§ 91-17-104. Trustee's power to adjust.

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 91-17-103(a), that the trustee is unable to comply with Section 91-17-103(b).

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) The intent of the settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust; or

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one (1) trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

(g)(1) For purposes of this section, and subject to subsection (c) of this section, from time to time a trustee may make a safe-harbor adjustment to increase net trust accounting income up to and including an amount equal to six percent (6%) of the trust's value as defined in subsection (g)(2). If a trustee determines to make this safe-harbor adjustment, the propriety of this adjustment shall be conclusively presumed. Nothing in this subsection (g) prohibits any other type of adjustment authorized under any provision of this section.

(2) A trust's value under subsection (g)(1) shall be calculated as follows:

(i) For trusts in existence for three (3) years or more, the value shall be the average fair market value of the trust assets over the past three (3) years;

(ii) For trusts in existence for at least two (2) years but less than three (3) years, the value shall be the average fair market value of the trust assets over the past two (2) years; and

(iii) For trusts in existence less than two (2) years, the value shall be the fair market value of the trust assets on December 31 of the preceding year.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-105. Judicial control of discretionary power.

(a) The court may not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) applies include:

(1) A decision under Section 91-17-104(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors, in deciding whether and to what extent to exercise the discretionary power conferred by Section 91-17-104(a).

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall place the

beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying paragraphs (1) and (2), to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by this chapter will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

ARTICLE 2.

DECEDENT'S ESTATE OR TERMINATING INCOME INTEREST.

Sec.

91-17-201.	Determination and distribution of net income.
91-17-202.	Distribution to residuary and remainder beneficiaries.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-201. Determination and distribution of net income.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 through 5 which apply to trustees and the rules in paragraph (5). The

fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 which apply to trustees and by:

(A) Including in net income all income from property used to discharge liabilities;

(B) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding-up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under paragraph (2) or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright and no interest or other amount is provided for by the will or by the terms of the trust, and if the pecuniary amount is not distributed to the beneficiary within one (1) year of the date of death of the testator or the date the income interest ends, then the fiduciary shall distribute to the beneficiary interest on any amount that remains undistributed after the one-year anniversary until the pecuniary amount is distributed in full. The interest rate shall be the IRS midterm applicable federal rate in effect on the date the interest begins to accrue.

(4) A fiduciary shall distribute the net income remaining after distributions required by paragraph (3) in the manner described in Section 91-17-202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in paragraph (1) because of a payment described in Section 91-17-501 or 91-17-502 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the

amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-202. Distribution to residuary and remainder beneficiaries.

(a) Each beneficiary described in Section 91-17-201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one (1) distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

ARTICLE 3.

APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST.

Sec.
91-17-301. When right to income begins and ends.
91-17-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.
91-17-303. Apportionment when income interest ends.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-301. When right to income begins and ends.

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.

(a) A trustee shall allocate an income receipt or disbursement other than one to which Section 91-17-201(1) applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which Section 91-17-401 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-303. Apportionment when income interest ends.

(a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent (5%) of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

ARTICLE 4.

ALLOCATION OF RECEIPTS DURING ADMINISTRATION OF TRUST.

Sec.
91-17-401. Character of receipt.
91-17-402. Distribution from trust or estate.
91-17-403. Business and other activities conducted by trustee.
91-17-404. Principal receipts.
91-17-405. Rental property.
91-17-406. Obligation to pay money.
91-17-407. Insurance policies and similar contracts.
91-17-408. Insubstantial allocations not required.
91-17-409. Deferred compensation, annuities, and similar payments.
91-17-410. Liquidating asset.
91-17-411. Minerals, water, and other natural resources.
91-17-412. Timber.
91-17-413. Property not productive of income.
91-17-414. Derivative and options.
91-17-415. Asset-backed securities.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

PART 1

RECEIPTS FROM ENTITIES

§ 91-17-401. Character of receipt.

(a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which Section 91-17-402 applies, a business or activity to which Section 91-17-403 applies, or an asset-backed security to which Section 91-17-415 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one (1) distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment

company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent (20%) of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subsection (d)(2), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-402. Distribution from trust or estate.

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, Section 91-17-401 or 91-17-415 applies to a receipt from the trust.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-403. Business and other activities conducted by trustee.

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

(1) Retail, manufacturing, service, and other traditional business activities;
(2) Farming;
(3) Raising and selling livestock and other animals;
(4) Management of rental properties;
(5) Extraction of minerals and other natural resources;
(6) Timber operations; and
(7) Activities to which Section 91-17-414 applies.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

PART 2

RECEIPTS NOT NORMALLY APPORTIONED

§ 91-17-404. Principal receipts.

A trustee shall allocate to principal:

(1) To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this article;

(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in Section 91-17-502(a) (7) or for other reasons to the extent not based on the loss of income;

(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) Other receipts as provided in Part 3 of this article.

HISTORY:
Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —
This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-405. Rental property.

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

HISTORY:
Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —
This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-406. Obligation to pay money.

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one (1) year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one (1) year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which Section 91-17-409, 91-17-410, 91-17-411, 91-17-412, 91-17-414, or 91-17-415 applies.

HISTORY:
Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —
This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-407. Insurance policies and similar contracts.

(a) Except as otherwise provided in subsection (b), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to Section 91-17-403, loss of profits from a business.

(c) This section does not apply to a contract to which Section 91-17-409 applies.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

PART 3

RECEIPTS NORMALLY APPORTIONED

§ 91-17-408. Insubstantial allocations not required.

If a trustee determines that an allocation between principal and income required by Section 91-17-409, 91-17-410, 91-17-411, 91-17-412, or 91-17-415 is insubstantial, the trustee may allocate the entire amount to principal unless one (1) of the circumstances described in Section 91-17-104(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in Section 91-17-104(d) and may be released for the reasons and in the manner described in Section 91-17-104(e). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent (10%); or

(2) The value of the asset producing the receipt for which the allocation would be made is less than ten percent (10%) of the total value of the trust's assets at the beginning of the accounting period.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-409. Deferred compensation, annuities, and similar payments.

(a) In this section:

(1) "Payment" means a payment that a trustee may receive over a fixed

number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of subsections (d), (e), (f), and (g), the term also includes any payment from any separate fund, regardless of the reason for the payment.

(2) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest, or a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent (10%) of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(d) Except as otherwise provided in subsection (e), subsections (f) and (g) apply, and subsections (b) and (c) do not apply, in determining the allocation of a payment made from a separate fund to:

(1) A trust to which an election to qualify for a marital deduction under Section 2056(b)(7) of the Internal Revenue Code of 1986, as amended, has been made; or

(2) A trust that qualifies for the marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1986, as amended.

(e) Subsections (d), (f), and (g) do not apply if and to the extent that the series of payments would, without the application of subsection (d), qualify for the marital deduction under Section 2056(b)(7)(C) of the Internal Revenue Code of 1986, as amended.

(f) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this chapter. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(g) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent (4%) of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the Internal Revenue Code of 1986, as amended, for the month preceding the accounting period for which the computation is made.

(h) This section does not apply to a payment to which Section 91-17-410 applies.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-410. Liquidating asset.

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one (1) year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to Section 91-17-409, resources subject to Section 91-17-411, timber subject to Section 91-17-412, an activity subject to Section 91-17-414, an asset subject to Section 91-17-415, or any asset for which the trustee establishes a reserve for depreciation under Section 91-17-503.

(b) A trustee shall allocate to income ten percent (10%) of the receipts from a liquidating asset and the balance to principal.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-411. Minerals, water, and other natural resources.

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production

payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety percent (90%) must be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2), or (3), ninety percent (90%) of the net amount received must be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent (90%) of the amount must be allocated to principal and the balance to income.

(c) This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2013, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before January 1, 2013. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2013, the trustee shall allocate receipts from the interest as provided in this chapter.

HISTORY:
Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —
This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

JUDICIAL DECISIONS

ANALYSIS

I. Under current law.

1.-5. [Reserved for future use.]

II. Under former § 91-17-9.

6. In general.

I. Under current law.

1.-5. [Reserved for future use.]

II. Under former § 91-17-9.

6. In general.

Annuitants vested with a remainder interest in testator's estate upon the death of the life tenant are not restricted only to that interest in royalties derived from oil leases to which the life tenant was entitled, but their interests in such royalties are governed by those terms of the testator's will dealing with the annuitants themselves. D'Evereaux Hall Orphan Asylum v. Green, 226 So. 2d 725, 1969 Miss. LEXIS 1311 (Miss. 1969).

A life tenant who executes oil leases subsequent to the death of the grantor of the life estate is entitled only to the interest derived from any investment of the royalty gained from such lease. D'Evereaux Hall Orphan Asylum v. Green, 226 So. 2d 725, 1969 Miss. LEXIS 1311 (Miss. 1969).

§ 91-17-412. Timber.

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (1) and (2); or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to paragraph (1), (2), or (3).

(b) In determining net receipts to be allocated pursuant to subsection (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on January 1, 2013, the trustee may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the trustee before January 1, 2013. If the trust acquires an interest in timberland after January 1, 2013, the trustee shall allocate net receipts from the sale of timber and related products as provided in this chapter.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-413. Property not productive of income.

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under Section 91-17-104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by Section 91-17-104(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-414. Derivative and options.

(a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under Section 91-17-403 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-415. Asset-backed securities.

(a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which Section 91-17-401 or 91-17-409 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one (1) accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one (1) accounting period, the trustee shall allocate ten percent (10%) of the payment to income and the balance to principal.

ARTICLE 5

ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

ARTICLE 5.

ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST.

Sec.	
91-17-501.	Disbursements from income.
91-17-502.	Disbursements from principal.
91-17-503.	Transfers from income to principal for depreciation.
91-17-504.	Transfers from income to reimburse principal.
91-17-505.	Income taxes.
91-17-506.	Adjustments between principal and income because of taxes.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-501. Disbursements from income.

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which Section 91-17-201(2)(B) or (C) applies:

(1) One-half (½) of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half (½) of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

HISTORY:
Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —
This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-502. Disbursements from principal.

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half (½) of the disbursements described in Section 91-17-501(1) and (2);

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in Section 91-17-501(4) of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common-law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

HISTORY:
Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —
This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-503. Transfers from income to principal for depreciation.

(a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one (1) year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under Section 91-17-403 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

HISTORY:
Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —
This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-504. Transfers from income to reimburse principal.

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) Disbursements described in Section 91-17-502(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a).

HISTORY:
Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —
This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-505. Income taxes.

(a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

(1) From income to the extent that receipts from the entity are allocated only to income;

(2) From principal to the extent that receipts from the entity are allocated only to principal;

(3) Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) From principal to the extent that the tax exceeds the total receipts from the entity.

(d) After applying subsections (a) through (c), the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-506. Adjustments between principal and income because of taxes.

A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) Elections and decisions, that the fiduciary makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

ARTICLE 6.

MISCELLANEOUS PROVISIONS.

Sec.
91-17-601. Uniformity of application and construction.
91-17-602. Severability clause.
91-17-603. Application of chapter to existing trusts and estates.
91-17-604. Transitional matter.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-601. Uniformity of application and construction.

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-602. Severability clause.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-603. Application of chapter to existing trusts and estates.

This chapter applies to every trust or decedent's estate existing on January 1, 2013, except as otherwise expressly provided in the will or terms of the trust or in this chapter.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

§ 91-17-604. Transitional matter.

Section 91-17-409 applies to a trust described in Section 91-17-409(d) on and after the following dates:

(1) If the trust is not funded as of January 1, 2013, the date of the decedent's death.

(2) If the trust is initially funded in the calendar year beginning January 1, 2013, the date of the decedent's death.

(3) If the trust is not described in paragraph (1) or (2), January 1, 2013.

HISTORY:

Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Notes —

This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013.

CHAPTER 19.

GIFTS TO MINORS [REPEALED]

Sec.
91-19-1 through 91-19-19. Repealed.

§§ 91-19-1 through 91-19-19. Repealed.

Repealed by Laws, 1994, ch. 416, § 26, eff from and after January 1, 1995.

§ 91-19-1. [Codes, 1942, § 672-110; Laws, 1958, ch. 248, § 10]

§ 91-19-3. [Codes, 1942, § 672-109; Laws, 1958, ch. 248, § 9]

§ 91-19-5. [Codes, 1942, § 672-101; Laws, 1958, ch. 248, § 1; Laws, 1971, ch. 505, § 1]

§ 91-19-7. [Codes, 1942, § 672-102; Laws, 1958, ch. 248, § 2; Laws, 1971, ch. 505, § 2]

§ 91-19-9. [Codes, 1942, § 672-103; Laws, 1958, ch. 248, § 3; Laws, 1971, ch. 505, § 3]

§ 91-19-11. [Codes, 1942, § 672-104; Laws, 1958, ch. 248, § 4; Laws, 1971, ch. 505, § 4]

§ 91-19-13. [Codes, 1942, § 672-105; Laws, 1958, ch. 248, § 5]

§ 91-19-15. [Codes, 1942, § 672-106; Laws, 1958, ch. 248, § 6; Laws, 1971, ch. 505, § 5]

§ 91-19-17. [Codes, 1942, § 672-107; Laws, 1958, ch. 248, § 7; Laws, 1971, ch. 505, § 6]

§ 91-19-19. [Codes, 1942, § 672-108; Laws, 1958, ch. 248, § 8; Laws, 1960, ch. 217 § 9]

Editor's Notes —

Former § 91-19-1 was entitled: Short title.

Former § 91-19-3 was entitled: Construction of chapter.

Former § 91-19-5 was entitled: Definitions.

Former § 91-19-7 was entitled: Manner of making gift.

Former § 91-19-9 was entitled: Effect of gift.

Former § 91-19-11 was entitled: Duties and powers of custodian.

Former § 91-19-13 was entitled: Custodian's expenses, compensation, bond and liabilities.

Former § 91-19-15 was entitled: Exemption of third persons from liability.

Former § 91-19-17 was entitled: Resignation, death or removal of custodian; bond; appointment of successor custodian.

Former § 91-19-19 was entitled: Accounting by custodian.

CHAPTER 20.

TRANSFERS TO MINORS

Sec.	
91-20-1.	Short title.
91-20-3.	Definitions.
91-20-5.	Applicability of chapter; jurisdiction.
91-20-7.	Nomination of custodian.
91-20-9.	Transfer by irrevocable gift or exercise of appointment power in favor of custodian.
91-20-11.	Transfer to custodian by personal representative or trustee as authorized by will or trust; designation of custodian by personal representative or trustee.
91-20-13.	Transfer by personal representative, trustee, or conservator to another adult or trust company as custodian without authorization by will or trust; prerequisites.
91-20-15.	Transfer to custodian by one holding property of or owing debt to minor; designation of custodian.
91-20-17.	Written receipt from custodian; effect.
91-20-19.	Creation and transfer of custodial property.
91-20-21.	One custodian for one minor.
91-20-23.	Factors not affecting validity of transfer; powers and duties of custodian unalterable.
91-20-25.	Powers and duties of custodian; standard of care; records.
91-20-27.	Custodian's exercise of powers and authority over custodial property.
91-20-29.	Delivery of property or money to minor; expenditure for benefit of minor; conditions; court order.
91-20-31.	Reimbursement of custodian for expenses; compensation of custodian; bond unnecessary.
91-20-33.	Good faith reliance on capacity of purported custodian.
91-20-35.	Assertion of claim against custodial property; personal liability of custodian or minor.
91-20-37.	Declination to serve or resignation as custodian; nomination of substitute custodian; designation of successor custodian; transfer of property.
91-20-39.	Petition for accounting or determination of responsibility for claims; accounting upon removal of custodian.
91-20-41.	Time for transfer of custodial property to minor or minor's estate.
91-20-43.	Applicability of chapter to certain transfers.
91-20-45.	Validation of transfers predating chapter; application of chapter to prior transfers.
91-20-47.	Construction of chapter.
91-20-49.	Severability of provisions of chapter.

§ 91-20-1. Short title.

This chapter may be cited as the "Mississippi Uniform Transfers to Minors Act."

HISTORY:

Laws, 1994, ch. 416, § 1, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the 'Mississippi Uniform Gifts to Minors Law,' which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

Comparable Laws from other States —

Alabama: Code of Ala. §§ 35-5A-1 through 35-5A-24.

Alaska: Alaska Stat. §§ 13.46.010 through 13.46.999.

Arizona: A.R.S. §§ 14-7651 through 14-7671.

Arkansas: A.C.A. §§ 9-26-201 through 9-26-227.

California: California Prob. Code §§ 3900 through 3925.

Colorado: C.R.S. §§ 11-50-101 through 11-50-126.

Connecticut: Conn. Gen. Stat. § 45a-557 et seq.

Delaware: 12 Del. C. §§ 4501 through 4523.

District of Columbia: D.C. Code §§ 21-301 through 21-324.

Florida: Fla. Stat. §§ 710.101 through 710.126.

Georgia: O.C.G.A. §§ 4-5-110 through 44-5-134.

Hawaii H.R.S. §§ 553A-1 through 553A-24.

Illinois: 760 I.L.C.S. 20/1 through 20/24.

Idaho: Idaho Code §§ 68-801 through 68.825.

Indiana: Burns Ind. Code §§ 30-2-8.5-1.

Iowa: Iowa Code §§ 565B.1 through 565B.25.

Kansas: K.S.A. §§ 38-1701 through 38-1726.

Kentucky: K.R.S. §§ 385.012 through 385.242.

Louisiana: La. R.S. §§ 9:751 through 9:773.

Maine: 33 M.R.S. §§ 1651 through 1674.

Maryland: Md. Estates and Trusts Code Ann. §§ 13-301 through 13-324.

Massachusetts: ALM GL ch. 201A, §§ 1 through 24.

Michigan: M.C.L.S. §§ 554.521 through 554.552.

Minnesota: Minn. Stat. §§ 527.21 through 527.44.

Montana: Mont. Code Anno. §§ 72-26-501 through 72-26-803.

Nebraska: R.R.S. Neb. §§ 43-2701 through 43-2724.

Nevada: Nev. Rev. Stat. Ann. §§ 167.010 through 167.110.

New Hampshire: R.S.A. §§ 463-A:1 through 463-A:26.

New Jersey: N.J. Stat. §§ 46:38A-1 through 46:38A-57.

New Mexico: N.M. Stat. Ann. § 46-7-11 et seq.

New York: NY CLS EPTL §§ 7-6.1 through 7-6.26.

North Carolina: N.C. Gen. Stat. §§ 33A-1 through 33A-24.

North Dakota: N.D. Cent. Code §§ 47-24.1-01 through 47-24.1-22.

Ohio: O.R.C. Ann. §§ 5814.01 through 5814.09.

Oklahoma: 58 Okl. St. §§ 1201 through 1225.

Oregon: O.R.S. §§ 126.805 through 126.886.

Pennsylvania: 20 Pa.C.S. §§ 5301 through 5321.

Rhode Island: R.I. Gen. Laws §§ 18-7-1 through 18-7-26.

South Dakota S.D. Codified Laws §§ 55-10A-1 through 55-10A-26.

Tennessee: Tenn. Code Ann. §§ 35-7-201 through 35-7-226.

Texas Property Code, §§ 141.001 through 141.025.

Utah: Utah Code Ann. §§ 75-5A-101 through 75-5A-123.

Vermont: 14 V.S.A. § 3211 et seq.

Virgin Islands: 15 V.I.C. §§ 1251a through 1251x.

Virginia: Va. Code Ann. §§ 64.2-1900 through 64.2-1922.

Washington: Rev. Code Wash. §§ 11.114.010 through 11.114.904.

West Virginia: W. Va. Code 36-7-1 through 36-7-24.

Wisconsin: Wis. Stat. §§ 54.854 through 54.898.

Wyoming: Wyo. Stat. §§ 34-13-114 through 34-13-137.

RESEARCH REFERENCES

Practice References.

Bicke and Flanneryl, Living Trusts: Forms and Practice (Matthew Bender).

Burke, Friel, and Gagliardi, Modern Estate Planning, Second Edition (Matthew Bender).

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Mobley, Robinson and Hedrick, Pritchard on the Law of Wills and Administration of Estates, Seventh Edition (Michie).

Rapkin, Planning for Large Estates (Matthew Bender).

Schoenblum, Estate Planning Forms and Clauses with CD Rom (Matthew Bender).

Wyatt, Trust Administration and Taxation (Matthew Bender).

LexisNexis® CD – Estate Planning Package (CD-ROM) (LexisNexis).

Murphy's Will Clauses: Annotations and Forms with Tax Effects (Matthew Bender).

§ 91-20-3. Definitions.

In this chapter:

(a) "Adult" means an individual who has attained the age of twenty-one (21) years.

(b) "Benefit plan" means an employer's plan for the benefit of an employee or partner.

(c) "Broker" means a person lawfully engaged in the business of effecting transactions in securities or commodities for the person's own account or for the account of others.

(d) "Conservator" means a person appointed or qualified by a court to act as general, limited or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions.

(e) "Court" means the chancery court of the county in which the parties reside.

(f) "Custodial property" means (i) any interest in property transferred to a custodian under this chapter and (ii) the income from and proceeds of that interest in property.

(g) "Custodian" means a person so designated under § 91-20-19 or a successor or substitute custodian designated under § 91-20-37.

(h) "Financial institution" means a bank, trust company, savings institution or credit union, chartered and supervised under state or federal law.

(i) "Legal representative" means an individual's personal representative or conservator.

(j) "Member of the minor's family" means the minor's parent, stepparent, spouse, grandparent, brother, sister, uncle or aunt, whether of the whole or half blood or by adoption.

(k) "Minor" means an individual who has not attained the age of twenty-one (21) years.

(*l*) "Person" means an individual, corporation, organization or other legal entity.

(m) "Personal representative" means an executor, administrator, successor personal representative or special administrator of a decedent's estate or a person legally authorized to perform substantially the same functions.

(n) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico and any territory or possession subject to the legislative authority of the United States.

(o) "Transfer" means a transaction that creates custodial property under Section 91-20-19.

(p) "Transferor" means a person who makes a transfer under this chapter.

(q) "Trust company" means a financial institution, corporation or other legal entity authorized to exercise general trust powers.

HISTORY:

Laws, 1994, ch. 416, § 2, eff from and after January 1, 1995.

Editor's Notes —

Laws of 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section

23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

Cross References —

Another definition of "minor," see § 1-3-27.

Savings banks as qualified institutions within meaning of that term as used in Uniform Gifts to Minors Law, see § 81-14-385.

RESEARCH REFERENCES

ALR.

Wills: what constitutes "bank," "checking," or "savings" account, within meaning of bequest. 31 A.L.R.4th 688.

Am. Jur.

38 Am. Jur. 2d, Gifts §§ 1 et seq., 6, 7.

§ 91-20-5. Applicability of chapter; jurisdiction.

(1) This chapter applies to a transfer that refers to this chapter in the designation under Section 91-20-19(1) by which the transfer is made if at the time of the transfer, the transferor, the minor or the custodian is a resident of this state or the custodial property is located in this state. The custodianship so created remains subject to this chapter despite a subsequent change in residence of a transferor, the minor or the custodian or the removal of custodial property from this state.

(2) A person designated as custodian under this chapter is subject to personal jurisdiction in this state with respect to any matter relating to the custodianship.

(3) A transfer that purports to be made and which is valid under the Uniform Transfers to Minors Act, the Uniform Gifts to Minors Act or a substantially similar act of another state is governed by the law of the designated state and may be executed and is enforceable in this state if at the time of the transfer, the transferor, the minor or the custodian is a resident of the designated state or the custodial property is located in the designated state.

HISTORY:

Laws, 1994, ch. 416, § 3, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 189.

§ 91-20-7. Nomination of custodian.

(1) A person having the right to designate the recipient of property transferable upon the occurrence of a future event may revocably nominate a custodian to receive the property for a minor beneficiary upon the occurrence of the event by naming the custodian followed in substance by the words: "As custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians to whom the property must be transferred, in the order named, if the first nominated custodian dies before the transfer or is unable, declines or is ineligible to serve. The nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment or in a writing designating a beneficiary of contractual rights which is registered with or delivered to the payor, issuer or other obligor of the contractual rights.

(2) A custodian nominated under this section must be a person to whom a transfer of property of that kind may be made under Section 91-20-19(1).

(3) The nomination of a custodian under this section does not create custodial property until the nominating instrument becomes irrevocable or a transfer to the nominated custodian is completed under Section 91-20-19. Unless the nomination of a custodian has been revoked, upon the occurrence of the future event the custodianship becomes effective and the custodian shall enforce a transfer of the custodial property pursuant to Section 91-20-19.

HISTORY:

Laws, 1994, ch. 416, § 4, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 190.

§ 91-20-9. Transfer by irrevocable gift or exercise of appointment power in favor of custodian.

A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor pursuant to Section 91-20-19.

HISTORY:

Laws, 1994, ch. 416, § 5, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 190.

§ 91-20-11. Transfer to custodian by personal representative or trustee as authorized by will or trust; designation of custodian by personal representative or trustee.

(1) A personal representative or trustee may make an irrevocable transfer pursuant to Section 91-20-19 to a custodian for the benefit of a minor as authorized in the governing will or trust.

(2) If the testator or settlor has nominated a custodian under Section 91-20-7 to receive the custodial property, the transfer must be made to that person.

(3) If the testator or settlor has not nominated a custodian under Section 91-20-7, or all persons so nominated as custodian die before the transfer or are unable, decline or are ineligible to serve, the personal representative or the trustee, as the case may be, shall designate the custodian from among those eligible to serve as custodian for property of that kind under Section 91-20-19(1).

HISTORY:

Laws, 1994, ch. 416, § 6, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 190.

§ 91-20-13. Transfer by personal representative, trustee, or conservator to another adult or trust company as custodian without authorization by will or trust; prerequisites.

(1) Subject to subsection (3), a personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian

for the benefit of a minor pursuant to Section 91-20-19, in the absence of a will or under a will or trust that does not contain an authorization to do so.

(2) Subject to subsection (3), a conservator may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor pursuant to Section 91-20-19.

(3) A transfer under subsection (1) or (2) may be made only if (a) the personal representative, trustee or conservator considers the transfer to be in the best interest of the minor, (b) the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement or other governing instrument, and (c) the transfer is authorized by the court if it exceeds Ten Thousand Dollars ($10,000.00) in value.

HISTORY:

Laws, 1994, ch. 416, § 7, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 190.

§ 91-20-15. Transfer to custodian by one holding property of or owing debt to minor; designation of custodian.

(1) Subject to subsections (2) and (3), a person not subject to Section 91-20-11 or 91-20-13 who holds property of or owes a liquidated debt to a minor not having a conservator may make an irrevocable transfer to a custodian for the benefit of the minor pursuant to Section 91-20-19.

(2) If a person having the right to do so under Section 91-20-7 has nominated a custodian under that section to receive the custodial property, the transfer must be made to that person.

(3) If no custodian has been nominated under Section 91-20-7, or all persons so nominated as custodian die before the transfer or are unable, decline or are ineligible to serve, a transfer under this section may be made to an adult member of the minor's family or to a trust company unless the property exceeds Ten Thousand Dollars ($10,000.00) in value.

HISTORY:

Laws, 1994, ch. 416, § 8, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section

23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 190.

9 Am. Jur. Legal Forms 2d (Rev), Gifts § 130:84 et seq. (gifts to minors).

§ 91-20-17. Written receipt from custodian; effect.

A written acknowledgment of delivery by a custodian constitutes a sufficient receipt and discharge for custodial property transferred to the custodian pursuant to this chapter.

HISTORY:

Laws, 1994, ch. 416, § 9, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 190.

§ 91-20-19. Creation and transfer of custodial property.

(1) Custodial property is created and a transfer is made whenever:

(a) An uncertificated security or a certificated security in registered form is either:

(i) Registered in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act"; or

(ii) Delivered if in certificated form, or any document necessary for the transfer of an uncertificated security is delivered, together with any necessary endorsement to an adult other than the transferor or to a trust company as custodian, accompanied by an instrument in substantially the form set forth in subsection (2);

(b) Money is paid or delivered to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act";

(c) The ownership of a life or endowment insurance policy or annuity contract is either:

(i) Registered with the issuer in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act"; or

(ii) Assigned in a writing delivered to an adult other than the transferor or to a trust company whose name in the assignment is followed in substance by the words: "as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act";

(d) An irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a contract is the subject of a written notification delivered to the payor, issuer or other obligor that the right is transferred to the transferor, an adult other than the transferor or a trust company, whose name in the notification is followed in substance by the words: "as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act";

(e) An interest in real property is recorded in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act";

(f) A certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property is either:

(i) Issued in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act"; or

(ii) Delivered to an adult other than the transferor or to a trust company, endorsed to that person followed in substance by the words: "as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act"; or

(g) An interest in any property not described in paragraphs (1) through (6) is transferred to an adult other than the transferor or to a trust company by a written instrument in substantially the form set forth in subsection (b).

(2) An instrument in the following form satisfies the requirements of paragraph (a)(ii) and (g) of subsection (1):

"TRANSFER UNDER THE MISSISSIPPI UNIFORM
TRANSFERS TO MINORS ACT

I, ________ (name of transferor or name and representative capacity if a fiduciary) hereby transfer to ________ (name of custodian), as custodian for ________ (name of minor) under the Mississippi Uniform Transfers to Minors Act, the following: (insert a description of the custodial property sufficient to identify it).

Dated: ________________

____

(Signature)

____________ (name of custodian) acknowledges receipt of the property described above as custodian for the minor named above under the Mississippi Uniform Transfers to Minors Act.

Dated: ____________

____

(Signature of Custodian)"

(3) A transferor shall place the custodian in control of the custodial property as soon as practicable.

HISTORY:

Laws, 1994, ch. 416, § 10, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

Cross References —

Delivery of ward's property to guardian, see § 93-13-31 et seq.

JUDICIAL DECISIONS

1. Effects of transfer.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found; the fact that the property was titled in the minor daughter's name under the Mississippi Uniform Transfers to Minors Act would have been a "red flag" because a transfer of real property made under Miss. Code Ann. § 91-20-19 was irrevocable, and under Miss. Code Ann. § 91-20-23(2), such custodial property was indefeasibly vested in the minor with the custodian being required to act as a prudent person in dealing with the property under Miss. Code Ann. § 91-20-25, such that the custodial property could not be returned by the custodian indiscriminately. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589, 2009 Bankr. LEXIS 3411 (Bankr. S.D. Miss. 2009).

RESEARCH REFERENCES

Am. Jur.

38 Am. Jur. 2d, Gifts § 63 et seq.

39 Am. Jur. 2d, Guardian and Ward § 190.

CJS.

38A C.J.S., Gifts § 47.

§ 91-20-21. One custodian for one minor.

A transfer may be made only for one (1) minor, and only one (1) person may be the custodian. All custodial property held under this chapter by the same custodian for the benefit of the same minor constitutes a single custodianship.

HISTORY:

Laws, 1994, ch. 416, § 11, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

“SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the ”Mississippi Uniform Gifts to Minors Law,“ which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities.”

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 190.

§ 91-20-23. Factors not affecting validity of transfer; powers and duties of custodian unalterable.

(1) The validity of a transfer made in a manner prescribed in this chapter is not affected by:

(a) Failure of the transferor to comply with Section 91-20-19(3) concerning possession and control;

(b) Designation of an ineligible custodian, except designation of the transferor in the case of property for which the transferor is ineligible to serve as custodian under Section 91-20-19(1); or

(c) Death or incapacity of a person nominated under Section 91-20-7 or designated under Section 91-20-19 as custodian or the disclaimer of the office by that person.

(2) A transfer made pursuant to Section 91-20-19 is irrevocable, and the custodial property is indefeasibly vested in the minor, but the custodian has all the rights, powers, duties and authority provided in this chapter, and neither the minor nor the minor's legal representative has any right, power, duty or authority with respect to the custodial property except as provided in this chapter.

(3) By making a transfer, the transferor incorporates in the disposition all the provisions of this chapter and grants to the custodian, and to any third person dealing with a person designated as custodian, the respective powers, rights and immunities provided in this chapter.

HISTORY:

Laws, 1994, ch. 416, § 12, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

“SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the ”Mississippi Uniform Gifts to Minors Law,“ which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities.”

JUDICIAL DECISIONS

1. Duties of custodian.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found; the fact that the property was titled in the minor daughter's name under the Mississippi Uniform Transfers to Minors Act would have been a "red flag" because a transfer of real property made under Miss. Code Ann. § 91-20-19 was irrevocable, and under Miss. Code Ann. § 91-20-23(2), such custodial property was indefeasibly vested in the minor with the custodian being required to act as a prudent person in dealing with the property under Miss. Code Ann. § 91-20-25, such that the custodial property could not be returned by the custodian indiscriminately. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589, 2009 Bankr. LEXIS 3411 (Bankr. S.D. Miss. 2009).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 190.

§ 91-20-25. Powers and duties of custodian; standard of care; records.

(1) A custodian shall:

(a) Take control of custodial property;

(b) Register or record title to custodial property if appropriate; and

(c) Collect, hold, manage, invest and reinvest custodial property.

(2) In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries. If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise. However, a custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

(3) A custodian may invest in or pay premiums on life insurance or endowment policies on (a) the life of the minor only if the minor or the minor's estate is the sole beneficiary, or (b) the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian, is the irrevocable beneficiary.

(4) A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor. Custodial property consisting of an undivided interest is so identified if the minor's interest is held as a tenant in common and is fixed. Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is so identified if it is either registered, or held in an account designated, in the name of the custodian, followed in substance by the words: "as a custodian for ________________ (name of minor) under the Mississippi Uniform Transfers to Minors Act."

(5) A custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has attained the age of fourteen (14) years.

HISTORY:

Laws, 1994, ch. 416, § 13, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

JUDICIAL DECISIONS

1. Duties of custodian.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found; the fact that the property was titled in the minor daughter's name under the Mississippi Uniform Transfers to Minors Act would have been a "red flag" because a transfer of real property made under Miss. Code Ann. § 91-20-19 was irrevocable, and under Miss. Code Ann. § 91-20-23(2), such custodial property was indefeasibly vested in the minor with the custodian being required to act as a prudent person in dealing with the property under Miss. Code Ann. § 91-20-25, such that the custodial property could not be returned by the custodian indiscriminately. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589, 2009 Bankr. LEXIS 3411 (Bankr. S.D. Miss. 2009).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 191.

§ 91-20-27. Custodian's exercise of powers and authority over custodial property.

(1) A custodian, acting in a custodial capacity, has all the rights, powers and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers and authority in that capacity only.

(2) This section does not relieve a custodian from liability for breach of Section 91-20-25.

HISTORY:

Laws, 1994, ch. 416, § 14, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section

23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward § 191.

§ 91-20-29. Delivery of property or money to minor; expenditure for benefit of minor; conditions; court order.

(1) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (a) the duty or ability of the custodian personally or of any other person to support the minor, or (b) any other income or property of the minor which may be applicable or available for that purpose.

(2) On petition of an interested person or the minor if the minor has attained the age of fourteen (14) years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.

(3) A delivery, payment or expenditure under this section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor.

HISTORY:
Laws, 1994, ch. 416, § 15, eff from and after January 1, 1995.

Editor's Notes —
Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

JUDICIAL DECISIONS

1. College expenses.
A minor may reach the assets of an account in her name through the custodian of the account; and either the minor or the custodian may withdraw funds for college expenses. Saliba v. Saliba, 753 So. 2d 1095, 2000 Miss. LEXIS 35 (Miss. 2000).

RESEARCH REFERENCES

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward § 191.

§ 91-20-31. Reimbursement of custodian for expenses; compensation of custodian; bond unnecessary.

(1) A custodian is entitled to reimbursement from custodial property for reasonable expenses incurred in the performance of the custodian's duties.

(2) Except for one who is a transferor under Section 91-20-9, a custodian has a noncumulative election during each calendar year to charge reasonable compensation for services performed during that year.

(3) Except as provided in Section 91-20-37(6), a custodian need not give a bond.

HISTORY:

Laws, 1994, ch. 416, § 16, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 191.

§ 91-20-33. Good faith reliance on capacity of purported custodian.

A third person in good faith and without court order may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining:

(a) The validity of the purported custodian's designation;

(b) The propriety of, or the authority under this chapter for, any act of the purported custodian;

(c) The validity or propriety under this chapter of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; or

(d) The propriety of the application of any property of the minor delivered to the purported custodian.

HISTORY:

Laws, 1994, ch. 416, § 17, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward § 191.

§ 91-20-35. Assertion of claim against custodial property; personal liability of custodian or minor.

(1) A claim based on (a) a contract entered into by a custodian acting in a custodial capacity, (b) an obligation arising from the ownership or control of custodial property, or (c) a tort committed during the custodianship, may be asserted against the custodial property by proceeding against the custodian in the custodial capacity, whether or not the custodian or the minor is personally liable therefor.

(2) A custodian is not personally liable:

(a) On a contract properly entered into in the custodial capacity unless the custodian fails to reveal that capacity and to identify the custodianship in the contract; or

(b) For an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian is personally at fault.

(3) A minor is not personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor is personally at fault.

HISTORY:
Laws, 1994, ch. 416, § 18, eff from and after January 1, 1995.

Editor's Notes —
Laws, 1994, ch. 416, § 26, provides as follows:
"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward § 191.

§ 91-20-37. Declination to serve or resignation as custodian; nomination of substitute custodian; designation of successor custodian; transfer of property.

(1) A person nominated under Section 91-20-7 or designated under Section 91-20-19 as custodian may decline to serve by delivering a valid disclaimer to the person who made the nomination or to the transferor or the transferor's legal representative. If the event giving rise to a transfer has not occurred and no substitute custodian able, willing and eligible to serve was nominated under Section 91-20-7, the person who made the nomination may

nominate a substitute custodian under Section 91-20-7; otherwise the transferor or the transferor's legal representative shall designate a substitute custodian at the time of the transfer, in either case from among the persons eligible to serve as custodian for that kind of property under Section 91-20-19(1). The custodian so designated has the rights of a successor custodian.

(2) A custodian at any time may designate a trust company or an adult other than a transferor under Section 91-20-9 as successor custodian by executing and dating an instrument of designation before a subscribing witness other than the successor. If the instrument of designation does not contain or is not accompanied by the resignation of the custodian, the designation of the successor does not take effect until the custodian resigns, dies, becomes incapacitated or is removed.

(3) A custodian may resign at any time by delivering written notice to the minor if the minor has attained the age of fourteen (14) years and to the successor custodian and by delivering the custodial property to the successor custodian.

(4) If a custodian is ineligible, dies or becomes incapacitated without having effectively designated a successor and the minor has attained the age of fourteen (14) years, the minor may designate as successor custodian, in the manner prescribed in subsection (2), an adult member of the minor's family, a conservator of the minor or a trust company. If the minor has not attained the age of fourteen (14) years or fails to act within sixty (60) days after the ineligibility, death or incapacity, the conservator of the minor becomes successor custodian. If the minor has no conservator or the conservator declines to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the minor's family, or any other interested person may petition the court to designate a successor custodian.

(5) A custodian who declines to serve under subsection (1) or resigns under subsection (3) or the legal representative of a deceased or incapacitated custodian, as soon as practicable, shall put the custodial property and records in the possession and control of the successor custodian. The successor custodian by action may enforce the obligation to deliver custodial property and records and becomes responsible for each item as received.

(6) A transferor, the legal representative of a transferor, an adult member of the minor's family, a guardian of the person of the minor, the conservator of the minor, or the minor if the minor has attained the age of fourteen (14) years may petition the court to remove the custodian for cause and to designate a successor custodian other than a transferor under § 91-20-9 or to require the custodian to give appropriate bond.

HISTORY:

Laws, 1994, ch. 416, § 19, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform

Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

RESEARCH REFERENCES

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward § 191.

§ 91-20-39. Petition for accounting or determination of responsibility for claims; accounting upon removal of custodian.

(1) A minor who has attained the age of fourteen (14) years, the minor's guardian of the person or legal representative, an adult member of the minor's family, a transferor or a transferor's legal representative may petition the court (a) for an accounting by the custodian or the custodian's legal representative, or (b) for a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property unless the responsibility has been adjudicated in an action under Section 91-20-35 to which the minor or the minor's legal representative was a party.

(2) A successor custodian may petition the court for an accounting by the predecessor custodian.

(3) The court, in a proceeding under this chapter or in any other proceeding, may require or permit the custodian or the custodian's legal representative to account.

(4) If a custodian is removed under Section 91-20-37(6), the court shall require an accounting and order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property.

HISTORY:
Laws, 1994, ch. 416, § 20, eff from and after January 1, 1995.

Editor's Notes —
Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

Cross References —
Jurisdiction of chancery court in general, see § 9-5-81.
Duties of chancery clerk in regard to guardianship, see § 9-5-137.
Production of vouchers in guardianship proceedings, see § 93-13-73.

§ 91-20-41. Time for transfer of custodial property to minor or minor's estate.

The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of:

(a) The minor's attainment of twenty-one (21) years of age with respect to custodial property transferred under Section 91-20-9 or 91-20-11;

(b) The minor's attainment of eighteen (18) years of age with respect to custodial property transferred under Section 91-20-13 or 91-20-15; or

(c) The minor's death.

HISTORY:

Laws, 1994, ch. 416, § 21, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

§ 91-20-43. Applicability of chapter to certain transfers.

This chapter applies to a transfer within the scope of Section 91-20-5 made after its effective date if:

(a) The transfer purports to have been made under the Mississippi Uniform Gifts to Minors Law, Sections 91-19-1 through 91-19-19; or

(b) The instrument by which the transfer purports to have been made uses in substance the designation "as custodian under the Uniform Gifts to Minors Act" or "as custodian under the Uniform Transfers to Minors Act" of any other state, and the application of this chapter is necessary to validate the transfer.

HISTORY:

Laws, 1994, ch. 416, § 22, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

§ 91-20-45. Validation of transfers predating chapter; application of chapter to prior transfers.

(1) Any transfer of custodial property as now defined in this chapter made before January 1, 1995, is validated notwithstanding that there was no specific authority in the Mississippi Uniform Gifts to Minors Act for the coverage of custodial property of that kind or for a transfer from that source at the time the transfer was made.

(2) This chapter applies to all transfers made before January 1, 1995, in a manner and form prescribed in the Mississippi Uniform Gifts to Minors Law except insofar as the application impairs constitutionally vested rights or extends the duration of custodianships in existence on January 1, 1995.

HISTORY:

Laws, 1994, ch. 416, § 23, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

§ 91-20-47. Construction of chapter.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

HISTORY:

Laws, 1994, ch. 416, § 24, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

§ 91-20-49. Severability of provisions of chapter.

If any provisions of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end provisions of this chapter are severable.

HISTORY:

Laws, 1994, ch. 416, § 25, eff from and after January 1, 1995.

Editor's Notes —

Laws, 1994, ch. 416, § 26, provides as follows:

"SECTION 26. Sections 91-19-1, 91-19-3, 91-19-5, 91-19-7, 91-19-9, 91-19-11, 91-19-13, 91-19-15, 91-19-17 and 91-19-19, Mississippi Code of 1972, entitled the "Mississippi Uniform Gifts to Minors Law," which regulate the manner of making certain gifts to minors, are repealed. To the extent that this act, by virtue of Section 23(2), does not apply to transfers made in a manner prescribed in the Mississippi Uniform Gifts to Minors Law or to the powers, duties and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of Sections 91-19-1 through 91-19-19 does not affect those transfers or those powers, duties and immunities."

CHAPTER 21.

UNIFORM TRANSFER-ON-DEATH SECURITY REGISTRATION ACT

Sec.

91-21-1. Short title.
91-21-3. Definitions.
91-21-5. Registration in beneficiary form; sole or joint tenancy ownership.
91-21-7. Registration in beneficiary form; applicable law.
91-21-9. Origination of registration in beneficiary form.
91-21-11. Form of registration in beneficiary form.
91-21-13. Effect of registration in beneficiary form.
91-21-15. Ownership on death of owner.
91-21-17. Protection of registering entity.
91-21-19. Nontestamentary transfer on death.
91-21-21. Terms, conditions, and forms for registration.
91-21-23. Rules of construction.
91-21-25. Application of chapter.

§ 91-21-1. Short title.

This chapter shall be known and may be cited as the "Mississippi Uniform Transfer-on-Death Security Registration Act."

HISTORY:

Laws, 1997, ch. 413, § 1, eff from and after passage (approved March 24, 1997).

Cross References —

Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

Comparable Laws from other States —

Alabama Code, §§ 5-24-1 through 5-24-34, 8-6-140 through 8-6-151.

Arkansas Code Annotated, §§ 28-14-101 through 28-14-112.

RESEARCH REFERENCES

Am. Jur.

38 Am. Jur. 2d, Gifts § 3.

Practice References.

Bickel and Flannery, Living Trusts: Forms and Practice (Matthew Bender).

Burke, Friel, and Gagliardi, Modern Estate Planning, Second Edition (Matthew Bender).

Christensen, International Estate Planning, Second Edition (Matthew Bender).

Mobley, Robinson and Hedrick, Pritchard on the Law of Wills and Administration of Estates, Seventh Edition (Michie).

Rapkin, Planning for Large Estates (Matthew Bender).

Schoenblum, Estate Planning Forms and Clauses with CD Rom (Matthew Bender).

Wyatt, Trust Administration and Taxation (Matthew Bender).

LexisNexis® CD – Estate Planning Package (CD-ROM) (LexisNexis).

Murphy's Will Clauses: Annotations and Forms with Tax Effects (Matthew Bender).

§ 91-21-3. Definitions.

In this chapter, unless the context otherwise requires:

(a) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(b) "Devisee" means any person designated in a will to receive a disposition of real or personal property.

(c) "Heirs" mean those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(d) "Person" means an individual, a corporation, an organization or other legal entity.

(e) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(f) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(g) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(h) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(i) "Security" means a share, participation, or other interest in property, in a business or in an obligation of an enterprise or other issuer and includes a certificated security, an uncertificated security, and a security account.

(j) "Security account" means:

(i) A reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, cash equivalents, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account or a brokerage account, whether or not credited to the account before the owner's death;

(ii) An investment or custody account with a trust company or trust division of a bank with trust powers, including the securities in the account, a cash balance in the account and cash, cash equivalents, interest, earnings or dividends earned or declared on a security in the account, whether or not credited to the account before the owner's death; or

(iii) A cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(k) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

HISTORY:

Laws, 1997, ch. 413, § 2; Laws, 2012, ch. 335, § 1, eff from and after July 1, 2012.

Cross References —

Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.

38 Am. Jur. 2d, Gifts § 3.

§ 91-21-5. Registration in beneficiary form; sole or joint tenancy ownership.

Only individuals whose registration of a security shows sole ownership by one (1) individual or multiple ownership by two (2) or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form, hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

HISTORY:

Laws, 1997, ch. 413, § 3, eff from and after passage (approved March 24, 1997).

Cross References —

Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.

38 Am. Jur. 2d, Gifts § 3.

§ 91-21-7. Registration in beneficiary form; applicable law.

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

HISTORY:

Laws, 1997, ch. 413, § 4, eff from and after passage (approved March 24, 1997).

Cross References —

Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.
38 Am. Jur. 2d, Gifts § 3.

§ 91-21-9. Origination of registration in beneficiary form.

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

HISTORY:
Laws, 1997, ch. 413, § 5, eff from and after passage (approved March 24, 1997).

Cross References —
Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.
38 Am. Jur. 2d, Gifts § 3.

§ 91-21-11. Form of registration in beneficiary form.

Registration in beneficiary form may be shown by the words “transfer on death” or the abbreviation “TOD,” or by the words “pay on death” or the abbreviation “POD,” after the name of the registered owner and before the name of a beneficiary.

HISTORY:
Laws, 1997, ch. 413, § 6, eff from and after passage (approved March 24, 1997).

Cross References —
Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.
38 Am. Jur. 2d, Gifts § 3.

§ 91-21-13. Effect of registration in beneficiary form.

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner’s death. A registration of a security in beneficiary form may be cancelled or changed at any time by the sole owner or all the surviving owners without the consent of the beneficiary.

HISTORY:
Laws, 1997, ch. 413, § 7, eff from and after passage (approved March 24, 1997).

Cross References —
Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.
38 Am. Jur. 2d, Gifts § 3.

§ 91-21-15. Ownership on death of owner.

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

HISTORY:
Laws, 1997, ch. 413, § 8, eff from and after passage (approved March 24, 1997).

Cross References —
Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.
38 Am. Jur. 2d, Gifts § 3.

§ 91-21-17. Protection of registering entity.

(1) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this chapter.

(2) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this chapter.

(3) A registering entity is discharged from all claims to a security by the estate, creditors, heirs or devisee of a deceased owner if it registers a transfer of the security in accordance with Section 91-21-15 and does so in good faith reliance (a) on the registration, (b) on this chapter, and (c) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representa-

tives, or other information available to the registering entity. The protections of this chapter do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this chapter.

(4) The protection provided by this chapter to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

HISTORY:

Laws, 1997, ch. 413, § 9, eff from and after passage (approved March 24, 1997).

Cross References —

Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.

38 Am. Jur. 2d, Gifts § 3.

§ 91-21-19. Nontestamentary transfer on death.

(1) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this chapter and is not testamentary.

(2) This chapter does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

HISTORY:

Laws, 1997, ch. 413, § 10, eff from and after passage (approved March 24, 1997).

Cross References —

Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.

38 Am. Jur. 2d, Gifts § 3.

§ 91-21-21. Terms, conditions, and forms for registration.

(1) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (a) for registrations in beneficiary form, and (b) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning

fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registration beneficiary form, may be contained in a registering entity's terms and conditions.

(2) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(a) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(b) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(c) Multiple owners-primary and secondary (substituted) beneficiaries: (i) John S Brown Mary B Brown JT TEN TOD John S Brown Jr SUB BENE Peter Q Brown; or (ii) John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

HISTORY:

Laws, 1997, ch. 413, § 11, eff from and after passage (approved March 24, 1997).

Cross References —

Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.

38 Am. Jur. 2d, Gifts § 3.

§ 91-21-23. Rules of construction.

(1) This chapter shall be liberally construed and applied to promote its underlying purposes and policy and to make uniform the laws with respect to the subject of these sections among states enacting them.

(2) Unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions.

HISTORY:

Laws, 1997, ch. 413, § 12, eff from and after passage (approved March 24, 1997).

Cross References —

Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.
38 Am. Jur. 2d, Gifts § 3.

§ 91-21-25. Application of chapter.

This chapter applies to registrations of securities in beneficiary form made before or after July 1, 1997, by decedents dying on or after July 1, 1997.

HISTORY:
Laws, 1997, ch. 413, § 13, eff from and after passage (approved March 24, 1997).

Cross References —
Whether indorsement, instruction, or entitlement order with respect to security transfers is effective, see § 75-8-107.

The transfer of securities, see § 75-8-301 et seq.

The registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am. Jur.
38 Am. Jur. 2d, Gifts § 3.

CHAPTER 23.

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

Sec.	
91-23-1.	Short title.
91-23-3.	Definitions.
91-23-5.	Applicability.
91-23-7.	User direction for disclosure of digital assets.
91-23-9.	Terms-of-service agreement.
91-23-11.	Procedure for disclosing digital assets.
91-23-13.	Disclosure of content of electronic communications of deceased user.
91-23-15.	Disclosure of other digital assets of deceased user.
91-23-17.	Disclosure of content of electronic communications of principal.
91-23-19.	Disclosure of other digital assets of principal.
91-23-21.	Disclosure of digital assets held in trust when trustee is original user.
91-23-23.	Disclosure of contents of electronic communications held in trust when trustee not original user.
91-23-25.	Disclosure of other digital assets held in trust when trustee not original user.
91-23-27.	Disclosure of digital assets to conservator of protected person.
91-23-29.	Fiduciary duty and authority.
91-23-31.	Custodian compliance and immunity.
91-23-33.	Uniformity of application and construction.
91-23-35.	Relation to Electronic Signatures in Global and National Commerce Act.

§ 91-23-1. Short title.

This chapter may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act.

HISTORY:

Laws, 2017, ch. 419, § 1, eff from and after July 1, 2017.

Comparable Laws from other States —

Arizona: A.R.S. § 14-13101 et seq.
California: Cal Prob Code § 870 et seq.
Colorado: C.R.S. § 15-1-1501 et seq.
Idaho: Idaho Code § 15-14-101 et seq.
Illinois: 755 ILCS 70/1 et seq.
Indiana: Burns Ind. Code Ann. § 32-39-1-1 et seq.
Minnesota: Minn. Stat. § 521A.01 et seq.
North Carolina: N.C. Gen. Stat. § 36F-1 et seq.
Tennessee: Tenn. Code Ann. § 35-8-101 et seq.

§ 91-23-3. Definitions.

In this chapter the following terms shall have the meanings ascribed in this section, unless the context clearly requires otherwise:

(a) "Account" means an arrangement under a terms of service agreement in which a custodian carries, maintains, processes, receives or stores a digital asset of the user or provides goods or services to the user.

(b) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(c) "Carries" means engages in the transmission of an electronic communication.

(d) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication and the electronic address of the person.

(e) "Conservator" means a person appointed by a court to manage the estate of a living individual and includes a guardian appointed by a court to manage the estate of a living individual, and "conservatorship" includes guardianship of the estate of a living individual.

(f) "Content of an electronic communication" means information concerning the substance or meaning of the communication which:

(i) Has been sent or received by a user;

(ii) Is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and

(iii) Is not readily accessible to the public.

(g) "Court" means the chancery court.

(h) "Custodian" means a person that carries, maintains, processes, receives or stores a digital asset of a user.

(i) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(j) "Digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(k) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

(*l*) "Electronic communication" has the meaning set forth in 18 USC Section 2510(12).

(m) "Electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(n) "Fiduciary" means an original, additional, or successor personal representative, conservator, agent or trustee.

(o) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases or the like.

(p) "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(q) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality, or other legal entity.

(r) "Personal representative" means an executor, administrator, special administrator or person that performs substantially the same function under law of this state other than this chapter.

(s) "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

(t) "Principal" means an individual who grants authority to an agent in a power of attorney.

(u) "Protected person" means a ward or other individual for whom a conservator has been appointed and includes an individual for whom an application for the appointment of a conservator is pending.

(v) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(w) "Remote-computing service" means a custodian that provides to a user computer processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 USC Section 2510(14).

(x) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(y) "Trustee" means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term also includes a successor trustee.

(z) "User" means a person that has an account with a custodian.

(aa) "Will" includes a codicil, testamentary instrument that only appoints an executor and an instrument that revokes or revises a testamentary instrument.

HISTORY:
Laws, 2017, ch. 419, § 2, eff from and after July 1, 2017.

§ 91-23-5. Applicability.

(1) This chapter applies to:

(a) A fiduciary acting under a will or power of attorney executed before, on, or after July 1, 2017;

(b) A personal representative acting for a decedent who died before, on, or after July 1, 2017;

(c) A conservatorship proceeding commenced before, on, or after July 1, 2017; and

(d) A trustee acting under a trust created before, on, or after July 1, 2017.

(2) This chapter applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(3) This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

HISTORY:
Laws, 2017, ch. 419, § 3, eff from and after July 1, 2017.

§ 91-23-7. User direction for disclosure of digital assets.

(1) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding

disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney or other record.

(2) If a user has not used an online tool to give direction under subsection (1) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(3) A user's direction under subsection (1) or (2) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

HISTORY:
Laws, 2017, ch. 419, § 4, eff from and after July 1, 2017.

§ 91-23-9. Terms-of-service agreement.

(1) This chapter does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(2) This chapter does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(3) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under Section 91-23-7.

HISTORY:
Laws, 2017, ch. 419, § 5, eff from and after July 1, 2017.

§ 91-23-11. Procedure for disclosing digital assets.

(1) When disclosing digital assets of a user under this chapter, the custodian may at its sole discretion:

(a) Grant a fiduciary or designated recipient full access to the user's account;

(b) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(2) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.

(3) A custodian need not disclose under this chapter a digital asset deleted by a user.

(4) If a user directs or a fiduciary requests a custodian to disclose under this chapter some, but not all, of the user's digital assets, the custodian need

not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

(a) A subset limited by date of the user's digital assets;

(b) All of the user's digital assets to the fiduciary or designated recipient;

(c) None of the user's digital assets; or

(d) All of the user's digital assets to the court for review in camera.

HISTORY:
Laws, 2017, ch. 419, § 6, eff from and after July 1, 2017.

§ 91-23-13. Disclosure of content of electronic communications of deceased user.

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the death certificate of the user;

(c) A certified copy of letters of administration or letters testamentary of the representative;

(d) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney or other record evidencing the user's consent to disclosure of the content of electronic communications; and

(e) If requested by the custodian:

(i) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(ii) Evidence linking the account to the user; or

(iii) A finding by the court that:

1. The user had a specific account with the custodian, identifiable by the information specified in subparagraph (i);

2. Disclosure of the content of electronic communications of the user would not violate 18 USC Section 2701 et seq., 47 USC Section 222, or other applicable law;

3. Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

4. Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

HISTORY:
Laws, 2017, ch. 419, § 7, eff from and after July 1, 2017.

§ 91-23-15. Disclosure of other digital assets of deceased user.

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the death certificate of the user;

(c) A certified copy of letters of administration or letters testamentary of the representative; and

(d) If requested by the custodian:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(ii) Evidence linking the account to the user;

(iii) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or

(iv) A finding by the court that:

1. The user had a specific account with the custodian, identifiable by the information specified in subparagraph (i); or

2. Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

HISTORY:
Laws, 2017, ch. 419, § 8, eff from and after July 1, 2017.

§ 91-23-17. Disclosure of content of electronic communications of principal.

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) An original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(c) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(d) If requested by the custodian:

(i) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(ii) Evidence linking the account to the principal.

HISTORY:
Laws, 2017, ch. 419, § 9, eff from and after July 1, 2017.

§ 91-23-19. Disclosure of other digital assets of principal.

Unless otherwise ordered by the court, directed by the principal or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) An original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(c) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(d) If requested by the custodian:

(i) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(ii) Evidence linking the account to the principal.

HISTORY:
Laws, 2017, ch. 419, § 10, eff from and after July 1, 2017.

§ 91-23-21. Disclosure of digital assets held in trust when trustee is original user.

Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

HISTORY:
Laws, 2017, ch. 419, § 11, eff from and after July 1, 2017.

§ 91-23-23. Disclosure of contents of electronic communications held in trust when trustee not original user.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the trust instrument or a certification of the trust under Section 91-8-1013 that includes consent to disclosure of the content of electronic-communications to the trustee;

(c) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) If requested by the custodian:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(ii) Evidence linking the account to the trust.

HISTORY:
Laws, 2017, ch. 419, § 12, eff from and after July 1, 2017.

§ 91-23-25. Disclosure of other digital assets held in trust when trustee not original user.

Disclosure of other digital assets held in trust when trustee not original user. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the trust instrument or a certification of the trust under Section 91-8-1013;

(c) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) If requested by the custodian:

(i) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(ii) Evidence linking the account to the trust.

HISTORY:
Laws, 2017, ch. 419, § 13, eff from and after July 1, 2017.

§ 91-23-27. Disclosure of digital assets to conservator of protected person.

(1) After an opportunity for a hearing under Chapter 13, Title 93, Mississippi Code of 1972, the court may grant a conservator access to the digital assets of a protected person.

(2) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a conservator the catalogue of electronic communications sent or received by a protected person and any digital assets, other than the content of electronic communications, in which the protected person has a right or interest if the conservator gives the custodian:

(a) A written request for disclosure in physical or electronic form;

(b) A certified copy of the court order that gives the conservator authority over the digital assets of the protected person; and

(c) If requested by the custodian:

(i) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the account of the protected person; or

(ii) Evidence linking the account to the protected person.

(3) A conservator with general authority to manage the assets of a protected person may request a custodian of the digital assets of the protected person to suspend or terminate an account of the protected person for good cause. A request made under this section must be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property.

HISTORY:

Laws, 2017, ch. 419, § 14, eff from and after July 1, 2017.

§ 91-23-29. Fiduciary duty and authority.

(1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(a) The duty of care;

(b) The duty of loyalty; and

(c) The duty of confidentiality.

(2) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(a) Except as otherwise provided in Section 91-23-7, is subject to the applicable terms of service;

(b) Is subject to other applicable law, including copyright law;

(c) In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

(d) May not be used to impersonate the user.

(3) A fiduciary with authority over the property of a decedent, protected person, principal or settlor has the right to access any digital asset in which the decedent, protected person, principal or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protected person, principal or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including Section 97-45-3.

(5) A fiduciary with authority over the tangible, personal property of a decedent, protected person, principal or settlor:

(a) Has the right to access the property and any digital asset stored in it; and

(b) Is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including Section 97-45-3.

(6) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(7) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(a) If the user is deceased, a certified copy of the death certificate of the user;

(b) A certified copy of the letters of administration or letters testamentary of the representative, court order, power of attorney, or trust giving the fiduciary authority over the account; and

(c) If requested by the custodian:

(i) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(ii) Evidence linking the account to the user; or

(iii) A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (i) of this paragraph (c).

HISTORY:

Laws, 2017, ch. 419, § 15, eff from and after July 1, 2017.

§ 91-23-31. Custodian compliance and immunity.

(1) Not later than sixty (60) days after receipt of the information required under Sections 91-23-13 through 91-23-29, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(2) An order under subsection (1) directing compliance must contain a finding that compliance is not in violation of 18 USC Section 2702.

(3) A custodian may notify the user that a request for disclosure or to terminate an account was made under this chapter.

(4) A custodian may deny a request under this chapter from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(5) This chapter does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order which:

(a) Specifies that an account belongs to the protected person or principal;

(b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and

(c) Contains a finding required by law other than this chapter.

(6) A custodian and its officers, employees and agents are immune from

liability for an act or omission done in good faith in compliance with this chapter.

HISTORY:
Laws, 2017, ch. 419, § 16, eff from and after July 1, 2017.

§ 91-23-33. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY:
Laws, 2017, ch. 419, § 17, eff from and after July 1, 2017.

§ 91-23-35. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act, 15 USC Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 USC Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 USC Section 7003(b).

HISTORY:
Laws, 2017, ch. 419, § 18, eff from and after July 1, 2017.

TITLE 93.

DOMESTIC RELATIONS

Chapter 1.	Marriage.	93-1-1
Chapter 3.	Husband and Wife.	93-3-1
Chapter 5.	Divorce and Alimony.	93-5-1
Chapter 7.	Annulment of Marriage.	93-7-1
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Chapter 16.	Grandparents' Visitation Rights.	93-16-1
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Chapter 19.	Removal of Disability of Minority.	93-19-1
Chapter 21.	Protection from Domestic Abuse.	93-21-1
Chapter 22.	Uniform Interstate Enforcement of Domestic Violence Protection Orders.	93-22-1
Chapter 23.	Uniform Child Custody Jurisdiction Act [Repealed].	93-23-1
Chapter 25.	Uniform Interstate Family Support Act.	93-25-1
Chapter 27.	Uniform Child Custody Jurisdiction and Enforcement Act.	93-27-101
Chapter 29.	Uniform Child Abduction Prevention Act.	93-29-1
Chapter 31.	Supporting and Strengthening Families Act.	93-31-1

CHAPTER 1.

MARRIAGE

Sec.

93-1-1. Certain marriages declared incestuous and void.
93-1-3. Unlawful marriage; effect of marrying outside of and returning to state.
93-1-5. Conditions precedent to issuance of license; penalty for noncompliance.
93-1-7. Repealed.
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93-1-11. Hours for issuance of licenses.
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93-1-15. License and solemnization required for valid marriage.
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93-1-23. Custodian of records relating to marriage licenses.
93-1-25. Solicitation of marriage ceremony unlawful; penalty.

§ 93-1-1. Certain marriages declared incestuous and void.

(1) The son shall not marry his grandmother, his mother, or his stepmother; the brother his sister; the father his daughter, or his legally adopted daughter, or his grand-daughter; the son shall not marry the daughter of his father begotten of his stepmother, or his aunt, being his father's or mother's sister, nor shall the children of brother or sister, or brothers and sisters intermarry being first cousins by blood. The father shall not marry his son's widow; a man shall not marry his wife's daughter, or his wife's daughter's daughter, or his wife's son's daughter, or the daughter of his brother or sister; and the like prohibition shall extend to females in the same degrees. All marriages prohibited by this subsection are incestuous and void.

(2) Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.

HISTORY:

Codes, Hutchinson's 1848, ch. 34, art. 1 (8); 1857, ch. 40, art. 8; 1871, §§ 1762, 1763; 1880, §§ 1145, 1146; 1892, §§ 2857, 2858; 1906, §§ 3242, 3243; Hemingway's 1917, §§ 2549, 2550; 1930, §§ 2359, 2360; 1942, §§ 457, 458; Laws, 1922, ch. 235; Laws, 1946, ch. 283, § 1; Laws, 1997, ch. 301, § 1, eff from and after passage (approved February 12, 1997).

Editor's Notes —

On June 26, 2015, the Supreme Court of the United States, in the case of *Obergefell v. Hodges* (2015 U.S. LEXIS 4250), held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples have a fundamental right to marry, and that since same-sex couples can exercise the fundamental right to marry in all states, there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.

Cross References —

Annulment of void marriages, see § 93-7-1 et seq.

Criminal offense of adultery and fornication generally, see § 97-29-1.

Criminal offense of adultery and fornication between kindred, see § 97-29-5.

Criminal offense of fornication between guardian and female ward, see § 97-29-7.

Criminal offense of persons prohibited from marriage in Mississippi leaving state to be married, see § 97-29-9.

Criminal offense of bigamy, see § 97-29-13.

Criminal offense of incest, see §§ 97-29-27, 97-29-29.

Domestic relations proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.

1. In general.

Mississippi's same-sex marriage ban violated the Fourteenth Amendment Due Process and Equal Protection Clauses as it deprived same-sex couples and their children of equal dignity under the law, and gay and lesbian citizens could not be subjected to second-class citizenship. Campaign for Southern Equal. v. Bryant, 64 F. Supp. 3d 906, 2014 U.S. Dist. LEXIS 165913 (S.D. Miss. 2014), aff'd, 791 F.3d 625, 2015 U.S. App. LEXIS 11581 (5th Cir. Miss. 2015), in part, 197 F. Supp. 3d 905, 2016 U.S. Dist. LEXIS 83036 (S.D. Miss. 2016).

Same-sex couples had standing to challenge Mississippi's same-sex marriage ban as they were all residents of Mississippi, where they were subject to laws which denied the first couple the right to marry and denied recognition of the second couple's out-of-state marriage, and Mississippi law caused them other substantial harms affecting their and their children's lives; a gay and lesbian advocacy group had standing to sue on behalf of its members, which allegedly suffered the same injuries as the couples, plus additional injuries. Campaign for Southern Equal. v. Bryant, 64 F. Supp. 3d 906, 2014 U.S. Dist. LEXIS 165913 (S.D. Miss. 2014), aff'd, 791 F.3d 625, 2015 U.S. App. LEXIS 11581 (5th Cir. Miss. 2015), in part, 197 F. Supp. 3d 905, 2016 U.S. Dist. LEXIS 83036 (S.D. Miss. 2016).

A chancellor properly set aside a separate maintenance agreement where the parties' marriage was void under § 93-1-1 because they were uncle and niece; equitable estoppel was not available, since the parties had equal access to all the facts and ample opportunity to investigate the legality of the marriage, and public policy prevented validation of the void marriage by the doctrine of estoppel. Weeks v. Weeks, 654 So. 2d 33, 1995 Miss. LEXIS 200 (Miss. 1995).

In prosecution for incest, rule of construction is one of strictness in favor of defendant, and court may not impose punishment upon one not within strict letter of law. State ex rel. District Attorney v. Winslow, 208 Miss. 753, 45 So. 2d 574, 1950 Miss. LEXIS 293 (Miss. 1950).

Construing Code 1942, §§ 457, 458, as setting forth conditions under which marriages are prohibited as incestuous under Code 1942, § 2234, there is no provision which clearly deals with the specific act of a son-in-law in marrying his mother-in-law, and order sustaining demurrer to indictment should be affirmed. State ex rel. District Attorney v. Winslow, 208 Miss. 753, 45 So. 2d 574, 1950 Miss. LEXIS 293 (Miss. 1950).

2. Constitutionality.

District court correctly granted an injunction barring enforcement of Miss. Const. art. 14, § 263A and Miss. Code Ann. § 93-1-1(2), because same-sex couples may exercise the fundamental right to marry and there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State. Campaign Southern Equal. v. Bryant, 791 F.3d 625, 2015 U.S. App. LEXIS 11581 (5th Cir. Miss. 2015).

RESEARCH REFERENCES

ALR.

Liability of one putative spouse to other for wrongfully inducing entry into or cohabitation under illegal, void, or nonexistent marriage. 72 A.L.R.2d 956.

Prosecutrix in incest case as accomplice or victim. 74 A.L.R.2d 705.

Recognition by forum state of marriage which, although invalid where contracted, would have been valid if contracted within forum state. 82 A.L.R.3d 1240.

Sexual intercourse between persons related by half blood as incest. 34 A.L.R.5th 723.

Am. Jur.

41 Am. Jur. 2d, Incest § 1 et seq.

1 Am. Jur. Pl & Pr Forms (Rev), Annulment of Marriage, Forms 41, 42 (complaint, petition, or declaration for annulment of incestuous marriage).

36 Am. Jur. Proof of Facts 2d 441, Validity of Marriage.

CJS.
42 C.J.S., Incest §§ 1-7 et seq.
55 C.J.S., Marriage § 16.

Lawyers' Edition.
Federal constitutional right to marry. – Supreme Court cases. 96 L. Ed. 2d 716.

Law Reviews.
Family Law At the Turn of the Century, 71 Miss. L.J. 781, Spring, 2002.

Practice References.
Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-1-3. Unlawful marriage; effect of marrying outside of and returning to state.

Any attempt to evade Section 93-1-1 by marrying out of this state and returning to it shall be within the prohibitions of said section.

HISTORY:
Codes, 1880, § 1147; 1892, § 2859; 1906, § 3244; Hemingway's 1917, § 2551; 1930, § 2361; 1942, § 459.

Cross References —
Criminal offense of persons prohibited from marriage in Mississippi leaving state to be married, see § 97-29-9.

Domestic relations proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

ALR.
Recognition by forum state of marriage which, although invalid where contracted, would have been valid if contracted within forum state. 82 A.L.R.3d 1240.

Am. Jur.
36 Am. Jur. Proof of Facts 2d 441, Validity of Marriage.

Lawyers' Edition.
Federal constitutional right to marry. – Supreme Court cases. 96 L. Ed. 2d 716.

§ 93-1-5. Conditions precedent to issuance of license; penalty for noncompliance.

(1) Every male who is at least seventeen (17) years old and every female who is at least fifteen (15) years old shall be capable in law of contracting marriage. However, males and females under the age twenty-one (21) years must furnish the circuit clerk satisfactory evidence of consent to the marriage by the parents or guardians of the parties. It shall be unlawful for the circuit court clerk to issue a marriage license until the following conditions precedent have been complied with:

(a) Application for the license is to be made in writing to the clerk of the circuit court of any county in the State of Mississippi. The application shall be sworn to by both applicants and shall include:

(i) The names, ages and addresses of the parties applying;

(ii) The names and addresses of the parents of the applicants, and, for applicants under the age of twenty-one (21), if no parents, then names and addresses of the guardian or next of kin;

(iii) The signatures of witnesses; and

(iv) Any other data that may be required by law or the State Board of Health.

(b) Proof of age shall be presented to the circuit court clerk in the form of either a birth certificate, baptismal record, armed service discharge, armed service identification card, life insurance policy, insurance certificate, school record, driver's license, or other official document evidencing age. The document substantiating age and date of birth shall be examined by the circuit court clerk before whom application is made, and the circuit court clerk shall retain in his file with the application the document or a certified or photostatic copy of the document.

(c) Applicants under the age of twenty-one (21) must submit affidavits showing the age of both applying parties made by either the father, mother, guardian or next of kin of each of the contracting parties and filed with the clerk of the circuit court along with the application.

(d) If the male applicant is under seventeen (17) years of age or the female is under fifteen (15) years of age, and satisfactory proof is furnished to the judge of any circuit, chancery or county court that sufficient reasons exist and that the parties desire to be married to each other and that the parents or other person in loco parentis of the person or persons so under age consent to the marriage, then the judge of any such court in the county where either of the parties resides may waive the minimum age requirement and by written instrument authorize the clerk of the court to issue the marriage license to the parties if they are otherwise qualified by law. Authorization shall be a part of the confidential files of the clerk of the court, subject to inspection only by written permission of the judge.

(e) In no event shall a license be issued by the circuit court clerk when it appears to the circuit court clerk that the applicants are, or either of them is:

(i) Intoxicated; or

(ii) Suffering from a mental illness or an intellectual disability to the extent that the clerk believes that the person does not understand the nature and consequences of the application for a marriage license.

(2) Any circuit clerk shall be liable under his official bond because of noncompliance with the provisions of this section.

(3) Any circuit court clerk who issues a marriage license without complying with the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than Fifty Dollars ($50.00) and not more than Five Hundred Dollars ($500.00).

HISTORY:

Codes, 1930, § 2363; 1942, § 461; Laws, 1930, ch. 237; Laws, 1957, Ex. ch. 17, § 1; Laws, 1983, ch. 522, § 48; Laws, 2008, ch. 442, § 24; Laws, 2010, ch. 476, § 78; Laws, 2012, ch. 431, § 1, eff from and after July 1, 2012.

Cross References —

Causes for annulment of marriage, see § 93-7-3.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Domestic relations proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Where decedent and his alleged surviving widow, in good faith and with the bona fide intention of becoming man and wife, had entered into a ceremonial marriage, thinking that his first wife was dead, when, in fact, she did not die until 1923, such marriage became lawful and valid upon the death of the first wife, without any new or different understanding or intention between them, so that second wife was his lawful widow and their offspring became and were legitimate children, entitled to share in his estate with the offspring of the first marriage. Johnson v. Johnson, 196 Miss. 768, 17 So. 2d 805, 1944 Miss. LEXIS 255 (Miss. 1944).

Marriage of parties who had right to marry without consent of anyone held not invalidated because of noncompliance with statute in that father of the wife, and a kinsman of the husband had obtained the license for the marriage, in view of manifest purpose of statute to prevent runaway marriages by juveniles below the age of consent. Zeigler v. Zeigler, 174 Miss. 302, 164 So. 768, 1935 Miss. LEXIS 89 (Miss. 1935).

Marriage license issued by circuit court clerk held valid, though female did not reside in such county. Hunt v. Hunt, 172 Miss. 732, 161 So. 119, 1935 Miss. LEXIS 172 (Miss. 1935).

Brother and sister of deceased, allegedly insane at time of marriage, could not after his death, in suit to have themselves declared heirs, collaterally attack marriage which was merely voidable. White v. Williams, 159 Miss. 732, 132 So. 573, 1931 Miss. LEXIS 82 (Miss. 1931).

OPINIONS OF THE ATTORNEY GENERAL

Female applicant under age of twenty-one is required to file application for marriage license in county of her residence which is defined by State Supreme Court as being county of residence of her parents or guardian. 1990 Miss. Op. Att'y Gen. 163.

A circuit clerk may issue a marriage license to a couple who have met the statutory conditions precedent. 1998 Miss. Op. Att'y Gen. 2.

A medical certificate expires in 30 days for purposes of filing an application for a marriage license. 1998 Miss. Op. Att'y Gen. 638.

If two applicants for a marriage license present the application and proper medical certificate dated within 30 days prior to the application and return after the 30 day period has expired to obtain the license, the circuit clerk may issue the license, and the applicants will not be required to obtain a new medical certificate and present a new application. 1998 Miss. Op. Att'y Gen. 638.

The fact that proffered documents are issued by a foreign government has no effect on the ability of an applicant to secure a marriage license. 2002 Miss. Op. Att'y Gen. 167.

A circuit clerk must make the factual determination that a document does substantiate an applicant's age and date of birth before a marriage license may be lawfully issued, and it is left to the discretion of the circuit clerk as to what steps are appropriate in making such determinations. 2002 Miss. Op. Att'y Gen. 167.

RESEARCH REFERENCES

ALR.

Validity of marriage as affected by intention of the parties that it should be only a matter of form or jest. 14 A.L.R.2d 624.

Validity of solemnized marriage as affected by absence of license required by statute. 61 A.L.R.2d 847.

Conflict of laws as to validity of marriage attacked because of nonage. 71 A.L.R.2d 687.

Common-law marriage between parties previously divorced. 82 A.L.R.2d 688.

Marriage between persons of the same sex. 81 A.L.R.5th 1.

Am. Jur.

52 Am. Jur. 2d, Marriage §§ 32-34.

17 Am. Jur. Pl & Pr Forms (Rev), Marriage, Forms 1 et seq. (proceedings prior to marriage); Forms 31 et seq. (license; solemnization; marriage certificate; registration or recording of marriage).

36 Am. Jur. Proof of Facts 2d 441, Validity of Marriage.

45 Am. Jur. Proof of Facts 2d 631, Age of Person.

CJS.

55 C.J.S., Marriage § 25 et seq.

Lawyers' Edition.

Federal constitutional right to marry. – Supreme Court cases. 96 L. Ed. 2d 716.

§ 93-1-7. Repealed.

Repealed by Laws of 2012, ch. 431, § 2, effective from and after July 1, 2012.

§ 93-1-7. [Codes, 1942, § 461.1; Laws, 1957, Ex. ch. 17, § 2, eff July 1, 1958.]

Editor's Notes —

Former § 93-1-7 provided for the right to contest the issuance of a marriage license by any interested party.

§ 93-1-9. Noncompliance with §§ 93-1-5 and 93-1-7 not to affect validity of solemnized marriage followed by cohabitation.

The failure to comply with the provisions of Sections 93-1-5 and 93-1-7 shall not affect the validity of any marriage duly solemnized, followed by cohabitation.

HISTORY:

Codes, 1942, § 461.2; Laws, 1957, Ex. ch. 17, § 3, eff July 1, 1958.

Editor's Notes —

Section 93-1-7, which is referred to in this section, provided for the right to contest the issuance of a marriage license by any interested party and was repealed by § 2 of Chapter 431, Laws of 2012, effective July 1, 2012.

Cross References —

Domestic relations proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am. Jur.

36 Am. Jur. Proof of Facts 2d 441, Validity of Marriage.

§ 93-1-11. Hours for issuance of licenses.

(1) It shall be unlawful for any clerk to issue a marriage license between the hours of 6 p.m. and 8 a.m. When a clerk shall issue a license he shall certify on said license the time when it was issued.

(2) Any clerk violating the provisions of this section shall be guilty of a misdemeanor, and shall be fined not more than Five Hundred Dollars ($500.00).

HISTORY:

Codes, 1942, § 461.5; Laws, 1950, ch. 282, §§ 1, 2.

Cross References —

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Domestic relations proceedings, see Miss. R. Civ. P. 81.

§ 93-1-13. License essential.

A marriage shall not be contracted or solemnized unless a license therefor shall first have been duly issued. No irregularity in the issuance of or omission in the license shall invalidate any marriage, nor shall this section be construed so as to invalidate any marriage that is good at common law.

HISTORY:

Codes, 1892, § 2864; Laws, 1906, § 3249; Hemingway's 1917, § 2556; Laws, 1930, § 2367; Laws, 1942, § 465.

Cross References —

Domestic relations proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Common-law marriages.

1. In general.

Legal relationship of husband and wife may be created only in conformity with procedures authorized by statute. Pickens v. Pickens, 490 So. 2d 872, 1986 Miss. LEXIS 2503 (Miss. 1986).

This section [Code 1942, § 465] and paragraph (14) of Code 1942, § 6998-02, which defines "widow" for the purposes of the workmen's compensation law, must be construed together. South Cent. Heating & Plumbing Co. v. Dependents of Campbell, 219 So. 2d 140, 1969 Miss. LEXIS 1413 (Miss. 1969).

Where decedent and his alleged surviving widow, in good faith and with the bona fide intention of becoming man and wife, had entered into a ceremonial marriage in 1896 under a regular license, thinking that his first wife was dead, when, in fact, she did not die until 1923, such marriage became lawful and valid upon the death of the first wife, without any new or different understanding or intention between them, so that second wife was his lawful widow and their offspring became and were legitimate children, entitled to share in his estate with the offspring of the first marriage. Johnson v. Johnson, 196 Miss. 768, 17 So. 2d 805, 1944 Miss. LEXIS 255 (Miss. 1944).

Marriage of parties who had right to marry without consent of anyone held not invalidated because of noncompliance with statute in that father of the wife, and a kinsman of the husband, had obtained the license for the marriage, in view of manifest purpose of statute to prevent runaway marriages by juveniles below the age of consent. Zeigler v. Zeigler, 174 Miss. 302, 164 So. 768, 1935 Miss. LEXIS 89 (Miss. 1935).

Marriage of girl of thirteen years and ten months of age followed by cohabitation held not voidable on account of girl's age alone. Hunt v. Hunt, 172 Miss. 732, 161 So. 119, 1935 Miss. LEXIS 172 (Miss. 1935).

2. Common-law marriages.

Cohabitation which had not ripened into a common law marriage prior to April 5, 1956 is wholly inoperative to vest marital rights to either party thereto. Pickens v. Pickens, 490 So. 2d 872, 1986 Miss. LEXIS 2503 (Miss. 1986).

A new agreement between persons who continued to cohabit after the removal of an impediment which rendered a ceremonial marriage invalid, is not necessary to a valid common-law marriage. In re Estate of Barker, 236 Miss. 436, 110 So. 2d 615, 1959 Miss. LEXIS 337 (Miss. 1959).

If the parties are in good repute, cohabitation and reputation have more weight as proof of the common-law marriage. Butler's Estate v. McQuarters, 210 Miss. 86, 48 So. 2d 617, 1950 Miss. LEXIS 324 (Miss. 1950).

A common-law marriage, that is an agreement between a man and woman who then and there become a husband and wife followed by cohabitation is recognized in this state. Butler's Estate v. McQuarters, 210 Miss. 86, 48 So. 2d 617, 1950 Miss. LEXIS 324 (Miss. 1950).

There is strong presumption in favor of validity of ceremonial marriage as against prior alleged common law marriage. Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22, 1949 Miss. LEXIS 305 (Miss. 1949).

Law favors marriage, and, when once solemnized according to forms of law, will not declare its nullity upon anything less than clear and certain testimony, especially after it has been dissolved by death of one of the parties. Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22, 1949 Miss. LEXIS 305 (Miss. 1949).

A common-law marriage in this state is as valid and binding as the statutory ceremonial marriage. D'Antonio v. State, 187 Miss. 648, 191 So. 281, 1939 Miss. LEXIS 78 (Miss. 1939).

Evidence that a man and woman lived and cohabited together as man and wife for several months and openly proclaimed that relationship, constitutes a valid common-law marriage. D'Antonio v. State, 187 Miss. 648, 191 So. 281, 1939 Miss. LEXIS 78 (Miss. 1939).

Evidence that the defendant had lived with a distant cousin for several months as man and wife and that they openly proclaimed that relationship, at a time prior to his ceremonial marriage to another, sustained a conviction for bigamy, notwithstanding the failure of the state to allege and prove ceremonial marriage as regards defendant's first marriage. D'Antonio v. State, 187 Miss. 648, 191 So. 281, 1939 Miss. LEXIS 78 (Miss. 1939).

Attempted common-law marriage alleged to have been contracted in Mississippi before adoption of amendment providing that requirement should not invalidate any marriage good at common law was void. Olivari v. Clark, 175 Miss. 883, 168 So. 465, 1936 Miss. LEXIS 85 (Miss. 1936).

Marriage valid at common law is recognized in Mississippi. Sykes v. Sykes, 162 Miss. 487, 139 So. 853, 1932 Miss. LEXIS 155 (Miss. 1932); Jourdan v. Jourdan, 181 Miss. 176, 179 So. 268, 1938 Miss. LEXIS 59 (Miss. 1938); D'Antonio v. State, 187 Miss. 648, 191 So. 281, 1939 Miss. LEXIS 78 (Miss. 1939); Butler's Estate v. McQuarters, 210 Miss. 86, 48 So. 2d 617, 1950 Miss. LEXIS 324 (Miss. 1950).

Marriage arises from an agreement between a man and woman, qualified for such relation, to become husband and wife, followed by cohabitation, whether or not a license was obtained therefor. Sims v. Sims, 122 Miss. 745, 85 So. 73, 1920 Miss. LEXIS 474 (Miss. 1920).

Married woman cannot contract a common-law marriage. Blanks v. Southern R. Co., 82 Miss. 703, 35 So. 570, 1903 Miss. LEXIS 204 (Miss. 1903).

RESEARCH REFERENCES

Am. Jur.

52 Am. Jur. 2d, Marriage §§ 32-34.

36 Am. Jur. Proof of Facts 2d 441, Validity of Marriage.

CJS.

55 C.J.S., Marriage § 25 et seq.

§ 93-1-15. License and solemnization required for valid marriage.

(1) No marriage contracted after April 5, 1956 shall be valid unless the contracting parties shall have obtained a marriage license as otherwise required by law, and unless also the marriage, after such license shall have been duly issued therefor, shall have been performed by or before any person, religious society, institution, or organization authorized by Sections 93-1-17 and 93-1-19 to solemnize marriages. Failure in any case to comply with both prerequisites aforesaid, which shall also be construed as mandatory and not merely directory, shall render the purported marriage absolutely void and any children born as a result thereof illegitimate.

(2) Nothing contained in this section shall be construed to affect the validity of any marriage, either ceremonial or common law, contracted prior to April 5, 1956.

HISTORY:

Codes, 1942, § 465.5; Laws, 1956, ch. 239, §§ 1, 2.

Cross References —

Domestic relations proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Common-law marriage.

1. In general.

Decedent's survivors sought to recover proceeds from a bank account that a joint tenant shared with decedent; because the two were cohabitating and were not married, a confidential relationship existed, which led to a presumption of undue influence. The joint tenant failed to rebut the presumption. Dean v. Kavanaugh, 920 So. 2d 528, 2006 Miss. App. LEXIS 71 (Miss. Ct. App. 2006).

Where the mother and father cohabited for many years, the mother was not entitled to an equitable distribution of property upon the termination of their relationship, because the parties never married pursuant to Miss. Code Ann. § 93-1-1 et seq., or purported to have married. Nichols v. Funderburk, 881 So. 2d 266, 2003 Miss. App. LEXIS 1036 (Miss. Ct. App. 2003), aff'd, 883 So. 2d 554, 2004 Miss. LEXIS 1198 (Miss. 2004).

Legal relationship of husband and wife may be created only in conformity with procedures authorized by statute. Pickens v. Pickens, 490 So. 2d 872, 1986 Miss. LEXIS 2503 (Miss. 1986).

Cohabitation which had not ripened into a common law marriage prior to April 5, 1956 is wholly inoperative to vest marital rights to either party thereto. Pickens v. Pickens, 490 So. 2d 872, 1986 Miss. LEXIS 2503 (Miss. 1986).

Where one party claims a valid common-law marriage but both of the parties to the claimed common-law marriage subsequently enter into ceremonial marriages without securing a divorce, such parties are estopped to claim there was a mutual agreement to become common-law husband and wife. Enis v. State, 408 So. 2d 486, 1981 Miss. LEXIS 2470 (Miss. 1981).

If a valid common-law marriage was celebrated in Georgia, it will be recognized in Mississippi even though common-law marriages are no longer permitted under § 93-1-15. George v. George, 389 So. 2d 1389, 1980 Miss. LEXIS 2134 (Miss. 1980).

Since the burden rested upon a wife, in attacking the validity of her second marriage, to establish by a search of the records in the city where her first husband had lived following their separation, or by other competent evidence, that there had been no divorce, in the absence of such showing the presumption of the validity of the wife's ceremonial marriage to the second husband prevailed, thus defeating her claim as the common law dependent wife of an alleged third husband contracted during the second husband's lifetime. Dale Polk Constr. Co. v. White, 287 So. 2d 278, 1973 Miss. LEXIS 1332 (Miss. 1973).

It was not error to permit, in a manslaughter trial, the alleged common law husband of the defendant to testify against her for the reason that he had a living wife and could not contract another marriage, there being nothing in the record to show that the defendant and her alleged common law husband agreed to be man and wife under the common law rule, and, moreover, under the provisions of Code 1942, § 465.5, common law marriages had been abolished in Mississippi before defendant began to cohabit with the alleged common-law husband. Gaines v. State, 272 So. 2d 919, 1973 Miss. LEXIS 1554 (Miss. 1973).

This section [Code 1942, § 465.5] and paragraph (14) of Code 1942, § 6998-02, which defines "widow" for the purposes of the workmen's compensation law, must be construed together. South Cent. Heating & Plumbing Co. v. Dependents of Campbell, 219 So. 2d 140, 1969 Miss. LEXIS 1413 (Miss. 1969).

In order to establish the existence of a common-law marriage entered into prior to the enactment of this section [Code 1942, § 465.5] it was necessary to show an agreement between the parties that they intended to be husband and wife, and that this agreement was followed by cohabitation. Stutts v. Estate of Stutts, 194 So. 2d 229, 1967 Miss. LEXIS 1405 (Miss. 1967), rev'd, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

A claim of the existence of a common-law marriage allegedly entered into prior to the enactment of this section [Code 1942, § 465.5] is regarded with suspicion and will be closely scrutinized, and the burden is on one who asserts the claim of the existence of such relationship to establish the existence of all essential elements. Stutts v. Estate of Stutts, 194 So. 2d 229, 1967 Miss. LEXIS 1405 (Miss. 1967), rev'd, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

Where one of the parties to an alleged common-law marriage is dead, the essential elements of its existence must be shown by clear, consistent, and convincing evidence. Stutts v. Estate of Stutts, 194 So. 2d 229, 1967 Miss. LEXIS 1405 (Miss. 1967), rev'd, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

An alleged common-law marriage between petitioner and one who died September 30, 1956, if established, would not have been affected by this section [Code 1942, § 465.5] under which common-law marriages are thereafter invalidated. Ladnier v. Estate of Ladnier, 235 Miss. 374, 109 So. 2d 338, 1959 Miss. LEXIS 439 (Miss. 1959).

2. Common-law marriage.

Claimant's request for life insurance benefits under a policy governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C.S. § 1001 et seq., was properly denied because the claimant and the insured, who was the claimant's putative common law spouse, were not legally married, as Miss. Code Ann. § 93-1-15 indicated that Mississippi did not recognize common law marriages, and the policy provided dependent coverage only for lawful spouses. Price v. Metro. Life Ins. Co., 2008 U.S. Dist. LEXIS 68063 (N.D. Miss. Sept. 8, 2008).

RESEARCH REFERENCES

Am. Jur.

36 Am. Jur. Proof of Facts 2d 441, Validity of Marriage.

Law Reviews.

1984 Mississippi Supreme Court Review: Wills and Estates. 55 Miss. L. J. 120, March, 1985.

§ 93-1-17. By whom marriages may be solemnized.

Any minister of the gospel ordained according to the rules of his church or society, in good standing; any Rabbi or other spiritual leader of any other religious body authorized under the rules of such religious body to solemnize rites of matrimony and being in good standing; any judge of the Supreme Court, Court of Appeals, circuit court, chancery court or county court may solemnize the rites of matrimony between any persons anywhere within this state who shall produce a license granted as herein directed. Justice court judges and members of the boards of supervisors may likewise solemnize the rites of matrimony within their respective counties. Any marriages performed by a mayor of a municipality prior to March 14, 1994 are valid provided such marriages satisfy the requirements of Section 93-1-18.

HISTORY:

Codes, Hutchinson's 1848, ch. 34, art. 1 (1); 1857, ch. 40, art. 1; 1871, § 1755; 1880, § 1150; 1892, § 2862; 1906, § 3247; Hemingway's 1917, § 2554; 1930, § 2365; 1942, § 463; Laws, 1962, ch. 490; Laws, 1984, ch. 412; Laws, 1993, ch. 518, § 35; Laws, 1994, ch. 330, § 2, eff from and after passage (approved March 14, 1994).

Editor's Notes —

Laws, 1993, ch. 518, § 35, was effectuated under the Voting Rights Act of 1965 on July 13, 1993, the date the United States Attorney General interposed no objection to the amendment of this section.

Cross References —

Domestic relations proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. Validity of marriage in general.
2. Validity of second marriage.
3. —Presumptions.
4. —Burden of proof.
5. —Evidence.
6. Annulment of marriage.

1. Validity of marriage in general.

The Universal Life Church is enough of a "religious body" and a minister of that church is enough of a "spiritual leader" to qualify to perform rights of matrimony under § 93-1-17. In re Last Will & Testament of Blackwell, 531 So. 2d 1193, 1988 Miss. LEXIS 411 (Miss. 1988).

Every presumption will be indulged in favor of the validity of a marriage solemnized according to the forms of law. Alabama & V. R. Co. v. Beardsley, 79 Miss. 417, 30 So. 660, 1901 Miss.

LEXIS 57 (Miss. 1901); Ladner v. Pigford, 138 Miss. 461, 103 So. 218, 1925 Miss. LEXIS 64 (Miss. 1925).

2. Validity of second marriage.

Presumption of validity attaching to a ceremonial marriage and the burden resting on one who assails it as bigamous to prove not only a former marriage but also that it was then subsisting, is supported by sound public policy. Matthews v. Jones, 149 F.2d 893, 1945 U.S. App. LEXIS 2711 (5th Cir. Miss. 1945).

3. —Presumptions.

Ceremonial marriage raises presumption that any former marriages of either party have been dissolved either by death or divorce and burden of overcoming such presumption rests on party asserting invalidity of subsequent marriage. Wallace v. Herring, 207 Miss. 658, 43 So. 2d 100, 1949 Miss. LEXIS 377 (Miss. 1949).

Presumption arising from subsequent ceremonial marriage that prior marriages have been dissolved by divorce is one of the strongest presumptions known to law and will prevail unless overcome by competent evidence to contrary. Wallace v. Herring, 207 Miss. 658, 43 So. 2d 100, 1949 Miss. LEXIS 377 (Miss. 1949).

There is strong presumption in favor of validity of ceremonial marriage as against prior alleged common law marriage. Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22, 1949 Miss. LEXIS 305 (Miss. 1949).

Presumption of marriage from cohabitation and reputation is rebutted or overcome by proof of subsequent ceremonial or actual marriage, since presumption of validity of such marriage is stronger than presumption of previous marriage from cohabitation and reputation. Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22, 1949 Miss. LEXIS 305 (Miss. 1949).

Marriage presumed valid though former husband still living. McAllum v. Spinks, 129 Miss. 237, 91 So. 694, 1922 Miss. LEXIS 13 (Miss. 1922).

The presumption that a marriage solemnized according to law is valid is superior to the presumption of life. Sullivan v. Grand Lodge, K. P., 97 Miss. 218, 52 So. 360, 1910 Miss. LEXIS 231 (Miss. 1910); Ladner v. Pigford, 138 Miss. 461, 103 So. 218, 1925 Miss. LEXIS 64 (Miss. 1925).

4. —Burden of proof.

Burden of proof is upon the person attacking the validity of a marriage. Sullivan v. Grand Lodge, K. P., 97 Miss. 218, 52 So. 360, 1910 Miss. LEXIS 231 (Miss. 1910); Buscaglia v. Liggett & Myers Tobacco Co., 149 F.2d 493, 1945 U.S. App. LEXIS 4241 (1st Cir. P.R. 1945).

5. —Evidence.

Law favors marriage, and, when once solemnized according to forms of law, will not declare its nullity upon anything less than clear and certain testimony, especially after it has been dissolved by death of one of the parties. Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22, 1949 Miss. LEXIS 305 (Miss. 1949).

Acts and declarations of the parties, general repute in the family, and declarations of deceased relatives may be used to establish the fact of marriage. McAllum v. Spinks, 129 Miss. 237, 91 So. 694, 1922 Miss. LEXIS 13 (Miss. 1922).

Testimony held sufficient to establish validity of a second marriage in the absence of opposing testimony that the first husband was not dead. Taylor v. Garrett, 101 Miss. 660, 57 So. 658, 1911 Miss. LEXIS 127 (Miss. 1911).

Where evidence shows that insured was not divorced from his first wife a second marriage was invalid. Sullivan v. Grand Lodge, K. P., 97 Miss. 218, 52 So. 360, 1910 Miss. LEXIS 231 (Miss. 1910).

Where plaintiff lived with her first husband most of the time but not continuously in the county of their marriage until plaintiff's second marriage, the jury may find, from the fact that the records of such county did not show a divorce and from other testimony, that there was no divorce from the first marriage. Colored Knights of Pythias v. Tucker, 92 Miss. 501, 46 So. 51, 1908 Miss. LEXIS 197 (Miss. 1908).

The jury must determine whether the presumption of the validity of a second marriage was overcome by the evidence that no divorce had been obtained from the first. Colored Knights of Pythias v. Tucker, 92 Miss. 501, 46 So. 51, 1908 Miss. LEXIS 197 (Miss. 1908).

6. Annulment of marriage.

Unratified contract of marriage may be annulled on the ground of duress. Marsh v. Whittington, 88 Miss. 400, 40 So. 326, 1906 Miss. LEXIS 106 (Miss. 1906).

RESEARCH REFERENCES

ALR.
Validity of marriage as affected by lack of legal authority of person solemnizing it. 13 A.L.R.4th 1323.

Am. Jur.
52 Am. Jur. 2d, Marriage §§ 35, 36.

CJS.
55 C.J.S., Marriage §§ 28 et seq.

§ 93-1-18. Validation of certain marriages performed by mayors.

Any marriages performed by a mayor of a municipality prior to March 14, 1994 are validated unless they have been invalidated by a court of competent jurisdiction, provided that all other requirements of law have been met and the marriages would have been valid if performed by an official authorized by law to solemnize the rites of matrimony.

HISTORY:
Laws, 1994, ch. 330, § 1, eff from and after passage (approved March 14, 1994).

§ 93-1-19. Marriage may be solemnized according to religious customs.

It shall be lawful for a pastor of any religious society in this state to join together in marriage such persons of the society to whom a marriage license has been issued, according to the rules and customs established by the society. The clerk or keeper of the minutes, proceedings, or other books of the religious society wherein such marriage shall be had and solemnized, shall make a true and faithful register of all marriages solemnized in the society, in a book kept by him for that purpose, and return a certificate of the same to the clerk of the circuit court of the county, to be by him recorded, under the penalty prescribed in Section 93-1-21.

HISTORY:
Codes, Hutchinson's 1848, ch. 34, art. 1 (2); 1857, ch. 40, art. 2; 1871, § 1756; 1880, § 1151; 1892, § 2863; 1906, § 3248; Hemingway's 1917, § 2555; 1930, § 2366; 1942, § 464.

Editor's Notes —
Section 93-1-21, referred to in this section, was repealed effective January 1, 1979.

Cross References —
Domestic relations proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am. Jur.
52 Am. Jur. 2d, Marriage §§ 35, 36.

CJS.
55 C.J.S., Marriage §§ 28 et seq.

§ 93-1-21. Repealed.

Repealed by Laws, 1978, ch. 406, § 2, effective from and after January 1, 1979.

[Codes, Hutchinson's 1848, ch. 34, art. 1(7); 1857, ch. 40, art. 7; 1871,

§ 1761; 1880, § 1149; 1892, § 2861; 1906, § 3246; Hemingway's 1917, § 2553; 1930, § 2364; 1942, § 462]

Editor's Notes —

Former § 93-1-21 was entitled: Transmittal of marriage certificate to clerk; penalty for failure.

§ 93-1-23. Custodian of records relating to marriage licenses.

The clerk of the circuit court in each county shall be the legal custodian of the records and papers relating to marriage licenses and certificates of marriage formerly kept by the clerk of the probate court of each county.

HISTORY:

Codes, 1871, § 570; 1880, § 1492; 1892, § 2865; 1906, § 3250; Hemingway's 1917, § 2557; 1930, § 2368; 1942, § 466.

Cross References —

Domestic relations proceedings, see Miss. R. Civ. P. 81.

§ 93-1-25. Solicitation of marriage ceremony unlawful; penalty.

(1) It shall be unlawful for any person to solicit or cause to be solicited within any courthouse, premises or grounds or lots on which the courthouse may be located in any county within the State of Mississippi, for himself or for and on behalf of any minister or other person, the performance of a marriage ceremony.

(2) Any person violating this section shall be guilty of a misdemeanor and shall be punished by a fine not exceeding Twenty-five Dollars ($25.00) for the first conviction, and for any second or subsequent conviction, by a fine not exceeding One Hundred Dollars ($100.00), or by imprisonment in the county jail not exceeding thirty (30) days, or by both such fine and imprisonment.

HISTORY:

Codes, 1942, § 466.5; Laws, 1956, ch. 240, §§ 1, 2.

Cross References —

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Domestic relations proceedings, see Miss. R. Civ. P. 81.

CHAPTER 3.

HUSBAND AND WIFE

Sec.
93-3-1. Disability of coverture abolished; cause of action for loss of consortium of husband.
93-3-3. May sue each other.
93-3-5. Dower and curtesy abolished.
93-3-7. Restrictions on contracts between husband and wife.
93-3-9. Validity of conveyance or lease between spouses.
93-3-11. Removal of disabilities of minority of certain married persons with respect to homestead transactions; presumption of occupancy.
93-3-13. Liability of husband for property or income of wife.

§ 93-3-1. Disability of coverture abolished; cause of action for loss of consortium of husband.

Married women are fully emancipated from all disability on account of coverture; and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married. Every woman not married, or hereafter to be married shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of all property, real and personal, in possession or expectancy, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she were not married. A married woman shall have a cause of action for loss of consortium through negligent injury of her husband.

HISTORY:

Codes, 1880, § 1167; 1892, § 2289; 1906, § 2517; Hemingway's 1917, § 2051; 1930, § 1940; 1942, § 451; Laws, 1968, ch. 304, § 1, eff from and after passage (approved May 27, 1968).

Cross References —

Property rights of women, see Miss. Const. Art. 4, § 94.

Land and conveyances generally, see §§ 89-1-1 et seq.

Proceedings for protection from domestic abuse, see §§ 93-21-1 et seq.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. Marriage in general.
2. Domicile.
3. Duty to support.
4. Alimony, right to.
5. Antenuptial contracts.
6. Transactions between spouses generally.
7. Agency of husband.
8. Title to property in general.
9. Transfers and conveyances in general.
10. Co-tenancy.
11. Transfers by husband to wife.
12. Contracts.
13. Torts.
14. Actions against wife.
15. Actions between spouses.
16. —Limitations.
17. Witness, competency as.
18. Consortium.

1. Marriage in general.

Where the parties were separated several years and the husband won $ 2,600,000 in a lottery shortly before the divorce but did not disclose this, in the wife's modification action for alimony and an equitable division of property, a remand was required for a determination under the applicable case law of whether the lottery ticket constituted marital property under Hemsley, and if so, for an equitable division pursuant to Ferguson; in light of the husband's failure to disclose the winnings, and in light of Miss. Unif. Ch. Ct. R. 8.05, the chancery court also erred in denying the wife's motion for contempt. Kalman v. Kalman, 905 So. 2d 760, 2004 Miss. App. LEXIS 1101 (Miss. Ct. App. 2004).

Father argued that the award of the marital home to the mother was an affront to basic principles of equity, primarily because of her adulterous relationship. However, the mother had primarily "maintained the marital home," it was close to her extended family, and in fact, it had been given to the parties by the mother's father; further, the father was awarded sole possession of his retirement benefits, and therefore, there was no inequity. Sandlin v. Sandlin, 906 So. 2d 39, 2004 Miss. App. LEXIS 1115 (Miss. Ct. App. 2004).

Mother asserted the chancellor erred in his division of the marital property because she was left with a deficit, that the father's income was almost three times that of her own, and that she should have been awarded alimony. However, the denial of alimony certainly did not leave the mother destitute, the property division was otherwise equitable, and there was no error in the chancellor's decision to deny alimony. Sandlin v. Sandlin, 906 So. 2d 39, 2004 Miss. App. LEXIS 1115 (Miss. Ct. App. 2004).

Under void marriage husband paying off encumbrance on wife's land acts as mere volunteer, and thereby acquires no lien or other right in wife's property. Brown v. Brown, 90 Miss. 410, 43 So. 178, 1907 Miss. LEXIS 47 (Miss. 1907).

2. Domicile.

The domicile of the husband is that of the wife. She cannot, to suit her convenience or pleasure, adopt a different home by refusing to reside in the domicile of his choice. Suter v. Suter, 72 Miss. 345, 16 So. 673, 1894 Miss. LEXIS 106 (Miss. 1894).

3. Duty to support.

In the absence of any express agreement, where a married woman shall obtain necessities, whether in the form of goods or services, for her own personal use or benefit, under circumstances which, if she had not been married, would give rise by implication to a contract on her part to pay for such goods or services, she shall be liable, jointly with her husband, for the value of such goods or services, and recovery therefor may be had from her separate estate. Cooke v. Adams, 183 So. 2d 925, 1966 Miss. LEXIS 1455 (Miss. 1966).

Duty of husband to support wife arises out of marital relationship and continues during existence of that relationship. Henderson v. Henderson, 208 Miss. 98, 43 So. 2d 871, 1950 Miss. LEXIS 231 (Miss. 1950).

Husband's duty to support his wife requires him to provide her with place of abode as a suitable home, measured in light of modern standards of civilization as pertains to health, comfort and welfare, the normal living of persons of their social rank and standard of living, within means and earning power of husband. Henderson v. Henderson, 208 Miss. 98, 43 So. 2d 871, 1950 Miss. LEXIS 231 (Miss. 1950).

Decree against wife in favor of husband for sum of money expended by husband in making repairs on house owned by wife, which were necessary to put house in livable condition and in which parties lived until husband deserted wife is erroneous when the repair was within means of husband and he was not required himself to acquire and make available a home for his wife. Henderson v. Henderson, 208 Miss. 98, 43 So. 2d 871, 1950 Miss. LEXIS 231 (Miss. 1950).

Husband's primary liability for necessities is determined at the time the expense was incurred, unaffected by subsequent separation. McLemore v. Riley's Hospital, Inc., 197 Miss. 317, 20 So. 2d 67, 1944 Miss. LEXIS 302 (Miss. 1944), overruled, Cooke v. Adams, 183 So. 2d 925, 1966 Miss. LEXIS 1455 (Miss. 1966).

4. Alimony, right to.

This section [Code 1942, § 451] does not deprive a woman of her right to alimony. Verner v. Verner, 62 Miss. 260, 1884 Miss. LEXIS 67 (Miss. 1884).

5. Antenuptial contracts.

An antenuptial contract between husband and wife as to her property is rescindable at their joint pleasure, and is rescinded pro tanto by their joint conveyance of part of the property. Stevenson v. Renardet, 83 Miss. 392, 35 So. 576, 1903 Miss. LEXIS 58 (Miss. 1904), limited, Cole v. Cole, 99 Miss. 335, 54 So. 953, 1910 Miss. LEXIS 30 (Miss. 1910).

6. Transactions between spouses generally.

Married woman may enter partnership with husband. Jones v. Jones, 99 Miss. 600, 55 So. 361, 1911 Miss. LEXIS 231 (Miss. 1911).

A contract between a husband and wife, upon sufficient consideration, by which the wife relinquished all claims against her husband's estate is valid. Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317, 1902 Miss. LEXIS 111 (Miss. 1902).

7. Agency of husband.

To charge wife's separate estate, seller has burden of proving goods purchased by husband were for use of wife's estate. McGahey v. McGraw, 100 Miss. 295, 56 So. 397, 1911 Miss. LEXIS 34 (Miss. 1911).

Husband's authority to sign release of landlord's lien for wife question for jury. Holden v. Rice Mercantile Co., 96 Miss. 425, 51 So. 895, 1910 Miss. LEXIS 200 (Miss. 1910).

Wife's property not liable for material purchased by her husband without her consent, for the erection of a building on her land. Schiaffino v. Christ, 96 Miss. 801, 51 So. 546, 1910 Miss. LEXIS 185 (Miss. 1910).

A wife is not liable to the penalty prescribed by Code 1892, § 1590, for selling or giving away liquors unlawfully, because her husband, without her knowledge and contrary to her express orders and his promise to refrain from so doing, sells intoxicating liquors in her grocery store, although he be the general manager of her business. Thurman v. Adams, 82 Miss. 204, 33 So. 944, 1903 Miss. LEXIS 118 (Miss. 1903).

8. Title to property in general.

Wife of guardian could not acquire title to property of ward which guardian could not acquire. Brandau v. Greer, 95 Miss. 100, 48 So. 519, 1909 Miss. LEXIS 217 (Miss. 1909).

Sale for taxes not invalidated solely because purchaser is wife of collector making sale. Means v. Haley, 86 Miss. 557, 38 So. 506, 1905 Miss. LEXIS 56 (Miss. 1905).

Where a husband before marriage fraudulently acquired a claim of title to land his widow cannot under a conveyance from him during coverture hold the land as against the defrauded owner, nor can she recover of such owner the money paid to him by her husband in attempting to hide his fraud. Hamblet v. Harrison, 80 Miss. 118, 31 So. 580, 1902 Miss. LEXIS 231 (Miss. 1902).

9. Transfers and conveyances in general.

Conveyance to "Pink Boutwell and wife" created tenancy in common. Conn v. Boutwell, 101 Miss. 353, 58 So. 105, 1911 Miss. LEXIS 155 (Miss. 1912).

Deed to grantee and his wife, and to "his" heirs and assigns, with habendum clause to "his" heirs and assigns conveyed an estate to the husband and wife by entireties, clerical errors being immaterial. W. C. Ellis Co. v. Walker, 101 Miss. 326, 58 So. 97, 1911 Miss. LEXIS 151 (Miss. 1912).

A deed executed by a wife to a county, purporting to convey her land in payment of a sum due by her husband as a defaulting officer, is void if the same be coerced by declarations of the district attorney to the effect that her husband would be sent to the penitentiary if it were not executed. Allen v. Leflore County, 78 Miss. 671, 29 So. 161, 1900 Miss. LEXIS 136 (Miss. 1900).

Fraud on marital rights cannot be predicated of a voluntary conveyance by either husband or wife made to prevent the other from inheriting. Jones v. Somerville, 78 Miss. 269, 28 So. 940, 1900 Miss. LEXIS 119 (Miss. 1900).

10. Co-tenancy.

Purchase by wife of one of co-tenants, at sale under deed of trust given by former owner, enures to benefit of all co-tenants. Beaman v. Beaman, 90 Miss. 762, 44 So. 987, 1907 Miss. LEXIS 126 (Miss. 1907).

That the husband of a co-tenant occupied the joint estate with her, and that he under the law is the recognized head of the family does not limit her liability for compensation to the other co-tenants for her use and occupation of the estate. Walker v. Williams, 84 Miss. 392, 36 So. 450, 1904 Miss. LEXIS 52 (Miss. 1904).

11. Transfers by husband to wife.

A conveyance from a husband to his wife, reciting a legal consideration, is prima facie valid and the burden of proof to show it is fraudulent is on the creditor of the husband who assails it. Virden v. Dwyer, 78 Miss. 763, 30 So. 45, 1901 Miss. LEXIS 153 (Miss. 1901).

12. Contracts.

The denial to a wife of separate maintenance and the custody of the children in no way invalidated claims for debt, which the wife may have against the husband as a result of contract, either express or implied. Tobias v. Tobias, 225 Miss. 392, 83 So. 2d 638, 1955 Miss. LEXIS 596 (Miss. 1955).

A married woman is bound by a contract to pay her own medical bills. Montgomery Ward & Co. v. Nickens, 203 Miss. 195, 33 So. 2d 815, 1948 Miss. LEXIS 250 (Miss. 1948).

Statute providing that husband and wife shall not contract with each other so as to entitle one to claim compensation from other for work or labor held not in conflict with statute emancipating women from disability on account of coverture and providing that married women should have capacity to own, control, and contract with reference to property. Martin v. First Nat'l Bank, 176 Miss. 338, 164 So. 896, 1936 Miss. LEXIS 96 (Miss. 1936).

Where evidence established that goods were furnished to wife under express contract between seller and wife, and solely on her credit, wife was personally liable. Skehan v. Davidson Co., 164 Miss. 518, 145 So. 247, 1933 Miss. LEXIS 236 (Miss. 1933).

Husband does not become surety where wife defaults in performance of her contracts. Skehan v. Davidson Co., 164 Miss. 518, 145 So. 247, 1933 Miss. LEXIS 236 (Miss. 1933).

Where it was not shown that husband's allowance to wife was not wholly adequate to her proper support, husband was not liable on wife's account for goods furnished. Skehan v. Davidson Co., 164 Miss. 518, 145 So. 247, 1933 Miss. LEXIS 236 (Miss. 1933).

Where goods were furnished to wife solely on her credit, and wife did not create debt impliedly as husband's agent, husband was not liable. Skehan v. Davidson Co., 164 Miss. 518, 145 So. 247, 1933 Miss. LEXIS 236 (Miss. 1933).

13. Torts.

Common law unity concept which prohibited suits between spouses for any claim is no longer viable and doctrine of interspousal tort immunity cannot be maintained. Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

Abrogation of rule of interspousal tort immunity required reversal of decision of trial judge dismissing complaint by wife against her husband for alleged assault and battery. Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

Exclusive remedy provisions of Workers' Compensation Act, § 71-3-9, preclude action by wife of injured employee for loss of consortium. West v. Plastifax, Inc., 505 So. 2d 1026, 1987 Miss. LEXIS 2497 (Miss. 1987).

Wife who has suffered substantial loss of conjugal rights as direct proximate result of injury to her husband caused by negligence of his employer is entitled to recover compensation. Walters v. Inexco Oil Co., 511 F. Supp. 21, 1979 U.S. Dist. LEXIS 12763 (S.D. Miss. 1979), aff'd, 632 F.2d 891, 1980 U.S. App. LEXIS 12555 (5th Cir. Miss. 1980).

A father's negligence which contributed to the injury sustained by his son, and which the trial court held under the Mississippi comparative negligence statute justified a substantial reduction in the award originally made by the court for the son's injuries, could not be made the basis for a reduction in the non-negligent wife's award for loss of consortium and past and subsequent services to her paraplegic son. Wright v. Standard Oil Co., 470 F.2d 1280, 1972 U.S. App. LEXIS 6335 (5th Cir. Miss. 1972), cert. denied, 412 U.S. 938, 93 S. Ct. 2772, 37 L. Ed. 2d 398, 1973 U.S. LEXIS 2112 (U.S. 1973).

In an action for injuries sustained as result of drinking a portion of bottled beverage containing foreign substance, an instruction which authorized the jury, in assessing damages, to take into consideration hospital, doctors and drug bills necessarily created for her treatment as the result of drinking the beverage, should have used to word "incurred" rather than "created", but the error was not misleading nor prejudicial in view of the fact that the plaintiff's wife was an adult and could contract for payment of such bills. Laurel Coca Cola Bottling Co. v. Hankins, 222 Miss. 297, 75 So. 2d 731, 1954 Miss. LEXIS 646 (Miss. 1954).

A judgment denying recovery in a wife's action for personal injuries was not res judicata and did not constitute a bar to the husband's action for loss of services. Palmer v. Clarksdale Hospital, 213 Miss. 611, 57 So. 2d 476, 1952 Miss. LEXIS 403 (Miss. 1952).

Husband's connection with and participation in wife's suit for personal injuries in employing an attorney to prosecute such suit, conferring with the attorney, appearing as a witness in his wife's behalf, paying some of the expenses incurred in the suit, and taking part in negotiations for settlement, were not of such nature as to bind him by the judgment rendered in such suit, where he had no proprietary or financial interest in, or control over, his wife's suit, he had no lawful interest in or legal title to the claim on which his wife was suing, and his participation in the suit was not for the promotion or protection of any interest of his own. Palmer v. Clarksdale Hospital, 213 Miss. 611, 57 So. 2d 476, 1952 Miss. LEXIS 403 (Miss. 1952).

In personal injury action, evidence as to plaintiff's earning capacity as trained nurse held admissible, notwithstanding that plaintiff may have been supported by her husband. Mississippi C. R. Co. v. Smith, 176 Miss. 306, 168 So. 604, 1936 Miss. LEXIS 129 (Miss. 1936).

Husband entitled to recover for loss of consortium of injured wife. Brahan v. Meridian L. & R. Co., 121 Miss. 269, 83 So. 467, 1919 Miss. LEXIS 163 (Miss. 1919).

14. Actions against wife.

In view of the provisions of statutes enabling a married woman to have a separate estate, a creditor suing her must, in his bill in equity or declaration at law, aver that she has such an estate, and that the debt is a charge upon it or ought to be paid out of it. Canal Bank v. Partee, 99 U.S. 325, 25 L. Ed. 390, 1878 U.S. LEXIS 1545 (U.S. 1879).

15. Actions between spouses.

A wife was entitled to proceed in Chancery Court against her husband for partition of jointly held property as an incident to her action for divorce. Johnson v. Johnson, 550 So. 2d 416, 1989 Miss. LEXIS 454 (Miss. 1989).

Common law unity concept which prohibited suits between spouses for any claim is no longer viable and doctrine of interspousal tort immunity cannot be maintained. Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

Abrogation of rule of interspousal tort immunity required reversal of decision of trial judge dismissing complaint by wife against her husband for alleged assault and battery. Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

In view of the provisions of §§ 11-21-3, 93-3-1 and 93-3-3, § 89-1-29 did not preclude a wife, who held real property as joint tenant with husband from whom she was separated but not divorced, from maintaining an action to partition the property, notwithstanding that husband continued to reside on the property and claimed it as his homestead. Trigg v. Trigg, 498 So. 2d 334, 1986 Miss. LEXIS 2779 (Miss. 1986).

Husband cannot convert his wife into his money debtor by performing his legal duty to support her. Henderson v. Henderson, 208 Miss. 98, 43 So. 2d 871, 1950 Miss. LEXIS 231 (Miss. 1950).

Section 94 of the Constitution of 1890, and §§ 1940 and 1941 of the Code of 1930 (Code 1942, §§ 451, 452), emancipating married women from the common-law disabilities of coverture, do not have the effect of removing the common-law disability of husband and wife to sue each other for a personal tort, and therefore the common-law rule stands that neither husband nor wife can maintain such a suit. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La.App. 1 Cir. 1944), aff'd, 24 So. 2d 875, 1946 La. LEXIS 707 (La. 1946).

Although wife can sue her husband, she has no cause of action in tort against him for injuries inflicted upon her by the negligence of her husband. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La.App. 1 Cir. 1944), aff'd, 24 So. 2d 875, 1946 La. LEXIS 707 (La. 1946).

Wife, injured as result of alleged negligence of husband in automobile accident, could not maintain action against husband's liability insurer, since tort claimant cannot maintain direct action against insurer but must first sue the insured, obtain judgment, and otherwise exhaust his remedies against the insured, and wife has no cause of action against husband for personal tort. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La.App. 1 Cir. 1944), aff'd, 24 So. 2d 875, 1946 La. LEXIS 707 (La. 1946).

In absence of statute, right of action against husband arising out of automobile accident, existing in wife before marriage, held extinguished by marriage. Scales v. Scales, 168 Miss. 439, 151 So. 551, 1934 Miss. LEXIS 334 (Miss. 1934), overruled, Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

Neither husband nor wife can sue the other for personal torts. Austin v. Austin, 136 Miss. 61, 100 So. 591, 1924 Miss. LEXIS 109 (Miss. 1924), overruled, Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

16. —Limitations.

The statute of limitations bars the wife's causes of action against her husband as if they were not married. Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317, 1902 Miss. LEXIS 111 (Miss. 1902).

17. Witness, competency as.

The law gives a defendant accused of crime the right, at his option, to introduce or not to introduce his wife as a witness. Cole v. State, 75 Miss. 142, 21 So. 706, 1897 Miss. LEXIS 90 (Miss. 1897).

The husband and wife are competent witnesses for each other in all cases. Saffold v. Horne, 72 Miss. 470, 18 So. 433, 1894 Miss. LEXIS 146 (Miss. 1894).

18. Consortium.

Married couple's motion for a judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50 was denied with respect to the jury's determination that the wife was not entitled to recover for loss of consortium under Miss. Code Ann. § 93-3-1 because, in light of the husband's testimony, the jury had a basis to conclude that his ability to engage in the same leisure activities, such as fishing, he enjoyed before he became sick undercut his and his wife's assertions that he was unable to engage in the same conjugal activities he pursued before he became sick. Further, the wife testified that the husband retained the ability to cook meals, mow the lawn, and so on, which provide a basis for the jury to conclude that normal aging explained his inability to engage in certain conjugal activities and that his activity level had not diminished to the extent that the couple claimed; and, while the wife pointed to many activities, including conjugal ones, that the husband no longer pursues, she did not provide testimony for determining a baseline with respect to the prior level of most of those activities, or when exactly they began to fade away. Jowers v. BOC Group, Inc., 608 F. Supp. 2d 724, 2009 U.S. Dist. LEXIS 28806 (S.D. Miss. 2009), vacated, in part, 617 F.3d 346, 2010 U.S. App. LEXIS 17862 (5th Cir. Miss. 2010).

Trial court erred in awarding a wife loss of consortium damages pursuant to Miss. Code Ann. § 93-3-1 because the evidence offered was insufficient to support the wife's claim; she failed to show how her husband's injuries affected his relationship with her such that she suffered a compensable injury. Coho Res., Inc. v. McCarthy, 829 So. 2d 1, 2002 Miss. LEXIS 208 (Miss. 2002).

An action for loss of consortium survives the death of the party asserting it, and may be brought as any other action by the executor or administrator or personal representative of the deceased party. Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1992 Miss. LEXIS 447 (Miss. 1992).

When a loss resulting from injury to a person may be recovered by either the injured person or another person, e.g., for loss of consortium, a judgment for or against the injured party has preclusive effect on any such other person's claim for the loss to the same extent as upon the injured person. A judgment for or against any such other person precludes recovery by or on behalf of the injured person of any loss that could have been recovered in the first action. When a person with a family relationship to one suffering personal injury has a claim for loss to himself or herself resulting from the injury, the determination of issues in an action by the injured person to recover for his or her injuries is preclusive against the family member, unless the judgment was based on a defense that is unavailable against the family member in the second action. McCoy v. Colonial Baking Co., 572 So. 2d 850, 1990 Miss. LEXIS 714 (Miss. 1990).

A defense available against a plaintiff in his or her personal injury action is available against the spouse's derivative consortium action. Byrd v. Matthews, 571 So. 2d 258, 1990 Miss. LEXIS 698 (Miss. 1990).

A loss of consortium action is derivative, and contributory negligence applies, because the action lies on account of injuries to the other spouse. Thus, an award to a wife for loss of consortium should have been reduced by the contributory negligence of her husband. Choctaw, Inc. v. Wichner, 521 So. 2d 878, 1988 Miss. LEXIS 120 (Miss. 1988).

Exclusivity provisions of Workers' Compensation Act preclude consortium claim by wife of injured claimant in actions falling within scope of Act. Stevens v. FMC Corp., 515 So. 2d 928, 1987 Miss. LEXIS 2883 (Miss. 1987).

The loss of consortium is the loss of any or all of the wife's rights to society, companionship, love, affection, aid, services, support, sexual relations and the comfort of her husband as special rights and duties growing out of the marriage covenant, the right to live together in the same house, to eat at the same table, and to participate together in the activities, duties and responsibilities necessary to make a home. Tribble v. Gregory, 288 So. 2d 13, 1974 Miss. LEXIS 1835 (Miss. 1974).

The damages recoverable by a wife in an action for loss of consortium under Code 1972 § 93-3-1 must be limited to avoid double recovery for the same damages by both husband and wife. Tribble v. Gregory, 288 So. 2d 13, 1974 Miss. LEXIS 1835 (Miss. 1974).

Consortium does not consist alone of intangible mental and emotional elements, but may include services performed by the husband for the wife which have a monetary value. Tribble v. Gregory, 288 So. 2d 13, 1974 Miss. LEXIS 1835 (Miss. 1974).

The recovery allowable under Code 1972 § 93-3-1 is limited so as to eliminate recovery by the wife for loss of financial support by the husband, recovery for nursing services and recovery for pain and suffering of the husband because these are items that may be recovered by the husband in his suit. Tribble v. Gregory, 288 So. 2d 13, 1974 Miss. LEXIS 1835 (Miss. 1974).

Where wife testified that she and her husband had had sexual relations about once a week before his injuries, but none since then, that she was deprived of his physical assistance in the usual and ordinary duties in and about the home and grounds, that they were not able to engage in activities after his injuries such as attending picture shows, church suppers, picnics and visiting friends, that her husband had a bed wetting problem, that without his assistance most of her time off from her job was spent in household duties, and that she was more nervous since the accident because of having to stay at home and wait on her husband, an award of $20,000 for loss of consortium was not so large that it evinced bias and prejudice on the part of the jury. Tribble v. Gregory, 288 So. 2d 13, 1974 Miss. LEXIS 1835 (Miss. 1974).

RESEARCH REFERENCES

ALR.

Dividends on corporate stock held as separate property, as separate or community property. 55 A.L.R.2d 960.

Conflict of laws as to right of action for loss of consortium. 46 A.L.R.3d 880.

Right of married woman to use maiden surname. 67 A.L.R.3d 1266.

Measure and elements of damages in wife's action for loss of consortium. 74 A.L.R.3d 805.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Recovery for loss of consortium for injury occurring prior to marriage. 5 A.L.R.4th 300.

Wife's liability for necessaries furnished husband. 11 A.L.R.4th 1160.

Necessity of physical injury to support cause of action for loss of consortium. 16 A.L.R.4th 537.

Negligence of spouse or child as barring or reducing recovery for loss of consortium by other spouse or parent. 25 A.L.R.4th 118.

Injured party's release of tortfeasor as barring spouse's action for loss of consortium. 29 A.L.R.4th 1200.

Action for loss of consortium based on nonmarital cohabitation. 40 A.L.R.4th 553.

Necessity that divorce court value property before distributing it. 51 A.L.R.4th 11.

Modern status of views as to validity of premarital agreements contemplating divorce or separation. 53 A.L.R.4th 22.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by circumstances surrounding execution – modern status. 53 A.L.R.4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms – modern status. 53 A.L.R.4th 161.

Parent's right to recover for loss of consortium in connection with injury to child. 54 A.L.R.4th 112.

When must loss-of-consortium claim be joined with underlying personal injury claim. 60 A.L.R.4th 1174.

Am. Jur.

41 Am. Jur. 2d, Husband and Wife §§ 2, 3, 213, 220-222, 224.

14 Am. Jur. Pl & Pr Forms (Rev), Husband and Wife, Forms 93, 94 (complaint, petition, or declaration for loss of husband's consortium).

6 Am. Jur. Trials, Predicting the Verdict § 83.

10 Am. Jur. Proof of Facts 3d 97, Damages for Loss of Consortium.

CJS.

41 C.J.S., Husband and Wife §§ 95,98, 99, 102, 208, 246, 247.

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1989 Mississippi Supreme Court Review: Equitable Division of Marital Property. 59 Miss. L. J. 902, Winter, 1989.

Practice References.

Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

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Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-3-3. May sue each other.

Husband and wife may sue each other.

HISTORY:

Codes, 1880, § 1168; 1892, § 2290; 1906, § 2518; Hemingway's 1917, § 2052; 1930, § 1941; 1942, § 452.

Cross References —

Testimony by spouses in proceedings for protection from domestic abuse, see § 93-21-19.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Suits for personal injury.
3. Divorce, alimony and support.

1. In general.

In view of the provisions of §§ 11-21-3, 93-3-1 and 93-3-3, § 89-1-29 did not preclude a wife, who held real property as joint tenant with husband from whom she was separated but not divorced, from maintaining an action to partition the property, notwithstanding that husband continued to reside on the property and claimed it as his homestead. Trigg v. Trigg, 498 So. 2d 334, 1986 Miss. LEXIS 2779 (Miss. 1986).

Whatever may be left of interspousal immunity in the tort field, § 93-3-3 has interred it forever with respect to property rights. Trigg v.

Trigg, 498 So. 2d 334, 1986 Miss. LEXIS 2779 (Miss. 1986).

Section 94 of the Constitution of 1890, and Code 1930, §§ 1940, 1941 [Code 1942, §§ 451, 452], emancipating married women from the common-law disabilities of coverture, do not have the effect of removing the common-law disability of husband and wife to sue each other for a personal tort, and therefore the common-law rule stands that neither husband nor wife can maintain such a suit. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La.App. 1 Cir. 1944), aff'd, 24 So. 2d 875, 1946 La. LEXIS 707 (La. 1946).

Where wife intervened and claimed diamond ring sought to be replevied by husband from mother-in-law, judgment for wife did not entitle husband to reversal because no judgment rendered against mother-in-law. Lee v. Patterson, 92 Miss. 357, 45 So. 980 (Miss. 1908).

2. Suits for personal injury.

Abrogation of rule of interspousal tort immunity required reversal of decision of trial judge dismissing complaint by wife against her husband for alleged assault and battery. Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

Common law unity concept which prohibited suits between spouses for any claim is no longer viable and doctrine of interspousal tort immunity cannot be maintained. Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

Doctrine of interspousal immunity bars personal injury lawsuit by one spouse against other which is filed subsequent to divorce and based upon cause of action arising prior to marriage. Matthews v. State Farm Mut. Auto. Ins. Co., 471 So. 2d 1223, 1985 Miss. LEXIS 2128 (Miss. 1985), overruled, Burns v. Burns, 518 So. 2d 1205, 1988 Miss. LEXIS 18 (Miss. 1988).

Where wife died in an automobile accident as a result of the negligent operation of vehicle by her husband, she could not have sued the husband in tort even if she had survived. Durham v. Durham, 227 Miss. 76, 85 So. 2d 807, 1956 Miss. LEXIS 656 (Miss. 1956).

Although wife can sue her husband, she has no cause of action in tort against him for injuries inflicted upon her by his negligence. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La.App. 1 Cir. 1944), aff'd, 24 So. 2d 875, 1946 La. LEXIS 707 (La. 1946).

Wife, injured as result of alleged negligence of husband in automobile accident, could not maintain action against husband's liability insurer, since tort claimant cannot maintain direct action against insurer but must first sue the insured, obtain judgment, and otherwise exhaust his remedies against the insured, and wife has no cause of action against husband for personal tort. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La.App. 1 Cir. 1944), aff'd, 24 So. 2d 875, 1946 La. LEXIS 707 (La. 1946).

3. Divorce, alimony and support.

A wife was entitled to proceed in Chancery Court against her husband for partition of jointly held property as an incident to her action for divorce. Johnson v. Johnson, 550 So. 2d 416, 1989 Miss. LEXIS 454 (Miss. 1989).

Upon finding that wife was entitled to separate maintenance, chancellor was bound by equitable principles to award her an amount sufficient to maintain her standard of living in accord with husband's estate and ability to provide for her well being. Gray v. Gray, 484 So. 2d 1032, 1986 Miss. LEXIS 2407 (Miss. 1986).

The denial to a wife of separate maintenance and the custody of the children in no way invalidated claims for debt, which the wife may have against the husband as a result of contract, either express or implied. Tobias v. Tobias, 225 Miss. 392, 83 So. 2d 638, 1955 Miss. LEXIS 596 (Miss. 1955).

Wife may sue in chancery court for support and maintenance against husband whether or not divorce is sought. Boyett v. Boyett, 152 Miss. 201, 119 So. 299, 1928 Miss. LEXIS 262 (Miss. 1928).

A divorce will be granted the wife on final hearing, if she is entitled to it, without reference to her purposes in suing. Bradford v. Bradford, 80 Miss. 467, 31 So. 963, 1902 Miss. LEXIS 277 (Miss. 1902).

Where the real purpose of the suit is to coerce the conveyance of property, her application for alimony and attorneys' fee to be paid by the husband pending the suit should be denied. Bradford v. Bradford, 80 Miss. 467, 31 So. 963, 1902 Miss. LEXIS 277 (Miss. 1902).

RESEARCH REFERENCES

ALR.

Effect of annulment of marriage on rights arising out of acts of or transactions between parties during the marriage. 2 A.L.R.2d 637.

Action against spouse or estate for causing death of other spouse. 28 A.L.R.2d 662.

Right of one spouse to maintain action against other for personal injury. 43 A.L.R.2d 632.

Conflict of laws as to right of action between husband and wife or parent and child. 96 A.L.R.2d 973.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Am. Jur.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

14 Am. Jur. Pl & Pr Forms (Rev), Husband and Wife, Forms 27 et seq. (actions between spouses involving settlements and agreements as to property rights); Forms 8 et seq. (actions between spouses involving property rights and interests).

CJS.

41 C.J.S., Husband and Wife §§ 154, 383–385, et seq.

Law Reviews.

1989 Mississippi Supreme Court Review: Equitable Division of Marital Property. 59 Miss. L. J. 902, Winter, 1989.

§ 93-3-5. Dower and curtesy abolished.

Dower and curtesy, as heretofore known, are abolished.

HISTORY:

Codes, 1880, § 1170; 1892, § 2291; 1906, § 2519; Hemingway's 1917, § 2053; 1930, § 1942; 1942, § 453.

RESEARCH REFERENCES

ALR.

Statutory or constitutional provision allowing widow but not widower to take against will and receive dower interests, allowances, homestead rights, or the like as denial or equal protection of law. 18 A.L.R.4th 910.

Am. Jur.

25 Am. Jur. 2d, Dower and Curtesy §§ 4, 5 et seq.

CJS.

28 C.J.S., Dower and Curtesy, §§ 6-8, 212-215.

§ 93-3-7. Restrictions on contracts between husband and wife.

Husband and wife shall not contract with each other, so as to entitle the one to claim or receive any compensation from the other for work and labor, and any contract between them whereby one shall claim or shall receive compensation from the other for services rendered, shall be void. It shall not be lawful for the husband to rent the wife's plantation, houses, horses, mules, wagons, carts, or other implements, and with them, or with any of her means, to operate and carry on business in his own name or on his own account, but all business done with the means of the wife by the husband shall be deemed and held to be on her account and for her use, and by the husband as her agent and manager in business, as to all persons dealing with him without notice, unless the contract between the husband and wife which changes this relation, be evidenced by writing, subscribed by them, duly acknowledged, and filed with the chancery clerk of the county where such business may be done, to be recorded as other instruments.

HISTORY:

Codes, 1880, § 1177; 1892, § 2293; 1906, § 2521; Hemingway's 1917, § 2055; 1930, § 1943; 1942, § 454.

JUDICIAL DECISIONS

ANALYSIS

1. Validity.
2. Contracts.
3. Conveyances.
4. Use of wife's property or means by husband generally.
5. Agency of husband.
6. Notice to third persons.
7. Release or waiver.

1. Validity.

An indigent accused under sentence for aggravated assault would be entitled to appointment of counsel to represent him on appeal. Killingsworth v. State, 490 So. 2d 849, 1986 Miss. LEXIS 2481 (Miss. 1986), overruled in part, Turner v. State, 818 So. 2d 1186, 2001 Miss. LEXIS 146 (Miss. 2001).

This provision, in prohibiting husband and wife from contracting with each other so as to entitle one to claim or receive compensation from other for work or labor is not violative of constitutional provision relating to emancipation of married women. Martin v. First Nat'l Bank, 176 Miss. 338, 164 So. 896, 1936 Miss. LEXIS 96 (Miss. 1936).

2. Contracts.

This section [Code 1942, § 454] was inapplicable to an action by a divorced wife against her former husband for an accounting as to rents, revenue and receipts derived from the operation of the land, on the partition of property, where under the bill and the wife's evidence, adopted by the court, the operation of the co-tenancy lands was a joint operation and there was not involved a contract between the husband and wife for work and labor. Horton v. Boatright, 231 Miss. 666, 97 So. 2d 637, 1957 Miss. LEXIS 553 (Miss. 1957).

Where a husband and wife made a partnership agreement and the consideration for the contract was founded on work and labor of the wife in the business, the partnership contract was not invalid and this section [Code 1942, § 454] had no application. McGehee v. McGehee, 227 Miss. 170, 85 So. 2d 799, 1956 Miss. LEXIS 670 (Miss. 1956).

Contract by wife in favor of husband for legal services to be rendered by him for her in recovery of her separate property held not enforceable by husband's assignee, since contract was void. Martin v. First Nat'l Bank, 176 Miss. 338, 164 So. 896, 1936 Miss. LEXIS 96 (Miss. 1936).

Contract between wife and husband for erection of a building on her separate property in consideration of payment to him as contractor was a nullity, and wife was liable for material furnished, and a lien therefor might be established against her property. Banks & Co. v. Pullen, 113 Miss. 632, 74 So. 424, 1917 Miss. LEXIS 134 (Miss. 1917).

3. Conveyances.

Where a husband acquires by fraud, before marriage, a claim of title to land, his widow cannot, under a conveyance from him during coverture, hold the land as against the defrauded owner; nor can she recover the money paid by her husband in attempting to hide the fraud. Hamblet v. Harrison, 80 Miss. 118, 31 So. 580, 1902 Miss. LEXIS 231 (Miss. 1902).

Where a husband has conveyed land to his wife, although confessedly in fraud of his creditors, and they continue, as before, to occupy it together as their home, their joint possession will be referred to her title, and after her death he cannot claim, as against her heirs, that his possession was adverse to her. Claughton v. Claughton, 70 Miss. 384, 12 So. 340, 1892 Miss. LEXIS 121 (Miss. 1892).

Where a husband buys land, taking the title in the wife's name and his own jointly, and afterwards makes improvements thereon, the presumption is of a gift to her of half interest in both the land and improvements. Kripperdorf v. Wolfe, 70 Miss. 81, 12 So. 26 (Miss. 1892).

4. Use of wife's property or means by husband generally.

The statute does not apply where only the money of the wife is used by the husband. Leinkauf v. Barnes, 66 Miss. 207, 5 So. 402, 1888 Miss. LEXIS 91 (Miss. 1889).

5. Agency of husband.

One furnishing husband as general manager means for operating plantation, without knowledge that husband was acting for wife, could recover from wife. Rivers v. Eastman Cotton Oil Co., 159 Miss. 361, 132 So. 327, 1931 Miss. LEXIS 50 (Miss. 1931).

Wife held liable for goods husband, operating wife's plantation and his logging business with her means, purchased for family and logging business. Rivers v. Wade Hardware Co., 151 Miss. 163, 117 So. 259, 1928 Miss. LEXIS 271 (Miss. 1928).

Directed verdict proper where evidence fails to show defendant's husband was doing business with her property. Teasley v. Roberson, 149 Miss. 188, 115 So. 211, 1928 Miss. LEXIS 18 (Miss. 1928).

Contract between wife and husband under which husband contracted for a consideration to erect a building on her separate property was a nullity, and wife's property was liable for materials furnished husband on credit on theory that husband was the wife's statutory agent. Banks & Co. v. Pullen, 113 Miss. 632, 74 So. 424, 1917 Miss. LEXIS 134 (Miss. 1917).

Under this section [Code 1942, § 454] a creditor may subject cotton raised on the wife's plantation to the payment of debts incurred for plantation and family supplies furnished the husband and used on the place. Dean v. Boyd, 86 Miss. 204, 38 So. 297, 1905 Miss. LEXIS 22 (Miss. 1905).

A wife may, by her conduct, extend the scope of her husband's statutory agency as limited by this section [Code 1942, § 454] and make herself liable to persons dealing with him without notice for debts contracted in the course of such business. Johnson v. Jones, 82 Miss. 483, 34 So. 83, 1903 Miss. LEXIS 136 (Miss. 1903).

6. Notice to third persons.

Where recorded instruments showed that wife leased plantation to husband for 1917 and again for 1921, wife's testimony that husband held over from year to year and was her holdover tenant held not admissible as far as rights of third persons were concerned, to show an implied tenancy, in view of purposes and language of statute relating to contracts evidencing a business relationship between husband and wife which require a recorded lease covering the specific year or years in issue to establish the relationship of landlord and tenant. Chapman v. Chase Nat'l Bank, 178 Miss. 401, 173 So. 455, 1937 Miss. LEXIS 231 (Miss. 1937).

Wife held not estopped to assert that contract executed by her in favor of husband for payment of fee for legal services to be rendered by him for wife in recovery of her separate property was unenforceable as against bank which took pledge of fee with knowledge that contract was void as to wife. Martin v. First Nat'l Bank, 176 Miss. 338, 164 So. 896, 1936 Miss. LEXIS 96 (Miss. 1936).

7. Release or waiver.

The taking of security upon the property of the husband is not a waiver of the right given under this section [Code 1942, § 454]. Dean v. Boyd, 86 Miss. 204, 38 So. 297, 1905 Miss. LEXIS 22 (Miss. 1905).

RESEARCH REFERENCES

ALR.

Effect of annulment of marriage on rights arising out of acts of or transactions between parties during marriage. 2 A.L.R.2d 637.

What constitutes contract between husband or wife and third person promotive of divorce or separation. 93 A.L.R.3d 523.

CJS.

41 C.J.S., Husband and Wife §§ 332–338, 342, 346–350.

§ 93-3-9. Validity of conveyance or lease between spouses.

A transfer or conveyance of goods and chattels, or lands, or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be. Possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record.

HISTORY:

Codes, 1880, § 1178; 1892, § 2294; 1906, § 2522; Hemingway's 1917, § 2056; 1930, § 1944; 1942, § 455; Laws, 1900, ch. 90.

Cross References —

Necessity of writing to convey land generally, see § 89-1-3.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Ownership of property involved.
3. Validity of transfers.
4. —Leases.
5. —Gifts.
6. —Property purchased with means of other spouse.
7. —Pending or threatened suit, effect of.

8. Consideration.
9. Persons protected.
10. Evidence.
11. Extraterritorial application.
12. Actions.

1. In general.

Where a husband assigned to his wife all his future earnings by an instrument which was not acknowledged and not recorded and neither the judgment creditor nor the garnishee had notice of the document until the garnishee was notified by counsel for the wife, this instrument was invalid as against the judgment creditor. Reynolds v. Smith, 226 Miss. 666, 85 So. 2d 178, 1956 Miss. LEXIS 447 (Miss. 1956).

The intent and purpose of this section [Code 1942, § 455] is to render invalid secret transfers and conveyances by a debtor as against the claims of a creditor, or any other third person whose interest might be affected by the unreported conveyance and seeks to prevent a secret transfer from being used as a means of a divestment of title. Detrio v. Boylan, 190 F.2d 40, 1951 U.S. App. LEXIS 2375 (5th Cir. Miss. 1951).

2. Ownership of property involved.

Presumption as to separate ownership of personal property on premises occupied by husband and wife living together, is in husband. Federal Reserve Bank v. Wall, 138 Miss. 204, 103 So. 5, 1924 Miss. LEXIS 236 (Miss. 1924).

A husband who manages his wife's farm under a verbal understanding with her that he is to own the crops is not the owner of the cotton produced thereon, under the provisions of this section [Code 1942, § 455]. Williams v. Yazoo & M. V. R. Co., 82 Miss. 659, 35 So. 169, 1903 Miss. LEXIS 187 (Miss. 1903).

3. Validity of transfers.

A mineral deed executed by a defendant to his wife was invalid under § 93-3-9, as to creditors, where the deed was recorded after the debtor-creditor relationships arose. Morgan v. Sauls, 413 So. 2d 370, 1982 Miss. LEXIS 1881 (Miss. 1982).

A conveyance between husband and wife is valid or invalid for the same reasons as between other persons, and the validity of such conveyances must be tested by the same principals as a conveyance by the debtor to a stranger, when brought into question as fraudulent against creditors though conveyances between husband and wife should be carefully scrutinized on account of the temptation to give an unfair advantage to the wife over other creditors. Detrio v. Boylan, 190 F.2d 40, 1951 U.S. App. LEXIS 2375 (5th Cir. Miss. 1951).

Landlord had no lien upon trucks which he attached and which were sold by tenant to his wife prior to attachment. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384, 1933 Miss. LEXIS 390 (Miss. 1933).

Unrecorded conditional sale of automobile by husband to wife is valid against third person, unless latter has valid claim, in absence of sale. Federal Credit Co. v. Scoggins, 158 Miss. 275, 130 So. 153, 1930 Miss. LEXIS 37 (Miss. 1930).

A transfer by a husband to his wife before he was adjudged a bankrupt was void as to the trustee in bankruptcy where the transfer was not recorded until after the trustee's appointment. Stockstill v. Brooks, 142 Miss. 691, 107 So. 888, 1926 Miss. LEXIS 130 (Miss. 1926).

Conveyance between husband and wife held valid or invalid for same reason as between other persons. Burks v. Moody, 141 Miss. 370, 106 So. 528, 1926 Miss. LEXIS 429 (Miss. 1926).

Deed from husband to wife in good faith for value is valid as against creditor of husband in suit pending at time of conveyance. Burks v. Moody, 141 Miss. 370, 106 So. 528, 1926 Miss. LEXIS 429 (Miss. 1926).

Conveyance of interest in land by husband to wife void as to creditors existing prior to filing for record. Carberry v. Lann-Carter Hardware Co., 126 Miss. 293, 88 So. 769, 1921 Miss. LEXIS 41 (Miss. 1921).

Conveyance from husband to wife properly set aside where grantor shown to be indebted at time of recordation. McCrory v. Donald, 119 Miss. 256, 80 So. 643, 1918 Miss. LEXIS 31 (Miss. 1919).

A conveyance for value and in good faith by a husband to his wife cannot be avoided by a creditor of the husband whose debt was unsecured at the time. Green & Sons v. Weems, 85 Miss. 566, 38 So. 551, 1904 Miss. LEXIS 196 (Miss. 1904).

4. —Leases.

Verbal lease between husband and wife held void as to creditors of husband. Dorsett v. Breithaupt, 133 Miss. 457, 97 So. 756, 1923 Miss. LEXIS 149 (Miss. 1923).

An agreement whereby a husband sublet a part of his leasehold to his wife is not within the condemnation of this section [Code 1942, § 455]. Underwood v. Ainsworth, 72 Miss. 328, 18 So. 379, 1894 Miss. LEXIS 141 (Miss. 1894).

5. —Gifts.

Although the deed transferring appellee husband's property to his wife was executed prior to the accident out of which appellant judgment creditor's lien arose, the deed was void as to the appellant and the appellant was entitled to subject this property to execution under his judgment where the deed in question was not supported by valuable consideration but was a gift to the wife, and it was not filed for record until after appellant's claim arose. Hudson v. Allen, 313 So. 2d 401, 1975 Miss. LEXIS 1674 (Miss. 1975).

The heirs at law of a decedent are not "third" persons as contemplated by this statute where the surviving widow claims certain personal property as gifts from the decedent. Reedy v. Alexander, 202 Miss. 80, 30 So. 2d 599, 1947 Miss. LEXIS 244 (Miss. 1947).

Gift of chattels by husband to wife need not be in writing; husband's heirs not being "third persons" within statute requiring such transfer to be recorded. Self v. King, 124 Miss. 874, 87 So. 489, 1921 Miss. LEXIS 192 (Miss. 1921).

Gift of necessary wearing apparel and personal ornaments by husband to wife not within this section [Code 1942, § 455]. Kennington v. Hemingway, 101 Miss. 259, 57 So. 809, 1911 Miss. LEXIS 133 (Miss. 1912).

6. —Property purchased with means of other spouse.

Where wife gave to her husband proceeds from the sale of her house and lot for use in his business upon his oral promise that when his business permitted he would build her a home of her choice, but the husband's business did not prosper, and it was not shown that the husband used any of the wife's money in the purchase of the home, the husband did not hold title to the home in trust for the wife. Howell v. General Contract Corp., 229 Miss. 687, 91 So. 2d 831, 1957 Miss. LEXIS 315 (Miss. 1957).

Purchase of automobile by husband for wife with her money held valid as against husband's creditors. Dorsett v. Breithaupt, 133 Miss. 457, 97 So. 756, 1923 Miss. LEXIS 149 (Miss. 1923).

7. —Pending or threatened suit, effect of.

A transfer by a husband to his wife in payment of a just debt due the wife, evidenced by a writing acknowledged and recorded as required by the section [Code 1942, § 455], is not fraudulent because of actions threatening or pending against the husband. Donoghue v. Shull, 85 Miss. 404, 37 So. 817, 1904 Miss. LEXIS 155 (Miss. 1904).

A transfer of property from a husband to his wife, otherwise valid, is not rendered invalid by the fact that suits were threatened or pending against the husband at the time it was made. Donoghue v. Shull, 85 Miss. 404, 37 So. 817, 1904 Miss. LEXIS 155 (Miss. 1904).

8. Consideration.

Conveyance does not violate statute where it was not voluntary conveyance and there was consideration. Barbee v. Pigott, 507 So. 2d 77, 1987 Miss. LEXIS 2475 (Miss. 1987).

Where a husband orally agreed to reconvey property to his wife which she had conveyed to him for the use of the security for the payment of certain notes, this was sufficient consideration to support a conveyance to the wife which was executed and recorded before the creditors of the husband secured a lien on his property. Detrio v. Boylan, 190 F.2d 40, 1951 U.S. App. LEXIS 2375 (5th Cir. Miss. 1951).

Recital of valid consideration in deed held prima facie true, burden of showing falsity of recital of valid consideration is on party attacking deed for fraud on creditors. Virden v. Dwyer, 78 Miss. 763, 30 So. 45, 1901 Miss. LEXIS 153 (Miss. 1901).

9. Persons protected.

Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384, 1933 Miss. LEXIS 390 (Miss. 1933).

The third persons against whom an unrecorded conveyance between husband and wife is void are such as claim an interest in, or right to, the property conveyed through or against the husband or wife, as the case may be, which claim would be valid in event that the conveyance had not been made. Federal Credit Co. v. Scoggins, 158 Miss. 275, 130 So. 153, 1930 Miss. LEXIS 37 (Miss. 1930).

Assignee of unrecorded conditional sale contract between husband and wife and seller's interest held entitled to possession as against third person, unless latter's possession is under superior claim. Federal Credit Co. v. Scoggins, 158 Miss. 275, 130 So. 153, 1930 Miss. LEXIS 37 (Miss. 1930).

Trustee may avoid transfer by bankrupt to his wife before he was adjudged bankrupt, but which was not filed for record until after trustee's appointment. Stockstill v. Brooks, 142 Miss. 691, 107 So. 888, 1926 Miss. LEXIS 130 (Miss. 1926).

Both antecedent and subsequent creditors of wife may attack her verbal transfer of store and stock of goods to husband. McCabe v. Guido, 116 Miss. 858, 77 So. 801, 1917 Miss. LEXIS 363 (Miss. 1917).

Insurance company was not a "third party" within the purview of this section [Code 1942, § 455] and was not prejudiced by fact that deed of wife conveying the property to husband, insured, was unrecorded, such conveyance being operative to invest title in husband within the meaning of the "unconditional and sole ownership" clause of a fire insurance policy. Groce v. Phoenix Ins. Co., 94 Miss. 201, 48 So. 298, 1908 Miss. LEXIS 45 (Miss. 1908).

A transfer of property from a husband to his wife, made with intent to defraud existing creditors, is valid as to his subsequent creditors unless made to defraud them. Donoghue v. Shull, 85 Miss. 404, 37 So. 817, 1904 Miss. LEXIS 155 (Miss. 1904).

10. Evidence.

A husband and wife are not competent witnesses against each other in a suit by a creditor to vacate a conveyance from the husband to the wife. Virden v. Dwyer, 78 Miss. 763, 30 So. 45, 1901 Miss. LEXIS 153 (Miss. 1901).

Neither the transfer nor notice to third parties can be established by parol proof. Montgomery v. Scott, 61 Miss. 409, 1883 Miss. LEXIS 149 (Miss. 1883).

11. Extraterritorial application.

This section [Code 1942, § 455], requiring transfers from the husband to the wife, and from her to him, to be recorded, has no application to property situated out of this state. Davis v. Williams, 73 Miss. 708, 19 So. 352 (Miss. 1896).

Property of the husband that he has removed to another state, and there transferred to the wife by a sale valid under the laws of such state, is not subject to the demands of his creditors on being brought back to the county in this state in which the husband and wife resided at the time of the removal of the property and have continued to reside, although the transfer to the wife has not been recorded in said county as required by this section [Code 1942, § 455]. Davis v. Williams, 73 Miss. 708, 19 So. 352 (Miss. 1896).

This section [Code 1942, § 455] does not affect a transfer by non-residents made out of the state, in case the property is subsequently brought into the state on removal of the parties to the state. Willis v. Memphis Grocery Co., 19 So. 101 (Miss. 1896).

A statute of Alabama, under which an unrecorded transfer between husband and wife, though good as between the parties, is void as to creditors and purchasers, cannot have any operation as to transactions made after the removal of the parties and property to this state. Walker v. Marseilles, 70 Miss. 283, 12 So. 211, 1892 Miss. LEXIS 108 (Miss. 1892).

12. Actions.

Tenant's wife who showed deed of sale to her reciting valid consideration for tenant's trucks attached by landlord made prima facie case, and landlord had burden to establish fraud or other defense. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384, 1933 Miss. LEXIS 390 (Miss. 1933).

In action by tenant's wife to replevy trucks which were attached by landlord as tenant's, whether wife was entitled to replevy held for jury. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384, 1933 Miss. LEXIS 390 (Miss. 1933).

A husband and wife are not competent witnesses against each other in a suit by a creditor of the husband to vacate a conveyance from the husband to the wife. Virden v. Dwyer, 78 Miss. 763, 30 So. 45, 1901 Miss. LEXIS 153 (Miss. 1901).

RESEARCH REFERENCES

CJS.

41 C.J.S., Husband and Wife §§ 371–373 et seq.

§ 93-3-11. Removal of disabilities of minority of certain married persons with respect to homestead transactions; presumption of occupancy.

The disabilities of minority of any married minor having attained the age of eighteen (18) are hereby removed solely for the purpose of executing, signing, or acknowledging contracts of purchase or sale, deeds, promissory notes, deeds of trust or mortgages, other negotiable or nonnegotiable instruments, assignments, or other transfers, homestead declarations, or homestead exemption applications, or other legal documents pertaining solely to the property occupied or to be occupied as the actual place of residence of such married minors. To assure validity and enforceability according to their terms of any legal documents executed by such married minors pursuant to this section, occupancy of, or intention to occupy, property as the place of residence of such married minors shall be conclusively presumed from the execution by them of such documents. The removal of disabilities provided under this section shall be supplemental and cumulative of other laws, but shall not be construed so as to apply to any transaction other than transactions pertaining to the residences or intended residences of such minors.

HISTORY:

Codes, 1942, § 455.5; Laws, 1962, ch. 277, § 1; Laws, 1968, ch. 305, § 1, eff from and after passage (approved August 7, 1968).

Cross References —

Definition of term "minor," see § 1-3-27.

Homestead exemption generally, see § 85-3-21 et seq.

§ 93-3-13. Liability of husband for property or income of wife.

If the husband receive and appropriate to his own use the property of his wife, or the income and profit of her property, he shall be debtor to his wife therefor; but neither he nor his representatives shall be accountable to his wife for the income or profits of her estate, after the expiration of one year from the receipt of such income or profits. If the husband be permitted by the wife to employ the income or profits of her estate, or to use her estate in the support and maintenance of the family, he shall not be chargeable therewith nor be liable to account therefor.

HISTORY:

Codes, 1880, § 1176; 1892, § 2292; 1906, § 2520; Hemingway's 1917, § 2054; 1930, § 1945; 1942, § 456.

JUDICIAL DECISIONS

1. In general.

The statute of limitations provided by this section [Code 1942, § 456] was inapplicable to a divorced wife's action against her former husband for an accounting on the partition of property, where under the allegations of the amended bill and the wife's evidence, which the court adopted, the husband did not appropriate to his own use the property of his wife or the income thereof, but the co-tenancy land was jointly operated by the parties and revenues arrived at from it was jointly applied to the discharge of the joint obligations. Horton v. Boatright, 231 Miss. 666, 97 So. 2d 637, 1957 Miss. LEXIS 553 (Miss. 1957).

The limitation of one year after receipt against proceedings to hold a husband or his representative accountable to his wife for the income or profits of her estate under this section [Code 1942, § 456], has no application to a proceeding by a widow to recover money in bank, being such income and profits deposited by her deceased husband in his own name, her purpose being the recovery of her own money and not the establishment of a claim against her husband's estate. Hendricks v. Peavy, 78 Miss. 316, 28 So. 944, 1900 Miss. LEXIS 121 (Miss. 1900).

Where a husband, having conveyed land to a trustee to hold in trust for his wife, afterwards, under alleged authority from the trustee, makes an unauthorized sale thereof, the fact that he applied part of the purchase money to discharge an encumbrance on the property made by the wife, will not estop her to recover the land. Edwards v. Hillier, 70 Miss. 803, 13 So. 692, 1893 Miss. LEXIS 63 (Miss. 1893).

Where, after the death of his wife, the husband sells the land of which she died seized, the heirs joining in the conveyance, with the agreement that they are to receive the purchase money, which, however, he appropriates, he is answerable to them for the same, regardless of any express promise to pay. Martin v. Tillman, 70 Miss. 614, 13 So. 251, 1910 Miss. LEXIS 2 (Miss. 1893).

RESEARCH REFERENCES

ALR.

Copyright, patent, or other intellectual property as marital property for purposes of alimony, support, or divorce settlement. 80 A.L.R.5th 487.

Am. Jur.

41 Am. Jur. 2d, Husband and Wife § 15 et seq.

17 Am. Jur. Proof of Facts 2d 191, Status as "Innocent Spouse" Under the Internal Revenue Code.

CJS.

41 C.J.S., Husband and Wife § 13 et seq.

CHAPTER 5.

DIVORCE AND ALIMONY

Sec.
93-5-1. Causes for divorce.
93-5-2. Divorce on ground of irreconcilable differences.
93-5-3. Not mandatory to deny divorce because of recrimination.
93-5-4. Offended spouse's failure to leave marital domicile or separate from offending spouse no impediment to divorce.
93-5-5. Residence requirements for divorce.
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93-5-33. Statistical requirements.
93-5-34. Child custody and visitation when a parent receives temporary duty, deployment or mobilization orders from the military.

§ 93-5-1. Causes for divorce.

Divorces from the bonds of matrimony may be decreed to the injured party for any one or more of the following twelve (12) causes:

First. Natural impotency.

Second. Adultery, unless it should appear that it was committed by collusion of the parties for the purpose of procuring a divorce, or unless the parties cohabited after a knowledge by complainant of the adultery.

Third. Being sentenced to any penitentiary, and not pardoned before being sent there.

Fourth. Willful, continued and obstinate desertion for the space of one (1) year.

Fifth. Habitual drunkenness.

Sixth. Habitual and excessive use of opium, morphine or other like drug.

Seventh. Habitual cruel and inhuman treatment, including spousal domestic abuse.

Spousal domestic abuse may be established through the reliable testimony of a single credible witness, who may be the injured party, and includes, but is not limited to:

That the injured party's spouse attempted to cause, or purposely, knowingly or recklessly caused bodily injury to the injured party, or that the injured party's spouse attempted by physical menace to put the injured party in fear of imminent serious bodily harm; or

That the injured party's spouse engaged in a pattern of behavior against the injured party of threats or intimidation, emotional or verbal abuse, forced isolation, sexual extortion or sexual abuse, or stalking or aggravated stalking as defined in Section 97-3-107, if the pattern of behavior rises above the level of unkindness or rudeness or incompatibility or want of affection.

Eighth. Having mental illness or an intellectual disability at the time of marriage, if the party complaining did not know of that infirmity.

Ninth. Marriage to some other person at the time of the pretended marriage between the parties.

Tenth. Pregnancy of the wife by another person at the time of the marriage, if the husband did not know of the pregnancy.

Eleventh. Either party may have a divorce if they are related to each other within the degrees of kindred between whom marriage is prohibited by law.

Twelfth. Incurable mental illness. However, no divorce shall be granted upon this ground unless the party with mental illness has been under regular treatment for mental illness and causes thereof, confined in an institution for persons with mental illness for a period of at least three (3) years immediately preceding the commencement of the action. However, transfer of a party with mental illness to his or her home for treatment or a trial visit on prescription or recommendation of a licensed physician, which treatment or trial visit proves unsuccessful after a bona fide effort by the complaining party to effect a cure, upon the reconfinement of the party with mental illness in an institution for persons with mental illness, shall be regular treatment for mental illness and causes thereof, and the period of time so consumed in seeking to effect a cure or while on a trial visit home shall be added to the period of actual confinement in an institution for persons with mental illness in computing the required period of three (3) years confinement immediately preceding the beginning of the action. No divorce shall be granted because of mental illness until after a thorough examination of the person with mental illness by two (2) physicians who are recognized authorities on mental diseases. One (1) of those physicians shall be either the superintendent of a state psychiatric hospital or institution or a veterans hospital for persons with mental illness in which the patient is confined, or a member of the medical staff of that hospital or institution who has had the patient in charge. Before incurable mental illness can be successfully proven as a ground for divorce, it shall be necessary that both of those physicians make affidavit that the patient is a person with mental illness at the time of the examination, and both affidavits shall be made a part of the permanent record of the divorce proceedings and shall create the prima facie presumption of incurable mental illness, such as would justify a divorce based on that ground. Service of process shall be made on the superintendent of the hospital or institution in which the defendant is a patient. If the patient is in a hospital or institution outside the state, process shall be served by publication, as in other cases of service by publication, together with the sending of a copy by registered mail to the superintendent of the hospital or institution. In addition, process shall be served upon the next blood relative and guardian, if any. If there is no legal guardian, the court shall appoint a guardian ad litem to represent the interest of the person with mental illness. The relative or guardian and superintendent of the hospital or institution shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of the person with mental illness shall not be altered in any way by the granting of the divorce.

However, in the discretion of the chancery court, and in those cases as the court may deem it necessary and proper, before any such decree is granted on the ground of incurable mental illness, the complainant, when ordered by the court, shall enter into bond, to be approved by the court, in such an amount as the court may think just and proper, conditioned for the care and keeping of the person with mental illness during the remainder of his or her natural life, unless the person with mental illness has a sufficient estate in his or her own right for that purpose.

HISTORY:

Codes, Hutchinson's 1848, ch. 34, art. 2 (3, 4, 6), art. 6 (1); 1857, ch. 40, arts. 11, 12, 13, 15; 1871, §§ 1767, 1768, 1770; 1880, §§ 1155, 1156, 1157; 1892, § 1562; 1906, § 1669; Hemingway's 1917, § 1411; 1930, § 1414; 1942, § 2735; Laws, 1932, ch. 275; Laws, 1938, ch. 264; Laws, 1956, ch. 248; Laws, 2008, ch. 442, § 25; Laws, 2010, ch. 476, § 79; Laws, 2017, ch. 427, § 6, eff from and after July 1, 2017.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in the eighth sentence of the Twelfth clause. The word "an" preceding "hospital or institution" was changed to "a" so that "If the patient is in an hospital or institution" reads "If the patient is in a hospital or institution." The Joint Committee ratified the correction at its August 5, 2008, meeting.

Amendment Notes —

The 2017 amendment, in the Seventh cause, added "including spousal domestic abuse" at the end of the first paragraph, and added the second through fourth paragraphs.

Cross References —

Prohibition against legislature passing local, private or special laws in matter of divorce, see Miss. Const. § 90.

Divorce on grounds of irreconcilable differences, see § 93-5-2.

Failure of offended spouse to leave marital domicile or separate from offending spouse as no impediment to divorce, see § 93-5-4.

Annulment of marriage, see § 93-7-1 et seq.

Criminal offense of desertion and nonsupport of children under age of 16 years, see § 97-5-3.

Criminal offenses of adultery and fornication generally, see § 97-29-1 et seq.

Criminal offense of incestuous marriage between kindred, see § 97-29-27.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

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1. In general.

In a no-fault divorce, the record showed that the line of questioning at issue (primarily cross-examination of the husband), was not intended to establish that he had abandoned the wife by his leaving the marital home before the marriage, but was for the purpose of establishing time lines and the financial contributions of the parties. The questioning was also to determine how the payments of the wife's vehicle were being made, not to establish fault; there was no indication that the husband's having left the marital home was the driving factor in establishing the alimony award to the wife, and in any event, the fact that both spouses agreed to a divorce did not eliminate the consideration of the fault factor. Patterson v. Patterson, 917 So. 2d 111, 2005 Miss. App. LEXIS 432 (Miss. Ct. App.), cert. denied, 921 So. 2d 1279, 2005 Miss. LEXIS 812 (Miss. 2005).

A chancellor erred in granting a divorce where the chancellor concluded that the parties had not proved any grounds for divorce but they were not going to be able to live together, since a chancellor does not have the authority to grant a divorce unless the facts and the law warrant it. Lewis v. Lewis, 602 So. 2d 881, 1992 Miss. LEXIS 401 (Miss. 1992).

The fact that a divorced plaintiff continued to live under the same roof with the defendant after filing the complaint is a heavy factor to be weighed in considering whether he or she has a valid cause, though it does not in and of itself compel a denial of divorce; it is conceivably possible for valid grounds for divorce to exist despite this. Lawyers representing persons seeking a divorce have the obligation to advise and warn them about the undesirability of continuing to live in the same household following the filing of the suit, and they have the obligation to seek and press for a temporary hearing before the chancellor to secure alimony pendente lite and temporary support money. Jethrow v. Jethrow, 571 So. 2d 270, 1990 Miss. LEXIS 700 (Miss. 1990).

The problem with § 93-5-2 is that it requires all financial matters incident to the divorce to be resolved by voluntary agreement. Section 93-5-2 blithely proceeds on the premise that parties having irreconcilable differences regarding their marriage will somehow be able to reconcile their differences on financial matters. What is needed is a simple amendment to § 93-5-1 providing for a thirteenth ground for divorce: irreconcilable differences. That ground for divorce should be subject to proof as any other. The defendant's denial should have no more effect than his or her denial in the case of any of the other 12 grounds for divorce. That one spouse out of blindness, obstinance or nostalgia refuses to recognize it hardly means that a marriage may not in fact be irretrievably broken. Most important, the defending spouse's refusal to agree on financial matters would be no bar to the granting of a divorce because of irreconcilable differences. Wilson v. Wilson, 547 So. 2d 803, 1989 Miss. LEXIS 368 (Miss. 1989).

There was no reversible error in the granting of a divorce on the grounds of habitual cruel and inhuman treatment rather than adultery, even though the court could just as easily have found grounds for divorce based on adultery as it did for habitual cruel and inhuman treatment, since any error was cured by the granting of the divorce. Robinson v. Irwin, 546 So. 2d 683, 1989 Miss. LEXIS 321 (Miss. 1989).

The chancery court acted beyond its statutory authority in awarding divorce on ground of irreconcilable differences where there was no written agreement of the parties regarding property rights, and husband had filed cross-complaint against wife whose complaint sought a divorce on grounds of adultery, habitual cruel and inhuman treatment, and, in the alternative, irreconcilable differences. Alexander v. Alexander, 493 So. 2d 978, 1986 Miss. LEXIS 2636 (Miss. 1986).

If chancellor finds that husband in divorce proceeding, or agents on husband's behalf, have intimidated witnesses of wife, chancellor should impose doctrine of clean hands to deny husband relief from chancery court, and wife should not be penalized for inability to provide corroborating witnesses in face of intimidation. Shelton v. Shelton, 477 So. 2d 1357, 1985 Miss. LEXIS 2279 (Miss. 1985).

The statute does not make mandatory the awarding of alimony. Anderson v. Anderson, 249 Miss. 1, 162 So. 2d 853, 1964 Miss. LEXIS 368 (Miss. 1964).

One who marries a woman believing himself to be the cause of her pregnancy may not obtain a divorce on learning it to have been caused by another. Burdine v. Burdine, 236 Miss. 886, 112 So. 2d 522, 1959 Miss. LEXIS 387 (Miss. 1959).

Affidavits to bill for divorce, "that the causes for divorce stated in said bill are true as stated," did not cover allegation in the bill as to the defendant's non-residence and post-office address, since nonresidence is not a ground for divorce, and consequently there was no affidavit on which publication for the defendant could have been made. Evans v. Brown, 198 Miss. 237, 21 So. 2d 588, 1945 Miss. LEXIS 189 (Miss. 1945).

Decree in separate maintenance suit is conclusive, as res judicata, in a subsequent divorce suit so far as concerns any issue which was litigated between the parties in the separate maintenance suit; and, if the issue were decided in favor of the wife, it bars the husband in a subsequent divorce suit brought by him predicated on facts which were in existence at the time of the maintenance decree and which were put in issue and decided in favor of the wife. Wilson v. Wilson, 198 Miss. 334, 22 So. 2d 161, 1945 Miss. LEXIS 202 (Miss.), modified, 198 Miss. 334, 23 So. 2d 303, 1945 Miss. LEXIS 203 (Miss. 1945); Van Norman v. Van Norman, 205 Miss. 114, 38 So. 2d 452, 1949 Miss. LEXIS 416 (Miss. 1949).

There is no legal duty upon wife to live with husband who persists in causes for divorce, such as habitual drunkenness and cruel and inhuman treatment. Hemphill v. Hemphill, 197 Miss. 783, 20 So. 2d 79, 1944 Miss. LEXIS 328 (Miss. 1944).

This section [Code 1942, § 2735] in providing for divorce on ground of insanity is in derogation of common law, and should be strictly construed. Parkinson v. Mills, 172 Miss. 784, 159 So. 651, 1935 Miss. LEXIS 128 (Miss. 1935).

Divorce not granted for acts during insanity. Walker v. Walker, 140 Miss. 340, 105 So. 753, 1925 Miss. LEXIS 267 (Miss. 1925), overruled, Davis v. Davis, 194 Miss. 343, 12 So. 2d 435, 1943 Miss. LEXIS 75 (Miss. 1943).

Acts need not be malicious to constitute ground for divorce. McNeill v. McNeill, 125 Miss. 277, 87 So. 645, 1921 Miss. LEXIS 118 (Miss. 1921).

This statute must be strictly complied with. Humber v. Humber, 109 Miss. 216, 68 So. 161, 1915 Miss. LEXIS 137 (Miss. 1915).

2. Impotency.

Van Norman v. Van Norman, 205 Miss. 114, 38 So. 2d 452, 1949 Miss. LEXIS 416 (Miss. 1949).

Evidence held not to support husband's allegations of wife's natural impotency as ground for divorce. Sarphie v. Sarphie, 180 Miss. 313, 177 So. 358, 1937 Miss. LEXIS 118 (Miss. 1937).

3. Adultery.

In a divorce action, a chancellor was well within her discretion in granting a divorce to a wife on the grounds of adultery, although the husband asserted that the wife also had adulterous affairs of her own, where there was abundant evidence of the husband's adultery and where the husband failed to prove that the wife committed adultery prior to the parties' separation. Dickerson v. Dickerson, 34 So. 3d 637, 2010 Miss. App. LEXIS 202 (Miss. Ct. App. 2010).

Divorce on the ground of adultery was properly granted because a tape recorded conversation between the husband and wife wherein the husband admitted to having engaged in two adulterous relationships was sufficient to support the chancellor's finding that the wife proved adultery by clear and convincing evidence. Rodriguez v. Rodriguez, 2 So. 3d 720, 2009 Miss. App. LEXIS 25 (Miss. Ct. App. 2009).

Where a wife presented evidence that, inter alia, the husband and the husband's secretary spent an excessive amount of time together, the husband let the secretary drive company vehicles, and the secretary began staying at the husband's house shortly after the secretary left her own husband, it was not error to grant a divorce to the wife on the ground of uncondoned adultery by the husband, because the facts were sufficient to establish that the husband had an infatuation with the secretary sufficient to be an adulterous inclination and there was sufficient testimony that they had opportunities to consummate that inclination. Lister v. Lister, 981 So. 2d 340, 2008 Miss. App. LEXIS 288 (Miss. Ct. App. 2008).

There was testimony that the husband and his female friend lived in the same apartment complex and that they spent a substantial amount of time together, and there was testimony that the girlfriend allegedly left the husband's apartment in her robe, and that their vehicles were often parked side by side over night, though the identity of the girlfriend's vehicle was controverted. The record also showed the chancellor focused on the lunches shared by the husband and his female friend, in which they would meet at the park, feed the ducks, and eat peanut butter and jelly sandwiches while discussing life's problems; needless to say, the appellate court held the evidence presented did not rise above mere suspicion of adultery, and the chancellor's grant of a divorce on said ground (where the parties had refused to agree to an irreconcilable differences divorce), and on the ground of habitual, cruel and inhuman treatment, where the record showed only repeated arguments between the couple, was reversed. Spence v. Spence, 930 So. 2d 415, 2005 Miss. App. LEXIS 547 (Miss. Ct. App. 2005).

In a divorce case, while the chancellor failed to make specific findings of fact, there was sufficient evidence in the record, beginning with the wife's admission of at least one act of extramarital intercourse, to support the grant of a divorce on the ground of adultery. In addition to the wife's admission, the husband testified that the wife's brother told him about the extramarital affair between his sister and another man, and the wife's ex-sister-in-law testified that the wife and the other man had a relationship during the time the parties were living together. McClelland v. McClelland, 879 So. 2d 1096, 2004 Miss. App. LEXIS 760 (Miss. Ct. App. 2004).

Where a husband admitted committing adultery, his wife was entitled to a divorce on the grounds of uncondoned adultery; that the husband's adultery did not cause the wife to file for divorce was immaterial. Davis v. Davis, 832 So. 2d 492, 2002 Miss. LEXIS 390 (Miss. 2002).

The wife's own adultery did not prevent her from obtaining a divorce from the husband on the basis of his adultery where she testified that she did not meet her subsequent lover until after she and her husband had separated, that her "marriage was over," and that her subsequent lover did nothing to contribute to the breakup of her marriage. Harmon v. Harmon, 757 So. 2d 305, 1999 Miss. App. LEXIS 677 (Miss. Ct. App. 1999).

Adultery need not be causally related to the final separation of the parties to be a valid basis for granting a divorce. Talbert v. Talbert, 759 So. 2d 1105, 1999 Miss. LEXIS 240 (Miss. 1999).

Evidence sustained a finding of adultery where (1) two witnesses testified to seeing the husband with a woman on various occasions, (2) a witness took photographs and video of the husband's vehicle parked at the woman's home overnight on two occasions, and (3) the husband admitted staying overnight with the woman but denied having sexual intercourse with her and maintained that they only talked about his marital problems. Reynolds v. Reynolds, 755 So. 2d 467, 1999 Miss. App. LEXIS 79 (Miss. Ct. App. 1999).

Where allegations of adultery are raised as grounds for divorce, chancellor is required to make findings of fact. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

Adultery may be grounds for divorce based either on infatuation for particular person of the opposite sex or on spouse's generally adulterous nature. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

There must be evidence of spouse's infatuation with another or of spouse's generally adulterous nature before divorce may be granted on grounds of adultery. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

Spouse seeking divorce on grounds of adultery must show, by clear and convincing evidence, both an adulterous inclination and a reasonable opportunity to satisfy that inclination. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

Circumstantial evidence may be used to prove adultery, and, in light of secretive nature of adultery, spouse seeking divorce on those grounds need not present direct testimony as to the events at issue; nevertheless, the evidence must be logical, must tend to prove the facts charged, and must be inconsistent with a reasonable theory of innocence. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

Adultery may be shown either by evidence or by admissions. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

Divorce based on adultery was supported by evidence that husband telephoned "close friend," that friend had stayed in husband's travel trailer and kept her things there, that husband had stayed in friend's home, that friend had addressed husband as her husband-to-be, that husband and friend had walked around a car show arm-in-arm, and that husband admitted that he and friend had kissed, hugged and danced, that he cared about her, and that marriage had been discussed. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

The evidence was sufficient to provide clear and convincing proof of a husband's adultery where he gave another woman numerous gifts, he admitted to sexual activity after leaving the wife, and he admitted that he loved the other woman, slept with her, lived with her, and kissed and embraced her, even though he maintained that his relationship with the woman was only one of friendship and that he was incapable of sexual intercourse because he was impotent. Brooks v. Brooks, 652 So. 2d 1113, 1995 Miss. LEXIS 152 (Miss. 1995).

The evidence was insufficient to support the granting of a divorce on the ground of the wife's adultery since the proof did not rise above mere suspicion of adultery where the evidence consisted primarily of photographs of the wife and her alleged paramour which were not inconsistent with a reasonable theory of innocence. McAdory v. McAdory, 608 So. 2d 695, 1992 Miss. LEXIS 600 (Miss. 1992).

A wife did not condone her husband's adultery as a matter of law by continuing to live in the same house with him and sleep in the same bed while waiting for a second indiscretion as proof of adultery after the initial indiscretion, which was not conclusive. Cheatham v. Cheatham, 537 So. 2d 435, 1988 Miss. LEXIS 627 (Miss. 1988).

Chancellor was not manifestly wrong in granting divorce to husband on ground of adultery, which may be shown by either evidence or admissions, either of which is sufficient to support decree of divorce, where evidence showed wife had sexual intercourse with another man and her acts of adultery were uncondoned. Jordan v. Jordan, 510 So. 2d 131, 1987 Miss. LEXIS 2628 (Miss. 1987).

Filing of second complaint by husband, grounded on wife's adultery, which was inconsistent with first complaint based upon irreconcilable differences, constituted an effective withdrawal from and objection to the first complaint and, since wife had adequate notice, chancellor could grant divorce and custody of minor child to husband on second complaint, notwithstanding the parties' earlier execution of child custody, child support, and property settlement agreements. McCleave v. McCleave, 491 So. 2d 522, 1986 Miss. LEXIS 2517 (Miss. 1986).

A wife's constant association with a man other than her husband, her acceptance of valuable gifts from him, and her statement that she intended to marry this man if she could obtain a divorce from her husband and he from his wife, was sufficient when considered with other evidence to sustain a charge of adultery. Hodge v. Hodge, 186 So. 2d 748, 1966 Miss. LEXIS 1326 (Miss. 1966).

Adultery on part of husband as ground of divorce is one involving moral turpitude and proof must be clear and convincing. McCraney v. McCraney, 208 Miss. 105, 43 So. 2d 872, 1950 Miss. LEXIS 232 (Miss. 1950).

Where decree, in action by husband against wife first charging habitual cruel and inhuman treatment and later amended to charge adultery, failed to state the grounds upon which it was rendered, the supreme court would sustain the decree on the ground of adultery, where the evidence amply supported such charge. Winfield v. Winfield, 203 Miss. 391, 35 So. 2d 443, 1948 Miss. LEXIS 285 (Miss. 1948).

The fact of adultery may be shown by proof or by admissions, the latter being sufficiently of record where a husband refused to answer a direct question whether it was true that he cohabited with a named co-respondent and his counsel stated that the allegation of adultery in the cross bill was not disputed. Oberlin v. Oberlin, 201 Miss. 228, 29 So. 2d 82, 1947 Miss. LEXIS 389 (Miss. 1947).

4. —Evidence.

A chancellor erroneously evaluated the evidence of a husband's alleged adultery under an incorrect quantum of proof where he found proof of adultery by a "preponderance of the evidence," rather than the higher quantum of evidence, "clear and convincing evidence," which is required to prove adultery. Brooks v. Brooks, 652 So. 2d 1113, 1995 Miss. LEXIS 152 (Miss. 1995).

A chancellor did not err in denying a wife a divorce on the ground of adultery where the only evidence of the husband's alleged "generally adulterous nature" was the wife's testimony that he frequently cheated on her. Lewis v. Lewis, 602 So. 2d 881, 1992 Miss. LEXIS 401 (Miss. 1992).

Chancellor was not manifestly wrong in granting divorce to husband on ground of adultery, which may be shown by either evidence or admissions, either of which is sufficient to support decree of divorce, where evidence showed wife had sexual intercourse with another man and her acts of adultery were uncondoned. Jordan v. Jordan, 510 So. 2d 131, 1987 Miss. LEXIS 2628 (Miss. 1987).

Where one spouse relies on circumstantial evidence as proof for allegations of adulterous activity on the part of the other spouse, he or she retains the burden of presenting satisfactory evidence sufficient to lead the trier of fact to the conclusion of guilt, but such evidence need not prove the alleged acts beyond a reasonable doubt. Dillon v. Dillon, 498 So. 2d 328, 1986 Miss. LEXIS 2749 (Miss. 1986).

Wife was entitled to a divorce on grounds of habitual cruel and inhuman treatment where wife testified that husband had hit her 15 or 20 times during course of their marriage, had cursed her on several occasions, had frequently questioned her fidelity to him, and had occasionally stayed out overnight, and wife's testimony was supported in most important aspects by the testimony of the daughter and the son of the parties, where nothing in the record would substantiate a finding that the testimony of wife, son and daughter was incredible and unbelievable. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Husband's testimony, excluding that pertaining to alleged adultery, would not support a divorce on grounds of habitual cruel and inhuman treatment, where he testified that wife had cursed him on several occasions, that their sex life had decreased in frequency, that wife had been cold toward him since their reconciliation, and that he was suspicious of wife's relation with another man. Moreover, with respect to the alleged adultery, since the alleged act occurred in the interim between an earlier divorce decree and the revocation of that decree, the wife was then a single woman and could not have committed adultery against her marital status with husband. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Where the husband's evidence as to wife's improper relationship with another man was sufficient to sustain the relief granted while, although she denied the existence of the circumstances complained about, the wife's frank admissions were strong against her, the supreme court could not declare that the chancellor's decree awarding the husband a divorce was manifestly wrong. Williams v. Williams, 250 Miss. 223, 164 So. 2d 898, 1964 Miss. LEXIS 457 (Miss. 1964).

Refusal to admit evidence of events occurring prior to wife's previous suit which was dismissed following reconciliation and which was brought two years prior to the present action by the husband for divorce was not prejudicial even if erroneously rejected, since its probative value was not sufficient to support the cross bill or to effectively challenge the evidence supporting the original bill. Rogers v. Rogers, 39 So. 2d 778 (Miss. 1949).

In guardian's suit to annul ward's marriage on ground of insanity, that witnesses at time of marriage observed nothing abnormal in ward held of but little weight, where evidence established that ward was then incurably insane. Parkinson v. Mills, 172 Miss. 784, 159 So. 651, 1935 Miss. LEXIS 128 (Miss. 1935).

In guardian's suit to annul marriage of ward on ground of insanity, evidence supported finding that defendant married ward with knowledge that he was inmate of institution for treatment of insane persons, and that ward was mentally incompetent of assuming marital relation. Parkinson v. Mills, 172 Miss. 784, 159 So. 651, 1935 Miss. LEXIS 128 (Miss. 1935).

Circumstances, introduced in support of the defense of adultery, must be proved with reasonable certainty, and such conclusion must follow logically from the facts. Banks v. Banks, 118 Miss. 783, 79 So. 841, 1918 Miss. LEXIS 115 (Miss. 1918).

5. Spouse sentenced to penitentiary.

This section [Code 1942, § 2735], authorizing granting of divorce in case offending party had been sentenced to the penitentiary refers only to penitentiary of State of Mississippi, and husband's sentence to federal penitentiary in another state did not entitle wife to divorce. Daughdrill v. Daughdrill, 180 Miss. 589, 178 So. 106, 1938 Miss. LEXIS 22 (Miss. 1938).

6. Desertion.

If the desertion occurred, the year period would have ceased a year after the husband left the marital home, and although the wife testified that she asked the husband to resume the marriage, the husband testified otherwise and the chancellor found the husband more credible; substantial evidence supported the chancellor's decision to deny the wife's petition for divorce on the grounds of desertion. Brown v. Brown, 142 So. 3d 425, 2013 Miss. App. LEXIS 820 (Miss. Ct. App. 2013), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 335 (Miss. 2014).

Chancellor did not err in granting a wife a divorce on the ground of desertion because (1) the chancellor determined that the husband offered no testimony to contradict the wife's assertion that the husband left the marital home and failed to return or resume any marital duties; and (2) the husband offered no proof that his failure to return to the home was the wife's fault. Gardner v. Gardner, 130 So. 3d 1162, 2013 Miss. App. LEXIS 624 (Miss. Ct. App. 2013).

Judgment dismissing the wife's divorce action for failing to meet the burden of proof was affirmed because the wife's uncorroborated testimony was insufficient to convince the chancellor that the husband's conduct made the marriage unendurable, or dangerous to life, health or safety. Hoskins v. Hoskins, 21 So. 3d 705, 2009 Miss. App. LEXIS 769 (Miss. Ct. App. 2009).

A bill for divorce, charging in the language of the statute, that the wife was guilty of wilful, continuous and obstinate desertion of the husband for the space of more than one year, sufficiently stated a charge of desertion. Thrasher v. Thrasher, 229 Miss. 536, 91 So. 2d 543, 1956 Miss. LEXIS 637 (Miss. 1956).

7. —Particular circumstances as constituting.

A conditional effort at reconciliation on the part of a husband and its refusal by the wife is not sufficient to make her separation the equivalent of desertion. Criswell v. Criswell, 254 Miss. 746, 182 So. 2d 587, 1966 Miss. LEXIS 1573 (Miss. 1966).

Where, under conflicting evidence, it appeared that the wife had left her husband's home in California under the guise of returning to the state to see a sick sister taking with her money which the parties had saved and borrowed to buy a home, and for three years the husband had provided the wife with funds for the support of the children, and that at no time did the wife say anything about returning to the husband although he would have received her back prior to the time of filing suit, and it was undisputed that the wife had been in the state for almost five years, the chancellor was justified in awarding husband a divorce on the ground of the wife's wilful, continued, and obstinate desertion of her husband for more than 12 months, and in concluding that the wife was a bona fide resident of the state. Carter v. Carter, 231 Miss. 662, 97 So. 2d 529, 1957 Miss. LEXIS 552 (Miss. 1957).

Where, in wife's earlier action for divorce, the court had found that the husband was not guilty of habitual cruel and inhuman treatment, but that the wife had wilfully deserted the husband without lawful cause, and on the afternoon of the day of the trial the wife sent the sheriff to see the husband with the message that she and her 17-year-old son by a former marriage would be back home the next day, and the husband told the sheriff that he would talk to his lawyer about the son returning, and on the next day the husband left town for a vacation, and while he was away the wife went to this home twice, each time finding no one there, but thereafter made no effort to communicate with the husband in any manner, and subsequently left the community, the chancellor, in husband's action for divorce upon the ground of desertion, was justified in finding that no good faith offer of reconciliation had been made by the wife and whether made in good faith or otherwise, the husband had not rejected it. Thrasher v. Thrasher, 229 Miss. 536, 91 So. 2d 543, 1956 Miss. LEXIS 637 (Miss. 1956).

8. —Constructive desertion.

Record contained substantial, credible evidence which supported the trial court's finding that the course of conduct by the wife amounted to constructive desertion. Deen v. Deen, 856 So. 2d 736, 2003 Miss. App. LEXIS 937 (Miss. Ct. App. 2003).

In deciding whether to award a divorce to a husband on the ground of constructive desertion, the chancellor should have determined whether the husband sufficiently demonstrated that the wife's conduct reasonably rendered the continuation of their marriage unendurable to the point that he was forced to leave and seek peace and safety elsewhere, and therefore the chancellor erred in denying a divorce on the ground of constructive desertion on the basis that the evidence was insufficient to show that the husband was "in fear of life, health, safety, or limb." Benson v. Benson, 608 So. 2d 709, 1992 Miss. LEXIS 687 (Miss. 1992).

A husband's charge of desertion in a divorce complaint, which stated that the wife had been guilty of willful, continued, and constructive desertion for the past 12 years, having abandoned all marital relations with the husband without his consent, without just cause or excuse and without the intention of returning to the husband, was sufficiently stated in the language of the statute to set out a ground for divorce with respect to desertion. Handshoe v. Handshoe, 560 So. 2d 182, 1990 Miss. LEXIS 199 (Miss. 1990).

The doctrine of constructive desertion is recognized in Mississippi. Day v. Day, 501 So. 2d 353, 1987 Miss. LEXIS 2260 (Miss. 1987).

In an action for divorce on grounds of constructive desertion, where the parties have been living apart under a separate maintenance decree granted to one of the parties, the plaintiff can show that, since the judgment for separate maintenance in favor of the defendant, the conditions have changed and the plaintiff has made efforts of reconciliation with the defendant with no avail, and hence the defendant is now a deserter and plaintiff is entitled to a divorce for desertion. Day v. Day, 501 So. 2d 353, 1987 Miss. LEXIS 2260 (Miss. 1987).

Constructive desertion is a ground for divorce in this state but the doctrine will not be applied except in extreme cases. Griffin v. Griffin, 207 Miss. 500, 42 So. 2d 720, 1949 Miss. LEXIS 358 (Miss. 1949).

Constructive desertion as ground for divorce arises where either spouse by reason of misconduct or cruelty drives the other away, in which case the former, and not the latter, is the deserter or is guilty of desertion. Griffin v. Griffin, 207 Miss. 500, 42 So. 2d 720, 1949 Miss. LEXIS 358 (Miss. 1949).

Where husband refused or failed to work, was indigent and improvident without cause, so that family was without sufficient food or shelter and was forced to live largely off the neighbors, and the wife left the husband to earn her own living, husband, and not wife, was guilty of desertion under the circumstances. Griffin v. Griffin, 207 Miss. 500, 42 So. 2d 720, 1949 Miss. LEXIS 358 (Miss. 1949).

9. Addiction, substance abuse.

Chancellor did not err in dismissing the husband's complaint for a divorce on the ground of habitual and excessive drug use as the record did not compel a finding that the wife's use of prescription drugs was excessive in light of her serious health issues or that she misused the prescription drugs because the husband's proof showed that the medication had been prescribed by a doctor for the wife's very legitimate health problems; neither the pharmacy and medical records nor the testimony established that the wife had been diagnosed with an addiction to prescription pain medications or indicated that the wife's drug use was excessive; and the evidence did not indicate that the wife was over-prescribed pain medication. Booker v. Booker, 205 So. 3d 1122, 2016 Miss. App. LEXIS 123 (Miss. Ct. App. 2016), cert. denied, 207 So. 3d 1238, 2017 Miss. LEXIS 7 (Miss. 2017).

Finding against the husband in his divorce action alleging habitual cruel and inhuman treatment and habitual and excessive use of opium, morphine, or other like drug, was inappropriate regardless of whether the affirmative defense of condonation was available to the wife because condonation of the wife's drug use by sexual intercourse between the parties was conditioned on her ceasing to abuse drugs. The wife's subsequent overdosing evidenced an intent not to abide by such condition. Ashburn v. Ashburn, 970 So. 2d 204, 2007 Miss. App. LEXIS 799 (Miss. Ct. App. 2007).

Chancery court's determination that the wife's drug abuse undermined and negatively impacted the marital relationship and was a proper ground for divorce enjoyed substantial support in the record. Lawson v. Lawson, 821 So. 2d 142, 2002 Miss. App. LEXIS 381 (Miss. Ct. App. 2002).

A wife seeking a divorce from her husband on the grounds of excessive drug use, pursuant to § 93-5-1, sufficiently proved that her husband's use of drugs was habitual on the basis that it was customarily and frequently indulged, that her husband's drug use was so excessive that he did not have the ability to control his appetite for drugs, and that the drugs used were morphine or opium or comparable to morphine or opium in effect, where the evidence indicated that the husband used drugs daily from 1976 to the time of separation in 1980, as brought out by the pharmacist's records, that the husband abused his prescribed drug dosage, at one time receiving prescriptions from more than one doctor to satisfy his needs, while making misrepresentations regarding usage and activities to his physicians, and that the effect produced upon the husband by his drug use was similar to that produced by morphine or opium, including extremes of hyperactivity or of stupidity, and adverse effects in his work habits and social, and family relationships. Ladner v. Ladner, 436 So. 2d 1366, 1983 Miss. LEXIS 2808 (Miss. 1983).

Complainant who separated from his wife because she was addicted to habitual and excessive use of narcotics, but did not file his bill for divorce until after she had overcome such habit and regained her normal condition of body and mind, was not entitled to divorce. Smithson v. Smithson, 113 Miss. 146, 74 So. 149, 1916 Miss. LEXIS 43 (Miss. 1916), modified, 113 Miss. 644, 74 So. 609, 1917 Miss. LEXIS 139 (Miss. 1917) but see Smithson v. Smithson, 113 Miss. 644, 74 So. 609, 1917 Miss. LEXIS 139 (Miss. 1917).

10. Cruel and inhuman treatment.

Judgment dismissing the wife's divorce action for failing to meet the burden of proof was affirmed because (1) the chancellor applied the appropriate legal standard in denying the wife a divorce on ground of habitual cruel and inhuman treatment; and (2) though the wife claimed she sought medical attention during the marriage for conditions that improved after she and the husband separated, she presented no medical evidence. Hoskins v. Hoskins, 21 So. 3d 705, 2009 Miss. App. LEXIS 769 (Miss. Ct. App. 2009).

Sexual indignity can rise to the level of being so repugnant to the non-offending spouse so as to render impossible the discharge of marital duties, thereby defeating the whole purpose of the marriage. Jones v. Jones, 43 So. 3d 465, 2009 Miss. App. LEXIS 946 (Miss. Ct. App. 2009), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Cumulative impact of the offensive and even repugnant behaviors over a long period of time might constitute cruelty, while similar conduct for a shorter time, or with fewer factors might not be cruelty. Jones v. Jones, 43 So. 3d 465, 2009 Miss. App. LEXIS 946 (Miss. Ct. App. 2009), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Court properly granted a divorce on the ground of cruel and inhuman treatment because the wife was involved in a shoving match with the husband shortly after he had been so ill that she "thought he was having a heart attack." Moreover, the court of appeals noted the impropriety of the wife's act of forging the husband's name to the savings bonds, cashing them without notifying him before doing so, and pretending to help him look for them afterward. McIntosh v. McIntosh, 977 So. 2d 1257, 2008 Miss. App. LEXIS 184 (Miss. Ct. App. 2008).

Divorce was properly granted in favor of the wife where the husband's habitual cruel and inhuman treatment was the precipitating cause of the deterioration of the parties' marital relationship and the wife's adultery occurred at least one year after she filed for divorce; the parties' marital assets were equitably divided and the husband was held in contempt where he did not demonstrate his inability to make the monthly mortgage payments. Langdon v. Langdon, 854 So. 2d 485, 2003 Miss. App. LEXIS 822 (Miss. Ct. App. 2003).

Evidence was insufficient to support the trial court's granting a divorce on the ground of habitual, cruel, and inhuman treatment because (1) in the course of the 19-year marriage, the wife cited to one isolated physical attack and verbal threat and the other accusations of the husband's mean tricks, name-calling, and refusal to sleep with her fell more in the categories of mere unkindness, rudeness, and incompatibility than cruelty and (2) the corroborative evidence, which was required by Miss. Unif. Ch. Ct. R. 8.03, provided by the daughter was inconsistent with the wife's testimony that the physical abuse was limited to the one choking incident; thus, the appellate court reversed and vacated the trial court's judgment granting the wife a divorce based upon the statutory ground of habitual, cruel, and inhuman treatment pursuant to Miss. Code Ann. § 93-5-1. Reed v. Reed, 839 So. 2d 565, 2003 Miss. App. LEXIS 136 (Miss. Ct. App. 2003).

Trial court was manifestly in error in concluding that wife was subjected to habitual cruel and inhuman treatment, a statutory ground for divorce, insofar as husband would move out of their bedroom and return when he was ready to have sex with her, culminating in incident when husband grabbed wife in bedroom and requested sex, where both parties testified that husband never forced wife to have sex, wife testified that she did not seek any type of treatment for bad nerves that resulted from husband's unpleasant behavior, and husband never hit wife or harmed her. Potts v. Potts, 700 So. 2d 321, 1997 Miss. LEXIS 464 (Miss. 1997).

In an action for divorce on the ground of the husband's adultery, the husband's counter-complaint for a divorce on the ground of habitual cruel and inhuman treatment was properly dismissed where the best that the husband could argue was that his wife was not congenial toward him, since more than "mere unkindness, rudeness, or incompatibility" is required to support the granting of a divorce on the ground of cruel and inhuman treatment. Brooks v. Brooks, 652 So. 2d 1113, 1995 Miss. LEXIS 152 (Miss. 1995).

A chancellor erred in granting a divorce to both parties on the ground of habitual cruel and inhuman treatment, since the 2 parties to a divorce can not be both guilty and innocent of habitual cruel and inhuman treatment; in a situation where both parties are at fault, the chancellor must determine which party's conduct was the proximate cause of the deterioration of the marital relationship and the divorce itself, and a divorce should be granted to the other party. Hyer v. Hyer, 636 So. 2d 381, 1994 Miss. LEXIS 139 (Miss. 1994).

Spouse seeking divorce on ground of habitual cruel and inhuman treatment must offer proof as to causal connection between cruel treatment complained of and spouse's separation from household. Fournet v. Fournet, 481 So. 2d 326, 1985 Miss. LEXIS 2337 (Miss. 1985), limited, Richard v. Richard, 711 So. 2d 884, 1998 Miss. LEXIS 240 (Miss. 1998).

Where the chancellor was warranted in believing that the husband had been guilty of habitual, cruel and inhuman treatment of the wife, and that the reconciliations between the parties amounted to a condonement of past wrongdoing on the assumption that the conduct complained of would not be repeated, decree awarding divorce to wife would be affirmed. Jones v. Jones, 234 Miss. 461, 106 So. 2d 134, 1958 Miss. LEXIS 518 (Miss. 1958).

11. —Elements generally.

A chancellor did not err in dismissing a wife's complaint for divorce on the ground of habitual cruel and inhuman treatment where the evidence did not demonstrate habitual cruelty or inhuman treatment which endangered the wife's "life, limbs, or health," but merely showed "incompatibility, indignities, and intense quarreling." Steen v. Steen, 641 So. 2d 1167, 1994 Miss. LEXIS 371 (Miss. 1994).

A trial court erred in refusing to grant a wife a divorce on the ground of habitual cruel and inhuman treatment based on an absence of evidence suggesting that cruelty proximately caused the parties' separation since the conduct of a separated spouse may constitute habitual cruel and inhuman treatment where the spouse's actions proximately cause harm to the other spouse's health and well-being. Faries v. Faries, 607 So. 2d 1204, 1992 Miss. LEXIS 599 (Miss. 1992).

Although a husband and wife each sought a divorce and genuinely despised each other, they were not entitled to a divorce on the ground of habitual cruel and inhuman treatment where there was no evidence that either party had been guilty of habitual cruel and inhuman treatment of the other, taking the legislative language by its common and ordinary meaning. Wilson v. Wilson, 547 So. 2d 803, 1989 Miss. LEXIS 368 (Miss. 1989).

A divorce on the ground of habitual cruel and inhuman treatment was warranted where a physician testified that the conduct of the husband was injurious to the wife's health to the extent that she required medical attention and hospitalization; a sensitive spouse, or a spouse from a society and environment of breeding, education or culture, may be physically, mentally, and emotionally affected and injured by slightly cruel and less severe treatment, while another spouse, who is hardened and calloused to physical abuse and treatment, might be unaffected by the same treatment. Parker v. Parker, 519 So. 2d 1232, 1988 Miss. LEXIS 157 (Miss. 1988).

Charge of cruel and inhuman treatment against spouse means something more than unkindness or rudeness or mere incompatibility or want of affection; divorce will not be granted on that ground where facts merely show that parties have irreconcilable differences and probably will never be able to live together in harmony. Churchill v. Churchill, 467 So. 2d 948, 1985 Miss. LEXIS 2039 (Miss. 1985).

Before a divorce can be granted upon the ground of habitual cruel and inhuman treatment, the complaining party has the burden to prove by clear and convincing evidence that the offending party was guilty of such conduct, and that such conduct endangered or adversely affected his health and was the proximate cause of the separation. Porter v. Ainsworth, 285 So. 2d 752, 1973 Miss. LEXIS 1294 (Miss. 1973).

The cruelty required by the statute is not such as to render the continuance of cohabitation undesirable or unpleasant, but must be so gross, unfeeling and brutal as to render further cohabitation impossible except at the risk of life, limb or health. Skelton v. Skelton, 236 Miss. 598, 111 So. 2d 392, 1959 Miss. LEXIS 354 (Miss. 1959).

To constitute cruel and inhuman treatment, short of personal violence, misconduct must be such as to impair complainant's health, create an apprehension of bodily injury, or cause the purpose of the marriage to be defeated. Taylor v. Taylor, 235 Miss. 239, 108 So. 2d 872, 1959 Miss. LEXIS 421 (Miss. 1959).

In order that a divorce may be granted on grounds of habitual cruel and inhuman treatment, the treatment must be something more than mere unkindness or rudeness, something more than a mere incompatibility, want of affection, or lack of civil attention, it must be conduct so unkind as to be cruel, that is, so unreasonably harsh and servere as, naturally and reasonably, to inflict pain or suffering on the spouse. McBroom v. McBroom, 214 Miss. 360, 58 So. 2d 831, 1952 Miss. LEXIS 478 (Miss. 1952).

Cruel and inhuman treatment, unaccompanied by personal violence is such conduct only as endangers life, limb, or health, or creates reasonable apprehension of danger thereto, thereby rendering the continuance of the marital relation unsafe for the unoffending spouse or such unnatural of infamous conduct as would make the marital relation revolting to the unoffending spouse and render it impossible to discharge duties thereof. Sandifer v. Sandifer, 215 Miss. 414, 61 So. 2d 144, 1952 Miss. LEXIS 580 (Miss. 1952); Howard v. Howard, 243 Miss. 301, 138 So. 2d 292, 1962 Miss. LEXIS 347 (Miss. 1962).

Mere marital unhappiness, no matter how intense it may be, caused or induced by ill treatment of one spouse by the other will not warrant divorce, unless it be of such a character, and so long persisted in, as actually to become dangerous to the life, limb or health of the other spouse, or to create a reasonable apprehension of such danger, and thus render further cohabitation unsafe for the unoffending spouse. Stringer v. Stringer, 209 Miss. 326, 46 So. 2d 791, 1950 Miss. LEXIS 393 (Miss. 1950).

"Cruel and inhuman treatment" authorizing divorce is conduct endangering life, limb, or health, or creating reasonable apprehension of danger, or unnatural and infamous conduct making marital relation revolting. Smith v. Smith, 40 So. 2d 156 (Miss. 1949); Price v. Price, 181 Miss. 539, 179 So. 855, 1938 Miss. LEXIS 95 (Miss. 1938); Russell v. Russell, 157 Miss. 425, 128 So. 270, 1930 Miss. LEXIS 303 (Miss. 1930).

Where there is no personal violence, misconduct, to constitute cruelty, must endanger health or create reasonable apprehension of bodily harm. Humber v. Humber, 109 Miss. 216, 68 So. 161, 1915 Miss. LEXIS 137 (Miss. 1915).

Personal violence is not required to constitute cruel and inhuman treatment. Wilson v. State, 85 Miss. 687, 38 So. 46, 1904 Miss. LEXIS 185 (Miss. 1904).

12. — —Continuousness.

Howard v. Howard, 243 Miss. 301, 138 So. 2d 292, 1962 Miss. LEXIS 347 (Miss. 1962).

Habitual cruel and inhuman treatment is offense of continuing nature and is not condoned by mere continuance of cohabitation. Reed v. Reed, 480 So. 2d 1163, 1985 Miss. LEXIS 2438 (Miss. 1985).

Habitual cruelty is an offense continuing in nature and is not condoned by mere continuing of cohabitation. Waites v. Waites, 233 Miss. 496, 102 So. 2d 431, 1958 Miss. LEXIS 407 (Miss. 1958).

13. —Single incident as constituting.

As a general rule the charge of cruel and inhuman treatment is not established by a single act or an isolated incident, but there must be more to show habitual cruel or inhuman treatment, but on the other hand, one incident of personal violence may be of such a violent nature as to endanger the life of the complainant spouse and be of sufficient gravity to establish the charge. Ellzey v. Ellzey, 253 So. 2d 249, 1971 Miss. LEXIS 1213 (Miss. 1971).

If the chancellor believed that the testimony showed that the defendant tried to shoot his wife, that incident alone was sufficient to establish the charge of cruel and inhuman treatment. Ellzey v. Ellzey, 253 So. 2d 249, 1971 Miss. LEXIS 1213 (Miss. 1971).

Habitually cruel and inhuman treatment as a ground for divorce consists generally of a course of conduct rather than a single act. Smith v. Smith, 40 So. 2d 156 (Miss. 1949).

14. —Events occurring post separation.

Since a party can be granted a divorce based on incidents occurring after the parties have separated, there is no reason, on principle, why the fact that the parties have not been living together would render it legally impossible to establish cruel and inhuman treatment such as to justify a divorce. Day v. Day, 501 So. 2d 353, 1987 Miss. LEXIS 2260 (Miss. 1987).

A charge of habitual cruel and inhuman treatment may be predicated upon conduct of the offending spouse occurring after the separation of the spouses. Bias v. Bias, 493 So. 2d 342, 1986 Miss. LEXIS 2566 (Miss. 1986).

Although wife, who was denied a divorce on her first complaint charging her husband with acts of cruel and inhuman treatment, could not relitigate the matter of the husband's conduct prior to the dismissal of the first complaint, she was not precluded from litigating question of whether husband's acts, if any, prior to the dismissal of first complaint aggregated with his acts after dismissal of first complaint, if any, constituted habitual cruel and inhuman treatment, even though the parties lived apart during the interim between the dismissal of the first complaint and filing of the second one. Bias v. Bias, 493 So. 2d 342, 1986 Miss. LEXIS 2566 (Miss. 1986).

15. —Particular circumstances as constituting.

It is common sense that abuse or mistreatment of a person's child may constitute cruelty to that person; chancery courts may consider evidence of child abuse or mistreatment as conduct supporting the grant of a divorce based on habitual cruel and inhuman treatment. Pittman v. Pittman, 195 So. 3d 727, 2016 Miss. LEXIS 231 (Miss. 2016).

In a wife's divorce action, the chancery court erred in granting a husband's motion to dismiss because it did not apply the correct legal standard when it failed to consider acts of child mistreatment by the husband in assessing whether sufficient evidence of habitual cruel and inhuman treatment existed; the chancery court failed to make factual findings to which the supreme court had to defer regarding the violence the husband perpetuated in considering whether the wife defeated the motion. Pittman v. Pittman, 195 So. 3d 727, 2016 Miss. LEXIS 231 (Miss. 2016).

Sufficient evidence showed a husband's habitual cruel and inhuman treatment because his wife's testimony about his homosexual affairs and child molestation was corroborated. Jackson v. Jackson, 172 So. 3d 221, 2014 Miss. App. LEXIS 638 (Miss. Ct. App. 2014), aff'd in part and rev'd in part, 172 So. 3d 179, 2015 Miss. LEXIS 413 (Miss. 2015).

Grant of divorce in favor of the wife was appropriate because the cumulative effect of the degrading sexual behavior, cursing and yelling, habitual gambling, jealousy, and stalking, and the resulting negative effect to the wife's health amounted to habitual cruel and inhuman treatment. The wife had testified about those behaviors and the adverse effects on her health. Harmon v. Harmon, 141 So. 3d 37, 2014 Miss. App. LEXIS 308 (Miss. Ct. App. 2014).

Due to multiple incidents of violent and cruel behavior, including a plate-throwing incident, destruction of the husband's property post separation, and corrobation of the violent events from husband's son, the appellate court agreed with the chancellor's findings and find that the husband met his burden of proving his ground for a divorce of cruel and inhuman treatment under Miss. Code Ann. § 93-5-1 (2008) by a preponderance of the evidence. Price v. Price, 22 So. 3d 331, 2009 Miss. App. LEXIS 772 (Miss. Ct. App. 2009).

Wife presented more than ample evidence of diverse repugnant conduct and more corroborative evidence existed than just the singular testimony of a sole spouse claiming she was subjected to degrading and offensive sexual behavior by the offending spouse; the combination of the husband's behaviors, including his sexual behavior, financial conduct, and his verbal degradation, were so repugnant to the wife to render her unable to perform her marital duties and sufficiently supported the grant of divorce on the ground of habitual cruel and inhuman treatment. Jones v. Jones, 43 So. 3d 465, 2009 Miss. App. LEXIS 946 (Miss. Ct. App. 2009), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Divorce granted on the ground of habitual cruel and inhuman treatment was affired because the wife testified to numerous displays of violence by the husband, including his whipping her with a wet towel in front of friends, his throwing plates of food in her face when he was unhappy with what she had cooked, his giving her a black eye, his forcing her to abort their third child because of the expense of another child, and his frequent threats to kill her. Stein v. Stein, 11 So. 3d 1288, 2009 Miss. App. LEXIS 368 (Miss. Ct. App. 2009).

Chancellor did not err in granting the wife a divorce on the ground of habitual cruel and inhuman treatment given the husband's demanding and manipulative behavior and two incidents that had rendered the relationship unsafe for the wife; the husband continually subjected the wife to demanding and manipulative behavior and accusations of infidelity, coupled with emotional isolation. G.B.W. v. E.R.W., 9 So. 3d 1200, 2009 Miss. App. LEXIS 285 (Miss. Ct. App. 2009).

Where a wife alleged that the husband committed adultery and physically and verbally abused the wife by hitting, punching, trying to strangle, and using a belt to whip the wife, it was error to deny a divorce based on the grounds of habitual cruel and inhuman treatment because (1) the wife offered testimony of physical and verbal abuse, (2) the wife provided sufficient corroboration to support the claim, and (3) the wife did not condone the abuse. Kumar v. Kumar, 976 So. 2d 957, 2008 Miss. App. LEXIS 156 (Miss. Ct. App. 2008).

Where appellee wife testified that appellant husband was emotionally and mentally abusive throughout the course of the marriage, which had an adverse affect on her mental and physical well-being, and the couple's adult son provided corroborating testimony regarding the effect of his father's treatment on his mother's health and well-being, that uncontradicted testimony provided substantial, credible evidence for a grant of divorce upon the grounds of cruel and inhuman treatment. Cassell v. Cassell, 970 So. 2d 267, 2007 Miss. App. LEXIS 844 (Miss. Ct. App. 2007).

Court properly granted a divorce to a wife where the husband's regular drinking binges, foul language, rude and condescending behavior toward the wife and the children, mysterious expenditure of marital funds, and unexplained extended absences rose to the level of habitual cruel and inhuman treatment. Jackson v. Jackson, 922 So. 2d 53, 2006 Miss. App. LEXIS 133 (Miss. Ct. App. 2006).

Granting of a divorce to the wife on the grounds of habitual, cruel, and inhuman treatment was proper pursuant to Miss. Code Ann. § 93-5-1 where the husband's actions in allowing his daughter's alleged sexual perpetrator to come for overnight visits over objections from his wife and daughter were insensitive and caused severe emotional stress that became intolerable. M.W.F. v. D.D.F., 926 So. 2d 923, 2005 Miss. App. LEXIS 482 (Miss. Ct. App. 2005), vacated, 926 So. 2d 897, 2006 Miss. LEXIS 204 (Miss. 2006).

Wife's allowing her 36-year-old son, who had been convicted of assaulting her husband, to live in the marital home despite the husband's objections was a sufficient basis to grant the husband a divorce based on habitual cruel and inhuman treatment. Ferro v. Ferro, 871 So. 2d 753, 2004 Miss. App. LEXIS 90 (Miss. Ct. App. 2004).

A wife's conduct in taking the parties' child and secreting her for over 270 days constituted a sufficient factual basis for the court to award the husband a divorce based upon habitual cruel and inhuman treatment. Michael v. Michael, 650 So. 2d 469, 1995 Miss. LEXIS 18 (Miss. 1995).

Evidence of a husband's "sexual problems," including his impotence and his interest in dressing in women's clothing, was sufficient to grant a divorce on the ground of habitual cruel and inhuman treatment. Cherry v. Cherry, 593 So. 2d 13, 1991 Miss. LEXIS 964 (Miss. 1991).

The chancery court's finding that the wife was not guilty of habitual cruel and inhuman treatment of her husband was supported by substantial evidence, even though the chancellor found that the wife's efforts, attitude, and desires to live beyond her husband's financial means were the cause of the parties' separation, that the husband was justified in leaving the home under all the circumstances, and that resumption of the marriage would be impossible given the psychological background of the parties. Ramsey v. State, 554 So. 2d 300, 1989 Miss. LEXIS 601 (Miss. 1989).

The evidence was sufficient to support a finding that a husband had been guilty of habitual cruel and inhuman treatment of his wife where the husband repeatedly subjected the wife to threats upon her life, there were instances of severe physical abuse and numerous occasions of physical intimidation. Jones v. Jones, 532 So. 2d 574, 1988 Miss. LEXIS 488 (Miss. 1988).

Chancery court properly found that husband was not entitled to a divorce on ground of cruel and inhuman treatment, notwithstanding husband's testimony that he could not talk with wife about family or other matters, that wife's drinking contributed to the problem, that the wife refused to permit him to retrieve items of personal property from the home and their lock box, that wife had destroyed some of his personal items, and that her financial practices were an embarrassment. Day v. Day, 501 So. 2d 353, 1987 Miss. LEXIS 2260 (Miss. 1987).

Marriage problems stemming from wife's desire to pursue career and on disputes over money, arguments regarding sexual relations, husband's criticism of stepson's behavior, husband's lack of friendliness and attentiveness when in-laws come to visit, and husband's single kick on wife's backside, causing her to scream out in pain, is not sufficient basis upon which to grant wife divorce on ground of habitual cruel and inhuman treatment. Haralson v. Haralson, 483 So. 2d 378, 1986 Miss. LEXIS 2382 (Miss. 1986).

Evidence that husband used physical violence upon wife, as well as insults, abuse, and conduct which was impairment and menace to wife's health and physical well-being is sufficient to grant divorce to wife on ground of habitual cruel and inhuman treatment. Ethridge v. Ethridge, 483 So. 2d 370, 1986 Miss. LEXIS 2400 (Miss. 1986).

Evidence that wife's manner of handling money caused husband hardship and embarrassment, that wife disappeared and abandoned family duties on several occasions, that wife occasionally bought jewelry without telling husband, that wife committed acts of cruelty against children, and that husband and wife frequently argued, is insufficient to support grant of divorce on grounds of habitual cruel and inhuman treatment where there is no proof that wife's mismanagement of family funds, disappearances, or alleged mistreatment of children rendered continuance of cohabitation impossible, except at risk of life, limb, or health on part of husband. Kergosien v. Kergosien, 471

So. 2d 1206, 1985 Miss. LEXIS 2133 (Miss. 1985).

Three minor incidents of physical abuse during 18 marriage and occasional social drinking is not sufficient basis upon which to find cruel and inhumane treatment as ground for divorce. Stennis v. Stennis, 464 So. 2d 1161, 1985 Miss. LEXIS 1955 (Miss. 1985).

Acts of husband in slapping wife, giving her a black eye on one occasion, hitting her on the head with the butt of a shotgun, causing her hospitalization for about a week, threatening to kill her and the children, repeatedly over a period of months making false accusations of infidelity, charging her with running around with other men and particularly with adultery with a named individual, constituted habitual cruel and inhuman treatment entitling the wife to a divorce. Petersen v. Petersen, 238 Miss. 190, 118 So. 2d 300, 1960 Miss. LEXIS 395 (Miss. 1960).

Cruelty justifying divorce is not established by fact that wife drank beer to such extent that in two years her weight had increased from 165 to 210 pounds, that husband had at times to prepare his own supper and breakfast, and that if he was a few minutes late she would cry and complain that he had been with some other woman. Skelton v. Skelton, 236 Miss. 598, 111 So. 2d 392, 1959 Miss. LEXIS 354 (Miss. 1959).

In husband's action for divorce, evidence failing to show abusive language, or continuous neglect, slander, unsociability, or threats of physical violence, or that there was any reasonable apprehension of physical danger or actual distress, which would cause a loss of weight, or injury to the husband's health, or made it impossible for the wife to discharge the duties of her marriage, did not establish habitual, cruel and inhuman treatment. Taylor v. Taylor, 235 Miss. 239, 108 So. 2d 872, 1959 Miss. LEXIS 421 (Miss. 1959).

Husband's admitted conduct in making frequent accusations of his wife's infidelity while admitting that he could not prove his charges, which caused the wife to become nervous and upset, and generally impaired her physical well being, entitled the wife to a divorce upon the ground of cruel and inhuman treatment. Thames v. Thames, 233 Miss. 24, 100 So. 2d 868, 1958 Miss. LEXIS 352 (Miss. 1958), but see Cheatham v. Cheatham, 537 So. 2d 435, 1988 Miss. LEXIS 627 (Miss. 1988).

In a suit for divorce where it was shown that the husband continuously fussed at and cursed the wife and called her parents by indecent names and the husband was very penurious and where this was particularly obnoxious to the wife since it was shown she was a very devout church member and worker, the chancellor was justified in granting a divorce. Owen v. Owen, 228 Miss. 534, 88 So. 2d 100, 1956 Miss. LEXIS 543 (Miss. 1956).

Proof that defendant at times was quarrelsome, that he did not provide the necessities of life as liberally as he could have, and that on the day before filing of the action he choked plaintiff inflicting bruises which disappeared within about two weeks, was insufficient to establish cruel and inhuman treatment as ground for divorce. Stringer v. Stringer, 209 Miss. 326, 46 So. 2d 791, 1950 Miss. LEXIS 393 (Miss. 1950).

Husband's complaint alleging that wife continuously went home to her people whenever the least little argument came up between them, that she habitually nagged him, accusing him of things he was not guilty of, and that life for them together as husband and wife was unbearable, failed to state a ground for divorce. Nichols v. Nichols, 197 Miss. 302, 20 So. 2d 72, 1944 Miss. LEXIS 301 (Miss. 1944).

Husband not entitled to divorce because of vile epithets applied to husband and his family by wife, where on two occasions husband whipped wife but later repented, and parties resumed marital relations. Price v. Price, 181 Miss. 539, 179 So. 855, 1938 Miss. LEXIS 95 (Miss. 1938).

In order to authorize granting divorce on ground of cruel and inhuman treatment, consisting of wife's refusal to permit husband to exercise marital rights, facts should present a clearly extreme case of inexcusable and long-continued refusal. Sarphie v. Sarphie, 180 Miss. 313, 177 So. 358, 1937 Miss. LEXIS 118 (Miss. 1937).

That husband indicated to wife he would approve of her leaving him, resulting in rendering her unhappy and her marital bond irksome, was not ground for divorce. Russell v. Russell, 157 Miss. 425, 128 So. 270, 1930 Miss. LEXIS 303 (Miss. 1930).

The crime of pederasty, whether restricted to sodomy, as commonly understood, or defined so as to include bestial habits and improper intimacy by a man with the male sex, is cruel and inhuman treatment within the meaning of this section [Code 1942, § 2735], making "habitual cruel and inhuman treatment" a ground for divorce. Crutcher v. Crutcher, 86 Miss. 231, 38 So. 337, 1905 Miss. LEXIS 38 (Miss. 1905).

16. —Burdens.

Where a plaintiff in a divorce asserts the ground of habitual, cruel and inhuman treatment, the plaintiff must prove the ground by a preponderance of the credible evidence and typically must corroborate the plaintiff's testimony supporting the ground. Shavers v. Shavers, 982 So. 2d 397, 2008 Miss. LEXIS 254 (Miss. 2008).

The burden rests upon the complainant to prove by clear and convincing evidence that the conduct of the appellant was not only cruel but that it endangered or adversely affected his health or safety, and further that it was the proximate cause of the separation. Criswell v. Criswell, 254 Miss. 746, 182 So. 2d 587, 1966 Miss. LEXIS 1573 (Miss. 1966).

17. —Evidence.

Chancery court erred in granting a wife a divorce on the fault ground of habitual, cruel, and inhuman treatment, pursuant to Miss. Code Ann. § 93-5-1, because the wife failed to provide evidence corroborating her allegations of abuse. Ladner v. Ladner, 49 So. 3d 669, 2010 Miss. App. LEXIS 659 (Miss. Ct. App. 2010).

Corroboration of the offensive conduct complained of by the moving party is required when seeking a divorce based on the ground of habitual cruel and inhuman treatment, except in unusual cases such as isolation; the testimony of the defendant may also provide corroboration. Additionally, the corroborating evidence need not be sufficient in itself to establish the ground, but rather need only provide enough supporting facts for a court to conclude that the plaintiff's testimony is true; corroboration must be sufficient enough to provide some supporting facts for a court to conclude that the plaintiff's testimony is true. Jones v. Jones, 43 So. 3d 465, 2009 Miss. App. LEXIS 946 (Miss. Ct. App. 2009), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Where the wife testified that her husband often became angry, cursed at her and the children, and threatened to physically harm her, substantial evidence supported a finding that the wife was entitled to a divorce on the ground of habitual cruel and inhuman treatment. Atkinson v. Atkinson, 11 So. 3d 172, 2009 Miss. App. LEXIS 300 (Miss. Ct. App. 2009).

Trial court did not abuse its discretion in granting the wife a divorce on the grounds of habitual cruel and inhuman treatment because the wife testified to three specific instances of abuse, and there was testimony from family members and friends that established a pattern of abuse. Fulton v. Fulton, 918 So. 2d 877, 2006 Miss. App. LEXIS 22 (Miss. Ct. App. 2006).

Chancellor did not err in refusing to consider evidence of cruel and inhuman treatment that occurred before the parties were married because, to grant a divorce on grounds of habitual cruel and inhuman treatment, there must be a causal connection between the cruel treatment and the separation from the household, and it must be related in point of time to the separation. Cochran v. Cochran, 912 So. 2d 1086, 2005 Miss. App. LEXIS 742 (Miss. Ct. App. 2005).

Chancellor did not err in dismissing a wife's complaint for divorce based on habitual cruel and inhuman treatment because she presented insufficient proof and the isolation exception did not apply because, although the nearest neighbor was ½ mile away, the wife was fully employed throughout the marriage and saw people on a daily basis at work. Cochran v. Cochran, 912 So. 2d 1086, 2005 Miss. App. LEXIS 742 (Miss. Ct. App. 2005).

Chancellor did not err in dismissing a wife's complaint for divorce based on habitual cruel and inhuman treatment where the wife failed to corroborate her allegations, which the husband denied except to admit to occasional name calling, and the evidence presented, consisting of her own testimony and the testimony of one of her former co-workers, as a whole was insufficient. Cochran v. Cochran, 912 So. 2d 1086, 2005 Miss. App. LEXIS 742 (Miss. Ct. App. 2005).

Court rejected the husband's claim that his conduct, upon which the wife relied in making her case for divorce on the grounds of habitual cruel and inhuman treatment, was too remote in time to establish a causal connection between the separation and the ground for divorce, because it was no longer required that a specific act be the proximate cause of a separation before a divorce could be granted on grounds of habitual cruel and inhuman treatment. It was, instead, habitual or continuous behavior over a period of time, close in proximity to the separation, or continuing after a separation occurs, that could satisfy the grounds for divorce. Peters v. Peters, 906 So. 2d 64, 2004 Miss. App. LEXIS 1125 (Miss. Ct. App. 2004).

In a divorce trial, where court was adjourned and the husband did not appear at the next scheduled hearing, the chancellor committed reversible error in concluding a decision on property division, alimony, and child support could be rendered fairly without allowing the wife an opportunity to cross-examine the husband; cross-examination of the husband was necessary for the chancellor's complete deliberation on the marriage and assets without a one-sided slant on the facts and circumstances. Barnes v. Barnes, 874 So. 2d 477, 2004 Miss. App. LEXIS 490 (Miss. Ct. App. 2004).

Trial court erred in granting the wife a divorce for habitual cruel and inhuman treatment because the husband's conduct did not rise to the appropriate level of abuse and the wife acknowledged that there was no physical abuse, threatening language nor financial neglect; due to the unconventional sleeping arrangement, conflicting testimony concerning each parties' sexual desire for the other and the undisputed fact that the couple consummated sex three months prior to separation, there was insufficient evidence to support the granting of divorce due to habitual cruel and inhuman treatment. Tedford v. Tedford, 856 So. 2d 753, 2003 Miss. App. LEXIS 940 (Miss. Ct. App. 2003).

The chancellor properly awarded a divorce to the husband on the ground of habitual cruel and inhuman treatment where (1) the record revealed several incidents of violence by the wife throughout the marriage and that she had homicidal thoughts of killing her husband and mother, (2) the wife was severely and emotionally disturbed, and the husband withstood years of trauma in his marriage as he tried to help his wife cope with her various mental problems and limit the effect of such mental disturbance on his children, and (3) the wife openly had an extramarital affair with another woman. Morris v. Morris, 783 So. 2d 681, 2001 Miss. LEXIS 89 (Miss. 2001).

A chancellor's decision to not grant a wife a divorce on the ground of cruel and inhuman treatment was not error where the only person who testified that the husband treated the wife in a cruel and inhuman manner was the wife herself, and the husband denied every instance of physical abuse that the wife alleged. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

Two photographs of a wife's bruised arms were not sufficient corroborating evidence of the wife's claim of habitual cruel and inhuman treatment to warrant the granting of a divorce on that ground where there were other witnesses to the marriage who were available to testify. Moeller v. Roy, 609 So. 2d 426, 1992 Miss. LEXIS 651 (Miss. 1992).

Even without corroboration as to any of the facts, a chancery court is not entirely powerless to find that the evidence is sufficient to support a finding of habitual cruel and inhuman treatment. Polk v. Polk, 559 So. 2d 1048, 1990 Miss. LEXIS 198 (Miss. 1990).

Wife failed to prove claim of habitual cruel and inhuman treatment where there was nothing in record to show any attempt to ferret out sources or gain further information about alleged murder plot against wife. Internal Revenue Service agent who informed wife that her husband planned to murder her was never offered as witness and court did not know whether his testimony would have been any more than hearsay. If wife contemplated using this as basis for sustaining charge of habitual cruel and inhuman treatment, she had responsibility of offering more evidence than conversation she had with agent. Cooper v. Cooper, 518 So. 2d 664, 1988 Miss. LEXIS 4 (Miss. 1988).

18. Insanity or mental incompetence.

A chancellor has authority and right in a divorce action to require the posting by a husband of a performance bond and the furnishing of a policy of insurance on his life to assure performance of provisions of a decree requiring him to support his mentally incompetent wife for the term of her natural life. Klumb v. Klumb, 194 So. 2d 221, 1967 Miss. LEXIS 1402 (Miss. 1967).

On taking jurisdiction of a divorce action in which one of the parties is a mentally incompetent wife confined to an institution, the chancery court is acting in a dual constitutional capacity, as trier of the action for divorce, and as superior guardian of a person of unsound mine. Klumb v. Klumb, 194 So. 2d 221, 1967 Miss. LEXIS 1402 (Miss. 1967).

When acting in the dual constitutional capacity of trier of divorce actions and as superior guardian of persons of unsound mind, it is the duty and responsibility of the chancellor to see that a mentally incompetent wife is supported and maintained during the remainder of her natural life. Klumb v. Klumb, 194 So. 2d 221, 1967 Miss. LEXIS 1402 (Miss. 1967).

Dissolution of a marriage on this ground must be sought in the incompetent's lifetime. Will of Case v. Case, 246 Miss. 750, 150 So. 2d 148, 1963 Miss. LEXIS 500 (Miss. 1963).

Under statute, insanity at time of marriage renders marriage voidable during lives of the parties by party not knowing of insanity, including insane party suing by guardian. Parkinson v. Mills, 172 Miss. 784, 159 So. 651, 1935 Miss. LEXIS 128 (Miss. 1935).

That this section [Code 1942, § 2735] provides for insanity as a ground for absolute divorce does not abrogate the power of the chancery court to annul a marriage on the ground of insanity brought for that purpose on behalf of the insane spouse. Parkinson v. Mills, 172 Miss. 784, 159 So. 651, 1935 Miss. LEXIS 128 (Miss. 1935).

Upon recovery of his reason, person, insane at time of marriage, may have marriage annulled, provided it clearly appears that he has not ratified marriage and is not estopped to attack it, but court may protect children of marriage by entry of decree effective on and after its date. Parkinson v. Mills, 172 Miss. 784, 159 So. 651, 1935 Miss. LEXIS 128 (Miss. 1935).

Presumption is that party insane at time of marriage and continuing insane thereafter did not know that he was insane at time of marriage within statute providing for divorce on ground of insanity by one not knowing of insanity at the time. Parkinson v. Mills, 172 Miss. 784, 159 So. 651, 1935 Miss. LEXIS 128 (Miss. 1935).

Common law rule that marriage of insane person was void, changed by this section [Code 1942, § 2735] providing insanity or idiocy ground for divorce only where complaining party did not know of infirmity at time of marriage. Wilson v. Wilson, 104 Miss. 347, 61 So. 453, 1913 Miss. LEXIS 48 (Miss. 1913).

19. Marriage to another at time of pretended marriage.

The chancery court erred in dismissing a wife's divorce complaint on the ground that no divorce would lie since the parties had never been legally married, in that the husband at the time of the pretended marriage was lawfully married to another woman; prior existing marriage is a valid ground for divorce. Callahan v. Callahan, 381 So. 2d 178, 1980 Miss. LEXIS 1923 (Miss. 1980).

In view of this provision, marriage to another person at the time of a pretended marriage is not ground for annulment. Will of Case v. Case, 246 Miss. 750, 150 So. 2d 148, 1963 Miss. LEXIS 500 (Miss. 1963).

20. Condonation.

Husband was properly granted a divorce on the ground of uncondoned adultery because the wife's defense of condonation failed since (1) there was nothing in the record to suggest that the husband, by engaging in sexual intercourse with the wife, forgave the wife for committing adultery, and (2) although the husband stated that the husband forgave the wife in a letter, the husband did not specify to which adulterous conduct the husband was referring. Ware v. Ware, 7 So. 3d 271, 2008 Miss. App. LEXIS 270 (Miss. Ct. App. 2008).

Appellate court affirmed the ruling that denied the husband a divorce on the grounds of adultery because even though the wife admitted that she had an extramarital affair that ended in November 2001, the parties continued to live with each other after the wife's admission and ultimately renewed sexual relations. Thus, the trial court held that the defense of condonation applied, and the appellate court agreed. Fulton v. Fulton, 918 So. 2d 877, 2006 Miss. App. LEXIS 22 (Miss. Ct. App. 2006).

A wife's condonation of her husband's "peculiar" sexual activities was not sufficient to deny her a divorce on the grounds of habitual cruel and inhuman treatment based on evidence that the husband was impotent and occasionally dressed in women's clothing, even though the wife continued to live with the husband and at least attempted to have sexual relations, since it was not proper for the wife to be penalized for attempting to save her marriage. Cherry v. Cherry, 593 So. 2d 13, 1991 Miss. LEXIS 964 (Miss. 1991).

Chancellor was not manifestly wrong in granting divorce to husband on ground of adultery, which may be shown by either evidence or admissions, either of which is sufficient to support decree of divorce, where evidence showed wife had sexual intercourse with another man and her acts of adultery were uncondoned. Jordan v. Jordan, 510 So. 2d 131, 1987 Miss. LEXIS 2628 (Miss. 1987).

The defense of condonation is recognized, but the mere resumption of residence does not constitute a condonation of past marital sins and does not act as bar to a divorce being granted. Wood v. Wood, 495 So. 2d 503, 1986 Miss. LEXIS 2691 (Miss. 1986).

Habitual cruel and inhuman treatment is offense of continuing nature and is not condoned by mere continuance of cohabitation. Reed v. Reed, 480 So. 2d 1163, 1985 Miss. LEXIS 2438 (Miss. 1985).

Where the chancellor was warranted in believing that the husband had been guilty of habitual, cruel and inhuman treatment of the wife, and that the reconciliations between the parties amounted to a condonement of past wrongdoing on the assumption that the conduct complained of would not be repeated, decree awarding divorce to wife would be affirmed. Jones v. Jones, 234 Miss. 461, 106 So. 2d 134, 1958 Miss. LEXIS 518 (Miss. 1958).

Habitual cruelty is an offense continuing in nature and is not condoned by mere continuing of cohabitation. Waites v. Waites, 233 Miss. 496, 102 So. 2d 431, 1958 Miss. LEXIS 407 (Miss. 1958).

Knowledge by complainant of cause for divorce at time marriage was consummated is bar to suit on that ground, but complainant does not have knowledge or good reason to believe that at time of marriage husband was habitual drunkard when husband, prior to marriage, was never drunk, but at most was only occasional and moderate social drinker and did not become habitual drunkard until after marriage. Kincaid v. Kincaid, 207 Miss. 692, 43 So. 2d 108, 1949 Miss. LEXIS 380 (Miss. 1949).

Wife's condonation of past acts of cruelty is impliedly conditioned upon the future good behaviour of the husband, and after condonation if the cruelty is repeated the right to assert the condoned offenses as a ground for divorce is revived. Smith v. Smith, 40 So. 2d 156 (Miss. 1949).

Cohabitation after cruel and inhuman treatment cannot be considered as condonation in the same sense as after an act of adultery. Smith v. Smith, 40 So. 2d 156 (Miss. 1949).

Contention that acts of cruel and inhuman treatment occurring prior to last reconciliation were condoned by the wife and could not constitute grounds for divorce held untenable, since habitually cruel and inhuman treatment as grounds for divorce consists generally of a course of conduct rather than a single act. Smith v. Smith, 40 So. 2d 156 (Miss. 1949).

Where husband and wife entered into an agreement after alleged acts of cruelty stating that differences were settled and agreeing to dismiss pending litigation and resume relations as husband and wife, the court held that by agreement and conduct the parties condoned all alleged acts of cruelty accruing prior to such agreement so as to preclude divorce under this section [Code 1942, § 2735]. Starr v. Starr, 206 Miss. 1, 39 So. 2d 520, 1949 Miss. LEXIS 238 (Miss. 1949).

Wife's failure to come and live with husband in designated town and her failure to deliver the children to him as provided in agreement condoning prior alleged acts of cruelty does not revive the alleged acts of cruelty, so as to constitute grounds for divorce under this section [Code 1942, § 2735]. Starr v. Starr, 206 Miss. 1, 39 So. 2d 520, 1949 Miss. LEXIS 238 (Miss. 1949).

Where evidence shows cruel treatment extending over several years plaintiff should not be denied divorce because she wrote defendant a friendly letter after leaving him. Forrester v. Forrester, 101 Miss. 155, 57 So. 553, 1911 Miss. LEXIS 115 (Miss. 1912).

21. Property rights affected.

Chancellor lacked authority to divide marital assets because the claims for divorce had been denied. Brown v. Brown, 142 So. 3d 425, 2013 Miss. App. LEXIS 820 (Miss. Ct. App. 2013), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 335 (Miss. 2014).

In the division of the marital property, the chancellor awarded the ex-wife a vehicle free and clear, the leasehold interest to a residence, one-half of the value of the marital home, and personal property in her possession, which she valued at $50,000 in her financial statement, and awarded the ex-husband sole ownership of a corporation, two encumbered vehicles, one-half of the value of the marital home, and any personal property in his possession; although the ex-wife alleged otherwise, the chancellor properly classified the ownership of the corporation, which was valued at $10,000, as marital property, and thus based on the facts of the case and the value of the corporation, the assets of the marriage were equitably divided. Wilson v. Wilson, 975 So. 2d 261, 2007 Miss. App. LEXIS 681 (Miss. Ct. App. 2007).

Where the husband and wife divorced on the ground of irreconcilable differences, the chancellor did not err in: (1) valuing the marital home based on the average of the two parties' appraisals; (2) awarding the husband his full retirement to maintain his life and to keep the marital home; (3) awarding the wife a substantial equity in the marital home; and (4) awarding alimony to the wife to address any discrepancy in the distribution of assets. McKnight v. McKnight, 951 So. 2d 594, 2007 Miss. App. LEXIS 130 (Miss. Ct. App. 2007).

Chancellor determined that a utility trailer was a marital asset, based on a pretrial order which classified it as a marital asset, and the chancellor relied on the evidence of the manner in which each spouse and the children would need to use the trailer; the mother would need to use the trailer for her daughter's horse, while the father stated that he would use the trailer for various tasks unrelated to his daughter's horse. Thus, the chancellor did not err in awarding the trailer to the mother; accordingly, there was nothing inequitable about the chancellor's finding with regard to the utility trailer, let alone reversible. Ethridge v. Ethridge, 926 So. 2d 264, 2006 Miss. App. LEXIS 270 (Miss. Ct. App. 2006).

Where the parties agreed to an irreconcilable differences divorce, the husband was awarded the double-wide and the wife the single-wide, and the chancellor ordered the husband to pay the wife $17,000, representing one-half of the equity; he was also required to pay the wife an additional $16,500 for the value of the single-wide mobile home which was destroyed in a fire before the entry of judgment. Sullivan v. Sullivan, 942 So. 2d 305, 2006 Miss. App. LEXIS 847 (Miss. Ct. App. 2006).

Equitable division of assets does not require that each party continue to have a possessory interest in an asset; a party being divested of her interest in an asset is compensated for her divestiture by receiving other assets or through monetary compensation. The former wife received two years free rent, valued at $ 9,600, as compensation for her interest in the marital residence; thus, the chancellor did not err in awarding the former husband sole ownership of the marital residence. Fogarty v. Fogarty, 922 So. 2d 836, 2006 Miss. App. LEXIS 139 (Miss. Ct. App. 2006).

Upon distributing property in a divorce, the chancellor committed reversible error by failing to properly classify $ 64,274 that the parties had borrowed to pay off a pre-marital debt owed by the husband. The wife did not benefit from the loan, and the debt should have been classified as nonmarital. Fitzgerald v. Fitzgerald, 914 So. 2d 193, 2005 Miss. App. LEXIS 240 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 749 (Miss. 2005).

Upon the parties' divorce, the chancellor did not abuse her discretion in awarding the wife the marital home as her separate property, because she received it from her father as a gift. Brock v. Brock, 906 So. 2d 879, 2005 Miss. App. LEXIS 241 (Miss. Ct. App. 2005).

Where the wife had established a service oriented painting business, the value of a business included more than physical assets and goodwill, as she argued. Contrary to her position, there were many factors, other than physical assets and goodwill, that could be used in arriving at the value of a business, including income generated, accounts receivable, pending contracts, and customer lists; the chancery court erred in not assigning a specific value to the business, and on remand, the chancery court was free to consider factors other than goodwill and physical assets in valuing the wife's business. Goodson v. Goodson, 910 So. 2d 35, 2005 Miss. App. LEXIS 29 (Miss. Ct. App. 2005).

Only document commemorating the transaction was a statement signed by the wife's friend that she borrowed $ 20,000 from him to buy a car. That document was not generated until after the parties' depositions and there was no legally binding lien on the wife's car; the wife never signed a document agreeing to pay back her friend, and on that evidence, there was no abuse of discretion in the chancellor holding that her car was free of liens and was marital property. Goodson v. Goodson, 910 So. 2d 35, 2005 Miss. App. LEXIS 29 (Miss. Ct. App. 2005).

Where the chancellor valued the marital home at $ 20,000 to $ 30,000 minus a $ 10,000 lien, but the only evidence in the record was a professional appraisal valuing the home at $ 65,000 minus a $ 6,000 lien, and where the chancery court's finding that all of the contributions the husband made to the household went to every day living expenses, and that none of the husband's contributions went to debt service on the mortgage was not supported by the record, a remand for consideration of the Ferguson factors was required. Tate v. Tate, 875 So. 2d 257, 2004 Miss. App. LEXIS 539 (Miss. Ct. App. 2004).

Trial court could consider only those factors it found applicable to the property in question when attempting to effect an equitable division of marital property; when a trial court denied a spouse's petition for contempt, no award of attorney's fees was warranted. Glass v. Glass, 857 So. 2d 786, 2003 Miss. App. LEXIS 961 (Miss. Ct. App. 2003).

Trial court erred by not identifying the assets as assets of the husband, of the wife, or of the marriage; therefore, it was unable to fairly evaluate whether the distribution of property was equitable. Smith v. Smith, 856 So. 2d 717, 2003 Miss. App. LEXIS 904 (Miss. Ct. App. 2003).

If "contribution" toward the acquisition of assets is proven by a divorcing party, then the court has the authority to divide these "jointly" accumulated assets. Thus, equitable division of the marital property, including the transfer of title to real property, was appropriate where the wife contributed cash and services to the family business. Jones v. Jones, 532 So. 2d 574, 1988 Miss. LEXIS 488 (Miss. 1988).

While the chancellor is not obligated to equally divide the property of the parties to divorce, because Mississippi is not a community property state, the chancellor does have the power and authority to effect an equitable division of jointly accumulated personal property acquired during the marriage. Dillon v. Dillon, 498 So. 2d 328, 1986 Miss. LEXIS 2749 (Miss. 1986).

While the chancellor is not obligated or required by law to equally divide the property of the parties to a divorce, he does have the power and authority to effect an equitable division of jointly accumulated personal property acquired during the marriage. Dillon v. Dillon, 498 So. 2d 328, 1986 Miss. LEXIS 2749 (Miss. 1986).

Husband was not entitled to a return of a coin collection under record showing that wife had the collection at the time of the divorce and at no time did husband move to have her produce it, and the evidence established that the wife assisted husband in acquiring and maintaining the collection and that the family may have made sacrifices in order to allow husband to form the collection. Tutor v. Tutor, 494 So. 2d 362, 1986 Miss. LEXIS 2639 (Miss. 1986).

Chancellor did not err in failing to award husband an interest in a certificate of deposit which was acquired with wife's funds. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Where at the time of the first divorce between the parties certain Tennessee property was placed in wife's name, and since the revocation of that divorce did not return the property to husband, the chancellor did not abuse his discretion in failing, nor did he have authority, to award any of that property to husband. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Divorce decree and property settlement agreement purporting to divest party of title to real property are not valid consent decree, which would be subject to modification, where decree is not signed and consented to in writing by parties. Spearman v. Spearman, 471 So. 2d 1204, 1985 Miss. LEXIS 2084 (Miss. 1985).

Although chancery court generally cannot force spouse to deed real property to other spouse by judicial decree, thereby divesting spouse of title to property, court may do so where there is consent decree wherein parties agree to such division of realty and it is incorporated into divorce decree itself or where property has been jointly accumulated by parties, and chancellor makes equitable division of it; realty in name of one spouse is subject to equitable division where other spouse has signed mortgage and contributed payments toward it. Watts v. Watts, 466 So. 2d 889, 1985 Miss. LEXIS 1972 (Miss. 1985).

Consent decree in which parties to divorce have agreed to division of realty may be set aside on clear showing of fraud, or substantial equivalent thereof, or mutual mistake. Wray v. Langston, 380 So. 2d 1262, 1980 Miss. LEXIS 1870 (Miss. 1980).

When acting in the dual constitutional capacity of trier of divorce actions and as superior guardian of persons of unsound mind, it is the duty and responsibility of the chancellor to see that a mentally incompetent wife is supported and maintained during the remainder of her natural life. Klumb v. Klumb, 194 So. 2d 221, 1967 Miss. LEXIS 1402 (Miss. 1967).

Where decree of divorce in favor of husband was sustainable on ground of wife's adultery, decree awarding wife sole use and occupancy of property owned by husband and wife as tenants in common was erroneous, and supreme court, having entered decree awarding custody of children to the father, would also reverse the decree as to property and direct that property should be made free to a partition proceeding between the parties. Winfield v. Winfield, 203 Miss. 391, 35 So. 2d 443, 1948 Miss. LEXIS 285 (Miss. 1948).

22. Alimony.

Chancellor erred in awarding a wife child support, periodic alimony, and lump-sum alimony because the chancellor erred in failing to conduct a hearing, to receive and consider evidence of the parties' financial circumstances up to the time of remand when determining periodic alimony and child support, and to receive and evaluate evidence of the value of the husband's interest in a car dealership; the chancellor was directed to conduct an evidentiary hearing to determine: (1) the value of marital assets, including the value of the husband's interest in dealership, (2) the amount of periodic alimony and child support due up until the time of the remand hearing, which would be determined based on circumstances that occurred up until the time of the remand hearing, and (3) the amount of periodic alimony and child support going forward from the time of the remand hearing, which would be determined based on the circumstances existing at the time of the remand hearing, and marital assets would be valued at a time no later than the date of divorce and would be based on evidence presented at the remand hearing. Yelverton v. Yelverton, 26 So. 3d 1053, 2010 Miss. LEXIS 50 (Miss. 2010).

From the record it was clear that the parties specifically reserved the issue of alimony for the trial court's resolution, and the implication of such a specific reservation was that there was no marital property remaining to be divided. Further, in representing to the chancellor that alimony, credit card debt, and attorney's fees were the sole issues remaining, the wife waived her opportunity to argue that the individual retirement account and the share of a trucking company were marital property subject to equitable distribution; in any event, the chancellor did consider the latter assets, and all assets, in awarding the wife periodic alimony which had no fixed termination date (except for when the obligor died or the obligee remarried), as she seemed to have implied on appeal. Evans v. Evans, 912 So. 2d 184, 2005 Miss. App. LEXIS 706 (Miss. Ct. App. 2005).

23. Practice and procedure; limitations.

In their divorce case, the parties' Miss. R. Civ. P. 8.05 declarations were "very unspecific," and they presented conflicting testimony as to the value of their property. Since neither party offered expert testimony as to the value of said property, and because there was no ongoing business or unusual or unique asset in the marital estate that might have required expert testimony, the chancellor properly derived a value for the property based primarily upon the Rule 8.05 declarations of the parties. Studdard v. Studdard, 894 So. 2d 615, 2004 Miss. App. LEXIS 1063 (Miss. Ct. App. 2004).

In an action for divorce on the ground of adultery, the chancellor erred by adopting, verbatim and by incorporation, the findings of fact and conclusions of law prepared by an attorney for one of the litigants as those of the lower court. Brooks v. Brooks, 652 So. 2d 1113, 1995 Miss. LEXIS 152 (Miss. 1995).

Where a wife was guilty of desertion in leaving her husband in the first place and had no intention of returning, the subsequent filing by her of a bill for separate maintenance did not toll the statute. Leggett v. Leggett, 185 So. 2d 431, 1966 Miss. LEXIS 1503 (Miss. 1966).

If it could be said that the husband made an unconditional effort in good faith to bring about a reconciliation and resumption of the marital relation, and that the wife's refusal so changed the character of the separation that it became wilful and obstinate desertion on her part, so as to set in motion the running of the one-year period required by the statute, nevertheless this period could be computed only from the date of the offer of reconciliation and would not revert back to the date when the original separation occurred. Criswell v. Criswell, 254 Miss. 746, 182 So. 2d 587, 1966 Miss. LEXIS 1573 (Miss. 1966).

Decree in favor of wife in separate maintenance suit is res adjudicata and bar to maintenance by husband of suit for divorce against wife on grounds of cruel and inhuman treatment and desertion when such acts occurred or had their origin prior to decree in separate maintenance suit as decree in separate maintenance in favor of wife necessarily conclusively established that wife was not guilty of habitual cruel and inhuman treatment prior to actual separation and that there was no wilful desertion of husband by wife. Van Norman v. Van Norman, 205 Miss. 114, 38 So. 2d 452, 1949 Miss. LEXIS 416 (Miss. 1949).

Decree granting wife separate maintenance in suit wherein the main issue was whether the wife had deserted the husband, barred husband's suit for divorce filed 60 days thereafter predicated on charge of desertion. Wilson v. Wilson, 198 Miss. 334, 22 So. 2d 161, 1945 Miss. LEXIS 202 (Miss.), modified, 198 Miss. 334, 23 So. 2d 303, 1945 Miss. LEXIS 203 (Miss. 1945).

Decree granting wife separate maintenance was an adjudication that at the date of that decree she was not then a deserter, and, no appeal having been taken, the decree stands as final and conclusive, except as it may be modified upon petition presented for that purpose because of a material and substantial change of circumstances arising subsequent to the date of the decree. Wilson v. Wilson, 198 Miss. 334, 22 So. 2d 161, 1945 Miss. LEXIS 202 (Miss.), modified, 198 Miss. 334, 23 So. 2d 303, 1945 Miss. LEXIS 203 (Miss. 1945).

24. Review.

While chancellor's determinations of events that precede divorce are findings of fact, finding that spouse's conduct rose to level of habitual cruel and inhuman treatment, as defined as statutory ground for divorce, is a determination of law and is reversible where chancellor has employed erroneous legal standard. Potts v. Potts, 700 So. 2d 321, 1997 Miss. LEXIS 464 (Miss. 1997).

Reviewing court in divorce action will not set aside chancellor's findings of fact on issue of adultery unless they are manifestly wrong. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

Where the chancellor in a divorce action has failed to make his or her own findings of fact and conclusions of law on issue of adultery, Supreme Court will review the record de novo. Holden v. Frasher-Holden, 680 So. 2d 795, 1996 Miss. LEXIS 485 (Miss. 1996).

In an appeal from a judgment of divorce on the ground of adultery, deference would not be given to the findings of fact and conclusions of law of the lower court where the chancellor erred by applying an incorrect legal standard of proof for adultery, and by adopting, verbatim and by incorporation, the findings of fact and conclusions of law prepared by an attorney for one of the litigants as those of the lower court. Brooks v. Brooks, 652 So. 2d 1113, 1995 Miss. LEXIS 152 (Miss. 1995).

Decree granting wife divorce and allowing attorney's fee and permanent alimony for herself and child will be entered in supreme court on appeal on reversal of chancery court's decree denying divorce, fees and alimony to wife. Kincaid v. Kincaid, 207 Miss. 692, 43 So. 2d 108, 1949 Miss. LEXIS 380 (Miss. 1949).

Supreme court has power to affirm, reverse, or modify divorce decree appealed from, or it may reverse in part and affirm in part, or remand for a new hearing, and where all the facts necessary to enable it to do justice are contained in the record, it may make such order with respect to alimony or allowances as the trial court should have made. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

Decree granting divorce must be reversed where the complaint fails to allege a ground for divorce, even though there was neither an answer nor a demurrer to the complaint. Nichols v. Nichols, 197 Miss. 302, 20 So. 2d 72, 1944 Miss. LEXIS 301 (Miss. 1944).

A chancellor's decree denying divorce is binding upon reviewing court and precludes granting of divorce by reviewing court, unless chancellor's finding on conflicting evidence was manifestly wrong. Sarphie v. Sarphie, 180 Miss. 313, 177 So. 358, 1937 Miss. LEXIS 118 (Miss. 1937).

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Admissibility in divorce action for adultery of wife's statement that husband was not father of her child. 4 A.L.R.2d 567.

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Divorce: necessity and sufficiency of corroboration of plaintiff's testimony concerning ground for divorce. 15 A.L.R.2d 170.

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What amounts to connivance by one spouse at other's adultery. 17 A.L.R.2d 342.

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Divorce decree as res judicata or estoppel as to previous marital status, against or in favor of third persons. 20 A.L.R.2d 1163.

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Refusal of sexual intercourse as grounds for annulment. 28 A.L.R.2d 499.

Wife's failure to follow husband to new domicile as constituting desertion or abandonment as ground for divorce. 29 A.L.R.2d 474.

What amounts to habitual intemperance, drunkenness, within statute relating to substantive grounds for divorce. 29 A.L.R.2d 925.

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Concealed premarital unchastity or parenthood as ground of divorce or annulment. 64 A.L.R.2d 742.

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Drunkenness, habitual intemperance, or use of drugs as constituting cruelty as ground for divorce. 76 A.L.R.2d 419.

Homosexuality as ground for divorce. 78 A.L.R.2d 807.

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Acts occurring after commencement of suit for divorce as ground for decree under original complaint. 98 A.L.R.2d 1264.

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Single act as basis of divorce or separation on ground of cruelty. 7 A.L.R.3d 761.

Jurisdiction on constructive or substituted service, in divorce or alimony action, to reach property within state. 10 A.L.R.3d 212.

Power of court to grant absolute divorce to both spouses upon showing of mutual fault. 13 A.L.R.3d 1364.

Fault of spouse as affecting right to divorce under statute making separation a substantive ground of divorce. 14 A.L.R.3d 502.

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Validity and construction of statutory provision relating to jurisdiction of court for purpose of divorce for servicemen. 73 A.L.R.3d 431.

Refusal of sexual intercourse as justifying divorce or separation. 82 A.L.R.3d 660.

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19 Am. Jur. Proof of Facts 2d 221, Dissolution of Marriage on Statutory Ground of Incompatibility.

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§ 93-5-2. Divorce on ground of irreconcilable differences.

(1) Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process.

(2) If the parties provide by written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.

(3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment. Such consent may not be withdrawn by a party without leave of the court after the court has commenced any proceeding, including the hearing of any motion or other matter pertaining thereto. The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights

between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection may be had as in other cases in chancery court only insofar as such orders and judgments relate to issues that the parties consented to have decided by the court.

(4) Complaints for divorce on the ground of irreconcilable differences must have been on file for sixty (60) days before being heard. Except as otherwise provided in subsection (3) of this section, a joint complaint of husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process, for divorce solely on the ground of irreconcilable differences, shall be taken as proved and a final judgment entered thereon, as in other cases and without proof or testimony in termtime or vacation, the provisions of Section 93-5-17 to the contrary notwithstanding.

(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the ground of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

(6) Irreconcilable differences may be asserted as a sole ground for divorce or as an alternate ground for divorce with any other cause for divorce set out in Section 93-5-1.

(7) For the purposes of orders touching the maintenance and alimony of the wife or husband, "property" and "an asset of a spouse" shall not include any interest a party may have as an heir at law of a living person or any interest under a third-party will, nor shall any such interest be considered as an economic circumstance or other factor.

HISTORY:

Laws, 1976, ch. 451, § 1; Laws, 1978, ch. 367, § 1; Laws, 1990, ch. 584, § 1; Laws, 2008, ch. 547, § 1, eff from and after July 1, 2008.

Cross References —

Causes for divorce generally, see § 93-5-1.

Provision of divorce decree respecting custody of children and alimony, see § 93-5-23.

Annulment of marriage, see § 93-7-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
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1. Generally.

Although the chancery court never specifically stated that the property settlement was adequate and sufficient, there was no reversible error as a lack of a mere recitation of the obligatory words was not outcome determinative under Miss. Code Ann. § 93-5-2. In re

Dissolution of the Marriage of De St. Germain, 977 So. 2d 412, 2008 Miss. App. LEXIS 163 (Miss. Ct. App. 2008).

Although a wife did not show prejudice as a result of a lower court's failure to comply with Miss. Code Ann. § 93-5-2 by requiring the parties to sign a consent to adjudicate a divorce action based on irreconcilable differences, the fact that the husband failed to file an appellate brief prevented an appellate court from concluding that equity did not warrant reversal. Engel v. Engel, 920 So. 2d 505, 2006 Miss. App. LEXIS 61 (Miss. Ct. App. 2006).

Under an irreconcilable differences divorce, pursuant to Miss. Code Ann. § 93-5-2(3), a written consent must state that the parties voluntarily consent to permit the court to decide the issues upon which they cannot agree, and the consent defines the issues that are to be contested and resolved by the chancellor. A chancellor erred when he failed to abide by what the parties had stipulated in the consent to divorce, namely, that all businesses of the parties were to be classified as marital property. Johnson v. Johnson, 877 So. 2d 485, 2003 Miss. App. LEXIS 1203 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 862 (Miss. 2004).

Because there was no enforceable agreement between the divorcing parties, the chancellor was required to address issues of property distribution and support consistent with the principles of equitable distribution; however, the record was completely devoid of any analysis of the appropriateness of the distribution of property or the award of alimony, and the chancellor merely took what was an agreement for purposes of an irreconcilable differences divorce and made it the order of the court, with the result that, by failing to apply the 12 factors to be considered in awarding alimony, there was not an appropriate and equitable distribution of property or a fair and just amount of alimony awarded. Ash v. Ash, 877 So. 2d 458, 2003 Miss. App. LEXIS 1040 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 878 (Miss. 2004).

A separation agreement signed by both parties was valid and binding as of the date of its execution and was not voided by the untimely death of the husband or by any supposed reconciliation of the parties and, consequently, the wife was precluded by the separation agreement from inheriting the estate of the husband. Barton v. Barton, 790 So. 2d 169, 2001 Miss. LEXIS 105 (Miss. 2001).

The chancellor did not exceed his statutory authority when he entered a final judgment of divorce on the sixtieth day subsequent to the filing of the joint complaint, rather than waiting until the next day, as the last day of the 60 day period prescribed by subsection (4) of this section is properly included in computing that period. Robbins v. Robbins (In re Robbins), 744 So. 2d 394, 1999 Miss. App. LEXIS 370 (Miss. Ct. App. 1999).

Giving a strict interpretation to subsection (2) of this section, the statute provides that the parties provide a written agreement and that the court finds that such provisions are adequate and sufficient; thus, where there was no written consent agreement, the chancellor exceeded his statutory authority by granting a divorce based on irreconcilable differences. Cassibry v. Cassibry, 742 So. 2d 1121, 1999 Miss. LEXIS 211 (Miss. 1999).

The chancellor was manifestly in error when he granted an irreconcilable differences divorce to the parties since there was no written agreement between the parties that resolved all matters touching on child custody and support and the settlement of all property rights; attorneys' notes signed by the parties at the end of a day's negotiations were incomplete and were nothing more than uninformative and practically unintelligible scribblings and were devoid of any information about child custody, visitation, or the various matters touching on the support and maintenance of the children of the parties. Joiner v. Joiner, 739 So. 2d 1043, 1999 Miss. App. LEXIS 167 (Miss. Ct. App. 1999).

Although the parties had not entered into a property settlement agreement nor had the court adjudicated those issues on the date that the court declared the parties divorced, such error was harmless where the agreed judgment of divorce provided for temporary custody and support and the parties thereafter entered into a child custody, support and property settlement agreement which the chancellor found to be adequate and sufficient and which was approved by the chancellor in the final judgment. Rounsaville v. Rounsaville, 732 So. 2d 909, 1999 Miss. LEXIS 36 (Miss. 1999).

An oral agreement of the parties is not sufficient to satisfy the requirements of the statute; the consent agreement must be written and signed by both parties. Cook v. Cook, 725 So. 2d 205, 1998 Miss. LEXIS 613 (Miss. 1998).

The problem with § 93-5-2 is that it requires all financial matters incident to the divorce to be resolved by voluntary agreement. Section 93-5-2 blithely proceeds on the premise that parties having irreconcilable differences regarding their marriage will somehow be able to reconcile their differences on financial matters. What is needed is a simple amendment to § 93-5-1 providing for a thirteenth ground for divorce: irreconcilable differences. That ground for divorce should be subject to proof as any other. The defendant's denial should have no more effect than his or her denial in the case of any of the other 12 grounds for divorce. That one spouse out of blindness, obstinance or nostalgia refuses to recognize it hardly means that a marriage may not in fact be irretrievably broken. Most important, the defending spouse's refusal to agree on financial matters would be no bar to the granting of a divorce because of irreconcilable differences. Wilson v. Wilson, 547 So. 2d 803, 1989 Miss. LEXIS 368 (Miss. 1989).

A prior property settlement agreement entered into by the parties is not enforceable if it is not approved by the court for purposes of § 93-5-2, which requires that parties seeking a divorce on the grounds of irreconcilable differences enter into a property settlement agreement that is to be incorporated into the final decree. Traub v. Johnson, 536 So. 2d 25, 1988 Miss. LEXIS 608 (Miss. 1988).

A divorce accompanied by property settlement did not revoke, by implication, a previously executed will where the parties continued to live together, the divorce decree or property settlement contained no proof of intent to revoke the prior testamentary instrument, and there was no showing that the property settlement was anything more than a formality to comply with the requirements of a divorce for irreconcilable differences. Rasco v. Estate of Rasco, 501 So. 2d 421, 1987 Miss. LEXIS 2274 (Miss. 1987).

Agreement between divorcing husband and wife, which was incorporated into their divorce decree pursuant to Mississippi Code § 93-5-2, which obligated husband to pay $5,000 per month to wife, and further provided that payments to the wife would not terminate upon husband's death or wife's remarriage, and that wife could never ask that payments to her be increased, was, notwithstanding the use of the term "alimony" therein, in fact a property settlement or lump sum alimony, payable in fixed, unalterable installments, which could not be modified on ground of husband's subsequent deteriorated financial condition. East v. East, 493 So. 2d 927, 1986 Miss. LEXIS 2564 (Miss. 1986).

Although no fault divorce may not be granted without parties having made provisions by written agreement for custody and maintenance of children and for settlement of property rights between parties, effective date of separation agreement is not delayed until no fault divorce is granted. Crosby v. Peoples Bank of Indianola, 472 So. 2d 951, 41 U.C.C. Rep. Serv. (CBC) 1052, 1985 Miss. LEXIS 2032 (Miss. 1985).

When parties who obtain divorce on grounds of irreconcilable differences have submitted property settlement agreement which has been incorporated by court into final decree; contradictory, private contract entered by parties is void as against public policy. Sullivan v. Pouncey, 469 So. 2d 1233, 1985 Miss. LEXIS 2083 (Miss. 1985).

When § 93-5-2 has been complied with, a custody, support, alimony and property settlement agreement becomes a part of the final decree for all legal intents and purposes, and this is so, whether the agreement is copied verbatim into the text of the decree, whether it is attached as an exhibit and incorporated by reference, or whether it is simply on file with the clerk of the court; if the agreement is sufficient to comply with the statute, that is enough to render it a part of the final decree of divorce. Switzer v. Switzer, 460 So. 2d 843, 1984 Miss. LEXIS 2032 (Miss. 1984).

2. Applicability.

Chancery court did not err by not equitably dividing a husband's military retirement when granting the parties a divorce based on irreconcilable differences because the wife signed a consent agreement wherein the wife indicated the chancery court only needed to resolve one disputed issue related to whether she had misappropriated $ 46,000 from the husband. Gordon v. Gordon, 126 So. 3d 922, 2013 Miss. App. LEXIS 273 (Miss. Ct. App.), cert. denied, 127 So. 3d 1115, 2013 Miss. LEXIS 631 (Miss. 2013).

In a case in which a husband argued that divorce judgment was void because the parties failed to execute a consent pursuant to Miss. Code Ann. § 93-5-2(3), that issue was meritless because there were no issues submitted to the chancellor. The judgment of divorce was entered pursuant to Miss. Code Ann. § 93-5-2(2), and the proposed agreed order met § 93-5-2(2)'s requirement of a written agreement. Cobb v. Cobb, 29 So. 3d 145, 2010 Miss. App. LEXIS 118 (Miss. Ct. App. 2010).

In divorce in which the parties entered a written consent for divorce on the ground of irreconcilable differences, it was signed by both parties and by their respective counsel, and neither party was granted leave of court to withdraw his or her consent to the divorce based on irreconcilable differences, the ex-wife argued unsuccessfully that the judgment of divorce was void because neither party had ever withdrawn the fault-based grounds asserted in their respective complaint and counter-complaint, as required by Miss. Code Ann. § 93-5-2(5). Section 93-5-2(3) operated as a cancellation and withdrawal of the contests or denials referenced in § 93-5-2(5). O'Neal v. O'Neal, 17 So. 3d 572, 2009 Miss. LEXIS 428 (Miss. 2009).

Amended § 93-5-2, which became effective April 9, 1990, applied to a divorce action in which all pleadings were filed prior to the effective date of the amendment and trial took place after the effective date since the amended statute affected only the mode of procedure and no substantive right of any of the parties, and the proceedings which were in process under the statute had not reached the stage of final judgment at the time the modification by amendment became effective. Massingill v. Massingill, 594 So. 2d 1173, 1992 Miss. LEXIS 74 (Miss. 1992).

3. Personal appearance requirement.

In an uncontested divorce action based on irreconcilable differences, it was within the chancellor's discretion to determine whether a personal appearance of a party or of an attorney was required since no proof is required under § 93-5-2, which governs a divorce sought on the grounds of irreconcilable differences, and neither § 93-5-7 nor 93-5-17, which govern the conduct of divorce proceedings, indicates a requirement that the person seeking the divorce must personally appear before the chancellor. The chancellor abused his discretion in refusing to grant the divorce without a personal appearance where the parties were proceeding pro se, the wife was a resident of California, and the husband was incarcerated in a correctional facility. Bullard v. Morris, 547 So. 2d 789, 1989 Miss. LEXIS 355 (Miss. 1989).

4. Pleadings.

Chancellor's decision to award a divorce based on irreconcilable differences amounted to manifest error because complaints for divorce on the ground of irreconcilable differences had to have been on file for 60 days before being heard pursuant to Miss. Code Ann. § 93-5-2(4) and an ex-husband's complaint failed to satisfy such requirement. Tyrone v. Tyrone, 32 So. 3d 1206, 2009 Miss. App. LEXIS 630 (Miss. Ct. App. 2009).

Chancery court exceeded its authority in granting the parties a divorce on the ground of irreconcilable differences because the parties failed to establish that each of the procedural steps in Miss. Code Ann. § 93-5-2 necessary for withdrawing the contested divorce were taken by the parties. Although the parties did filed the requisite consent, the record was devoid of any order permitting the parties to withdraw their contest or denial. Pittman v. Pittman, 4 So. 3d 395, 2009 Miss. App. LEXIS 126 (Miss. Ct. App.), abrogated, Sellers v. Sellers, 22 So. 3d 299, 2009 Miss. App. LEXIS 338 (Miss. Ct. App. 2009), overruled, O'Neal v. O'Neal, 17 So. 3d 572, 2009 Miss. LEXIS 428 (Miss. 2009).

Trial court did not err by not ruling that the judgment of divorce was void and, consequently, that the citation of contempt against the father for failing to pay child support was void, as the mandates of Miss. Code Ann. § 93-5-2(5) were inapplicable; the father filed neither an answer to the complaint for divorce, nor a counterclaim, and he admitted in his appellate brief that the proceedings for divorce were uncontested. Further, because the record showed that the father was personally served with process, the divorce proceedings met the requisite mandates of Miss. Code Ann. § 93-5-2(1). Breland v. Breland, 920 So. 2d 510, 2006 Miss. App. LEXIS 57 (Miss. Ct. App. 2006).

Chancellor's decision dividing the marital property and awarding alimony was based upon a complete and careful factor-by-factor analysis and was supported by substantial evidence; the chancellor did not err in denying the wife's request for attorney fees because under Miss. Code Ann. § 93-5-2(3), the chancellor was limited to the resolution of the issues specifically identified and personally agreed to in writing by the parties, which only included the three contested issues of property distribution, alimony, and marital property. Wideman v. Wideman, 909 So. 2d 140, 2005 Miss. App. LEXIS 557 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 344 (Miss. 2006).

Because the Irreconcilable Differences Divorce Act had been complied with, the parties' settlement agreement became a part of the final divorce decree; it became a part of the final decree of divorce as if the decree had been rendered by the chancery court following a contested divorce proceeding. West v. West, 891 So. 2d 203, 2004 Miss. LEXIS 1411 (Miss. 2004).

The mere fact that irreconcilable differences was asserted in the pleadings filed by both parties as an alternate ground for divorce did not, in and of itself, meet all the requirements of § 93-5-2(3), which mandates a written consent to a divorce on the ground of irreconcilable differences signed by both parties, and was not alone sufficient to justify a divorce on the ground of irreconcilable differences; although both parties requested a divorce on the ground of irreconcilable differences, both parties also denied that the other party was entitled to a divorce on that ground, and, therefore, the facts negated any conclusion that there was mutual consent to a divorce on the ground of irreconcilable differences. Massingill v. Massingill, 594 So. 2d 1173, 1992 Miss. LEXIS 74 (Miss. 1992).

The chancery court acted beyond its statutory authority in awarding divorce on ground of irreconcilable differences where there was no written agreement of the parties regarding property rights, and husband had filed cross-complaint against wife whose complaint sought a divorce on grounds of adultery, habitual cruel and inhuman treatment, and, in the alternative, irreconcilable differences. Alexander v. Alexander, 493 So. 2d 978, 1986 Miss. LEXIS 2636 (Miss. 1986).

Filing of second complaint by husband, grounded on wife's adultery, which was inconsistent with first complaint based upon irreconcilable differences, constituted an effective withdrawal from and objection to the first complaint and, since wife had adequate notice, chancellor could grant divorce and custody of minor child to husband on second complaint, notwithstanding the parties' earlier execution of child custody, child support, and property settlement agreements. McCleave v. McCleave, 491 So. 2d 522, 1986 Miss. LEXIS 2517 (Miss. 1986).

5. Contest or denial.

Parties complied with the requirements of Miss. Code Ann. § 93-5-2(3) and filed a consent agreement prior to trial and the terms of the consent agreement made it clear that after the chancellor commenced the hearing, the parties could not withdraw their consent without leave of court. Because the parties fully and properly acceded to the procedural strictures of § 95-5-2(3), the safeguards provided by § 93-5-2(5) – namely the withdrawal of any contest or denial – were no longer necessary. Cossey v. Cossey, 22 So. 3d 353, 2009 Miss. App. LEXIS 771 (Miss. Ct. App. 2009).

In a divorce proceeding, a husband argued unsuccessfully that the divorce judgment was void because he did not formally withdraw his initial denial of his wife's assertion in her complaint that she was entitled to a divorce on the grounds of irreconcilable differences. The agreed judgment of divorce provided that all further relief herein requested by either party was denied and that was sufficient to operate as a withdrawal of the wife's fault-based grounds for divorce and the husband's initial denial of her assertion that she was entitled to a divorce on the grounds of irreconcilable differences. Cobb v. Cobb, 29 So. 3d 145, 2010 Miss. App. LEXIS 118 (Miss. Ct. App. 2010).

Chancery court did possess the requisite jurisdiction under Miss. Code Ann. § 93-5-2 to grant the divorce on the ground of irreconcilable differences even though the parties never canceled or withdrew their contest or denial by leave and order of the chancery court. Sellers v. Sellers, 22 So. 3d 299, 2009 Miss. App. LEXIS 338 (Miss. Ct. App. 2009).

Chancery court did not err in denying a wife's motion to declare a divorce judgment null and void; because the parties entered into a consent agreement to divorce on the ground of irreconcilable differences, under Miss. Code § 93-5-2(3), the requirements of Miss. Code § 93-5-2(5) did not apply. Irby v. Estate of Irby, 7 So. 3d 223, 2009 Miss. LEXIS 146 (Miss. 2009).

Statutory requirements of Miss. Code Ann. § 93-5-2(5) were not met because the wife never withdrew or cancelled her answer and counterclaim denying that the husband was entitled to a divorce on the ground of irreconcilable differences. On remand, if the wife agreed to withdraw her answer and denial to the husband's complaint, the chancellor was permitted to grant the parties a divorce on the basis of irreconcilable differences. Heatherly v. Heatherly, 914 So. 2d 754, 2005 Miss. App. LEXIS 796 (Miss. Ct. App. 2005).

Granting a divorce based on irreconcilable differences on the day set for the trial to hear a fault-based divorce fully contested by one of the parties and where irreconcilable differences had not been pled as an alternative was manifest error because the statutory requirements for irreconcilable differences divorce were not met. Perkins v. Perkins, 787 So. 2d 1256, 2001 Miss. LEXIS 158 (Miss. 2001).

An irreconcilable differences divorce requires that neither spouse contest its granting; this does not mean that both spouses must fervently desire a divorce; unless a spouse exercises the right to contest it, a decree of divorce may be entered. Sanford v. Sanford, 749 So. 2d 353, 1999 Miss. App. LEXIS 596 (Miss. Ct. App. 1999).

The wife was entitled to relief from a judgment of divorce where she was unrepresented, she indicated several times her misunderstanding of her husband's right to a divorce merely by wanting one, she expressed frequently her opposition to the divorce, and, not least of all, she promptly sought to undo the agreement. Sanford v. Sanford, 749 So. 2d 353, 1999 Miss. App. LEXIS 596 (Miss. Ct. App. 1999).

6. Child custody, support.

Chancellor properly awarded child support to a wife because the amount was presumptively correct under the guidelines and the parties' proposed agreement did not provide adequate and sufficient support for the child. Mosher v. Mosher, 192 So. 3d 1118, 2016 Miss. App. LEXIS 334 (Miss. Ct. App. 2016).

Escalation clauses do not have to be tied to all four factors in Tedford v. Dempsey, 437 So.2d 410 (Miss. 1983); therefore, in a child support dispute, a child support agreement was enforceable because it was clear and measurable, it adequately and sufficiently provided for the needs of the child, it allotted room for a fluctuation in income, and it set the minimum amount the parties agreed was sufficient to support the child. The clause was tied to the father's earnings, and depending upon his yearly income, it could have been escalating or de-escalating. (overruling Bruce v. Bruce, 687 So.2d 1199 (Miss. 1996)). Short v. Short, 131 So. 3d 1149, 2014 Miss. LEXIS 85 (Miss. 2014).

Father's argument that a chancellor disregarded the statutory guidelines for child support was rejected because the child support was ordered pursuant to an agreement that the father freely entered into; the parties used the broad latitude prescribed to them in formulating an agreement that they presented to the chancellor as sufficient to support their child. Even though the amount of child support was high, the father consented to providing more support than recommended by the guidelines. Short v. Short, 131 So. 3d 1149, 2014 Miss. LEXIS 85 (Miss. 2014).

Although a chancery court erred in granting the parties a divorce based on irreconcilable differences without addressing custody or support of their seventeen-year-old child, who was residing with his older sister, the error was harmless and the issue was moot because the child was no longer a minor and the parties were no longer obligated to pay child support for him. Gordon v. Gordon, 126 So. 3d 922, 2013 Miss. App. LEXIS 273 (Miss. Ct. App.), cert. denied, 127 So. 3d 1115, 2013 Miss. LEXIS 631 (Miss. 2013).

Trial court denied wife's motion for relief from a divorce judgment under Miss. R. Civ. P. 60(b) based upon its erroneous application of law because a showing that an agreement was overreaching did not require a showing of fraud, and the settlement agreement that the wife signed without an attorney was clearly one-sided and unfair with the wife giving up custody of the children and all her marital property. Further, the court could not say that the agreement was in the best interests of the children because it gave the children no specific visitation period with their mother, formerly the primary caregiver of the children, and thus it did not meet the requirements of Miss. Code Ann. § 93-5-2. Lowrey v. Lowrey, 919 So. 2d 1112, 2005 Miss. App. LEXIS 522 (Miss. Ct. App. – 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 33 (Miss. 2006).

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to offset the ex-husband's child support obligation by his payments for his oldest child's college education because, inter alia: (1) although the child lived at college, he frequently came home on the weekend and for holidays; (2) the child received financial support from both parents as the ex-wife gave him money to pay for his car insurance; (3) the wife used a portion of the child's support payment to provide for the child when he came home for visits and to maintain the household for the rest of the family; and (4) the child support agreement contained no provision for reducing child support payments to the wife once the children left home. Dix v. Dix, 941 So. 2d 913, 2006 Miss. App. LEXIS 812 (Miss. Ct. App. 2006).

In an irreconcilable differences divorce case, the parties asked the chancellor to decide the issues of primary custody, property settlement, and support, pursuant to Miss. Code Ann. § 93-5-2(3); because the parties consented to the chancellor determination of custody, that met the statutory directive of "joint application" in § 93-5-24(2). Because the parents had been sharing joint legal and physical custody since their separation, on their own initiative, the chancellor found that there was a proven willingness from both parties to cooperate; thus, the chancellor did not err in awarding joint custody of the child to the parties. Crider v. Crider, 904 So. 2d 142, 2005 Miss. LEXIS 222 (Miss. 2005).

Although the chancellor erred by granting a divorce absolute before adjudicating all matters involving custody and maintenance of the children and property rights between the parties raised by the pleadings, such error was harmless in the absence of a showing of prejudice. Johnston v. Johnston, 722 So. 2d 453, 1998 Miss. LEXIS 457 (Miss. 1998).

Chancellor can modify child support provisions of divorce decree only when there has been material or substantial change in circumstances of one of the parties, and that is true for divorces granted due to irreconcilable differences. Bruce v. Bruce, 687 So. 2d 1199, 1996 Miss. LEXIS 484 (Miss. 1996), overruled in part, Short v. Short, 131 So. 3d 1149, 2014 Miss. LEXIS 85 (Miss. 2014).

A child support agreement, submitted to the court pursuant to § 93-5-2, which ends support for a child before that child reaches the age of 21 or is otherwise emancipated, is unenforceable as to the rights of the child. Lawrence v. Lawrence, 574 So. 2d 1376, 1991 Miss. LEXIS 17 (Miss. 1991).

Chancery courts must refuse to approve any child custody agreement presented under § 93-5-2 or otherwise which mandates, without exception, that children be raised in a given community. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

The provision in § 93-5-2 stating that a divorce decree "may be modified as other decrees for divorce," refers only to child custody and maintenance because property right settlements are fixed and final. A divorce judgment relating to child support is not a settlement of property rights, which is immutable, fixed and not subject to change, but a decretal provision based upon the reasonable needs of the child coupled with the ability of the parent to pay, and which can vary, dependent upon future developments. Brown v. Brown, 566 So. 2d 718, 1990 Miss. LEXIS 450 (Miss. 1990).

In a divorce suit wherein the husband answered and cross-claimed for divorce and for custody of the parties' minor child and, where in the interim, the child was found to be a neglected child while in mother's custody and custody was given to child's maternal grandfather by youth court referee, the chancellor, who, at the divorce hearing, refused to hear testimony on child's custody, left child in custody of maternal grandfather, and granted divorce on irreconcilable differences, was without authority to substitute youth court referee's judgment, and in so doing, he deprived natural father of right to be heard on the custody of his son. Keely v. Keely, 495 So. 2d 452, 1986 Miss. LEXIS 2652 (Miss. 1986).

Filing of second complaint by husband, grounded on wife's adultery, which was inconsistent with first complaint based upon irreconcilable differences, constituted an effective withdrawal from and objection to the first complaint and, since wife had adequate notice, chancellor could grant divorce and custody of minor child to husband on second complaint, notwithstanding the parties' earlier execution of child custody, child support, and property settlement agreements. McCleave v. McCleave, 491 So. 2d 522, 1986 Miss. LEXIS 2517 (Miss. 1986).

Section 93-5-2 gives the chancellor the power and the responsibility, in the face of the reasonably foreseeable, to require a reasonable escalation clause in every child support agreement, tailored to the situation of parties, absent unusual circumstances that might render it inequitable. Tedford v. Dempsey, 437 So. 2d 410, 1983 Miss. LEXIS 2861 (Miss. 1983).

7. Visitation.

Chancellor's finding that she lacked authority to order specific visitation schedule because the issue had not been jointly submitted to the court was error; although Miss. Code Ann. § 93-5-2 does not explicitly state that visitation must be agreed upon by the parties or adjudicated by the court before a divorce based on irreconcilable differences, it is implicit in the statute's language that visitation must be addressed if the issue of custody is submitted to the trial court for resolution. Benal v. Benal, 22 So. 3d 369, 2009 Miss. App. LEXIS 805 (Miss. Ct. App. 2009).

8. Modifiability.

Since a petition was not made to the chancellor to review and modify the property settlement agreement, it was not properly before the chancery court; in order to change the agreement to reflect the parties' new custodial arrangement, the wife had to petition the chancery court to review and alter the agreement. Everett v. Burchfield, 192 So. 3d 1053, 2015 Miss. App. LEXIS 640 (Miss. Ct. App. 2015).

Chancellor did not abuse his discretion in denying a former husband's request for modification of child support. The husband had agreed in a property-settlement agreement that he would pay a minimum monthly support payment of $3,000 and while the husband had incurred a loss of income,under the relevant Powell factors, the circumstances did not warrant a downward modification. Short v. Short, 131 So. 3d 1200, 2013 Miss. App. LEXIS 35 (Miss. Ct. App. 2013), rev'd, 131 So. 3d 1149, 2014 Miss. LEXIS 85 (Miss. 2014).

In this divorce action, the chancellor was within her authority to utilize the equitable powers of the chancery court to "modify" or "reform" the property settlement agreement and to order its distribution according to the applicable percentages because the impossibility stemmed from the incorrect estimate of the account's balance at the time of divorce, and from the fact that the husband did not have the information regarding the account to which to effect the transfer. Wood v. Wood, 35 So. 3d 507, 2010 Miss. LEXIS 272 (Miss. 2010).

Where a father lost his job and made less at a subsequent employer, an agreement entered into regarding alimony and child support due to the granting of a divorce based on irreconcilable differences was modified under Miss. Code Ann. § 93-5-23; the agreement could no longer have been given its intended effect, and a material change in circumstances was shown. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Record made it clear that the parties reached their property settlement agreement by and through the negotiations of their attorneys and the court was not persuaded that the language proposed by the former husband reflected the original intent of the parties; a thorough comparison of the documents provided in the record did not lend the court to agree with the husband's contention that the final agreement should have been reformed due to a mutual mistake to reflect the understanding and intent of the parties. Pratt v. Pratt, 977 So. 2d 386, 2007 Miss. App. LEXIS 606 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 94 (Miss. 2008).

Chancery court erred in granting a husband's motion for modification of the property settlement agreement approved by the court, nine years after it was incorporated into the divorce decree; the trial court erred in voiding the alimony and property settlement provisions of the property settlement agreement and in concluding that the provisions were ambiguous, unconscionable and contained illegal escalation clauses. The husband made a deal that he had no problem with for nine years; he was represented by numerous counsel during negotiations of the property settlement agreement, which the parties negotiated for over a year, and could not now be heard to complain. West v. West, 881 So. 2d 188, 2004 Miss. LEXIS 1025 (Miss. 2004).

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to reduce or eliminate the ex-husband's periodic alimony award to the ex-wife because, inter alia: (1) he was in a much better financial position than her; (2) the decrease in his salary for one year did not reflect a continuing pattern of decline and he was still able to purchase luxury items that year, including an airplane and a recreational vehicle, and to invest in numerous real estate ventures; and (3) based on the husband's monthly disposable income, he could pay his annual periodic alimony obligation to the wife in one month and still have money left over. Dix v. Dix, 941 So. 2d 913, 2006 Miss. App. LEXIS 812 (Miss. Ct. App. 2006).

Chancery court did not err in denying a husband's motion for modification of the amount of child support payable under an agreement entered into in connection with the parties' irreconcilable differences divorce where husband had paid less than 10 percent of the amount due and had voluntarily changed jobs resulting in a lowering of the husband's income; husband was ordered to not only continue paying the agreed amount but the amount of the husband's monthly obligation was increased to pay the past due amount. Seeley v. Stafford, 840 So. 2d 111, 2003 Miss. App. LEXIS 134 (Miss. Ct. App. 2003).

This section empowered the chancellor to modify a judgment of divorce by entry of a supplemental judgment based on substantial evidence to support the reformation of the parties' property settlement agreement. Dilling v. Dilling, 734 So. 2d 327, 1999 Miss. App. LEXIS 58 (Miss. Ct. App. 1999).

Chancellor can modify child support provisions of divorce decree only when there has been material or substantial change in circumstances of one of the parties, and that is true for divorces granted due to irreconcilable differences. Bruce v. Bruce, 687 So. 2d 1199, 1996 Miss. LEXIS 484 (Miss. 1996), overruled in part, Short v. Short, 131 So. 3d 1149, 2014 Miss. LEXIS 85 (Miss. 2014).

Support agreements for divorces granted on ground of irreconcilable differences are subject to modification, but only if there has been material change in circumstances with one or more of parties which occurs as result of after-arising circumstances not reasonably anticipated at time of agreement. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Section 93-5-2 gives the chancellor the power and the responsibility, in the face of the reasonably foreseeable, to require a reasonable escalation clause in every child support agreement, tailored to the situation of parties, absent unusual circumstances that might render it inequitable. Tedford v. Dempsey, 437 So. 2d 410, 1983 Miss. LEXIS 2861 (Miss. 1983).

Alimony agreements in divorces based upon irreconcilable differences are subject to modification the same as other decrees. Taylor v. Taylor, 392 So. 2d 1145, 1981 Miss. LEXIS 1912 (Miss. 1981).

9. Written consent.

Although both parties orally consented to a divorce on the ground of irreconcilable differences, because this statute required that consent to a divorce had to be in writing and signed by both parties personally, the chancellor committed manifest error by not getting consent to the divorce in writing and by granting the divorce. Reno v. Reno, 119 So. 3d 1154, 2013 Miss. App. LEXIS 487 (Miss. Ct. App. 2013).

Grant of divorce on the ground of irreconcilable differences to the husband and wife in their divorce action was inappropriate because the parties failed to comply with Miss. Code Ann. § 93-5-2(3) or (5). There was discussion between counsel at trial that revealed that no written consent was ever entered into by the parties and the husband never sought leave of the court to withdraw his fault-based complaint. Johnson v. Johnson, 21 So. 3d 694, 2009 Miss. App. LEXIS 746 (Miss. Ct. App. 2009).

10. Revocation of consent.

Under Miss. Code Ann. § 93-5-2(3), an ex-husband needed leave of the court to withdraw his consent and the chancellor committed no manifest error in denying the request, because the divorce had been pending for three years before the husband sought to revoke his consent and there had been hearings on the matter since the parties had given their consent. McDuffie v. McDuffie, 21 So. 3d 685, 2009 Miss. App. LEXIS 628 (Miss. Ct. App. 2009).

11. Miscellaneous.

Chancery court did not err in denying a husband's Miss. R. Civ. P. 60(b)(4) motion for relief from a final judgment of divorce on the grounds that it lacked subject matter and personal jurisdiction where the wife had waived the defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process by not raising them, and the husband's failure to comply with Miss. Code Ann. § 93-5-2(1) had created the alleged jurisdictional defect. Ridgeway v. Hooker, 240 So. 3d 1202, 2018 Miss. LEXIS 68 (Miss. 2018).

After granting the parties a divorce based on irreconcilable differences, the chancellor properly found their date of separation as the date of demarcation, divided the marital assets, and refused to award the wife alimony because neither party provided any monetary support to the other post-separation, except the disability benefits paid on behalf of their child, the chancellor set out his considerations in classifying the contested items as marital property and conducted a detailed analysis of all the factors in distributing that property, and alimony was inappropriate inasmuch as the wife was not left with a deficit where she was awarded 28 acres of a 34-acre tract (valued at $35,000) and a majority of the marital assets. Randolph v. Randolph, 199 So. 3d 1282, 2016 Miss. App. LEXIS 579 (Miss. Ct. App. 2016).

There was a genuine dispute of material fact about whether an alienation of affections case was time barred because it was unclear when a former wife's affections were alienated; although the couple filed for divorce on May 27, 2010, they moved back in together in July 2010 as the wife recovered from surgery, during which time they allegedly cohabitated and engaged in sexual relations. The trial court failed to consider the sixty-day waiting period before an irreconcilable differences divorce became final, as well as the public policy underlying the waiting period, which sought to foster reconciliation. Anderson v. Ladner, 198 So. 3d 381, 2016 Miss. App. LEXIS 15 (Miss. Ct. App.), cert. denied, 202 So. 3d 617, 2016 Miss. LEXIS 364 (Miss. 2016).

In a divorce proceeding, a husband argued unsuccessfully that the agreed judgment of divorce was void because it incorrectly recited that the parties were present and giving testimony. Both parties agreed that no testimony was heard by the chancellor on the day the divorce was entered, and the husband asserted that was a material variance in the judgment which renders it void, but he cited no authority for this proposition; however, chancellor correctly found that the language was mere surplusage and held any error harmless. Cobb v. Cobb, 29 So. 3d 145, 2010 Miss. App. LEXIS 118 (Miss. Ct. App. 2010).

12. Illustrative cases.

Parents may resolve a custody schedule issue through an agreement that a chancellor finds adequate and sufficient before incorporating it into an amended divorce judgment, or they could allow the chancellor to resolve the issue for them. A joint-physical-custody schedule should provide each parent with significant periods of physical custody in such a way so as to assure their child of frequent and continuing contact with both parents, but that does not necessarily mean that each parent would have to get equal time with their child. Todd v. Todd, 216 So. 3d 1178, 2017 Miss. App. LEXIS 214 (Miss. Ct. App. 2017).

Although the issue of periodic alimony was not included in the parties' signed consent, as required for an irreconcilable differences divorce, a remand was necessary to determine if an initial award of lump sum alimony was intended to be part of a property settlement such that it could have been reinstated. If it was intended as alimony, it could not have been reinstated. Myrick v. Myrick, 186 So. 3d 429, 2016 Miss. App. LEXIS 102 (Miss. Ct. App. 2016).

Chancellor erred in distributing the parties' property because several of his findings were not supported by the evidence presented at trial where, while the husband used the proceeds of the sale of certain agricultural equipment to pay off marital debt, the chancellor weighed it against the husband, finding that he had violated a temporary order and dissipated marital assets, and, while the husband possessed four college degrees, no evidence was provided to show that they would provide more gainful employment than he presently possessed as a junior college professor. Burnham v. Burnham, 185 So. 3d 358, 2015 Miss. LEXIS 560 (Miss. 2015).

Contempt action was timely because the statute of limitations in Miss. Code Ann. § 15-1-43 applied as a spouse's action sought enforcement of a hold-harmless provision of a property-settlement agreement, which became part of the final judgment of divorce, and the spouse filed for contempt within seven years of learning that a bank was pursuing the spouse for the debt on a car which was assigned to the other spouse and discharged in bankruptcy by the other spouse. Moseley v. Smith, 180 So. 3d 667, 2014 Miss. App. LEXIS 689 (Miss. Ct. App. 2014), cert. dismissed, — So. 3d —, 2015 Miss. LEXIS 605 (Miss. 2015), cert. dismissed, — So. 3d —, 2015 Miss. LEXIS 625 (Miss. 2015).

Where a husband and wife, in attempting to obtain an irreconcilable-differences divorce, never fully complied with either Miss. Code Ann. § 93-5-2(2) or (3), as their signed consent agreement did not set forth any issues for the chancellor to decide, and their purported settlement did not settle all property rights, the chancellor erred in erred in granting a final divorce. Sanford v. Sanford, 124 So. 3d 647, 2013 Miss. LEXIS 571 (Miss. 2013).

Because the wife acknowledged that she was entering into a binding agreement to divorce the husband pursuant to the terms of the settlement and on the basis of irreconcilable differences, she withdrew her fault-based divorce grounds, and their property-settlement agreement was executed in writing and signed by both parties, she could not later renegotiate the nature or the terms of the divorce. Keith v. Keith, 121 So. 3d 967, 2013 Miss. App. LEXIS 596 (Miss. Ct. App. 2013).

Consent agreement was not invalid. Miss. Code Ann. § 93-5-2 did not require it to be notarized or signed by an attorney; furthermore, the husband's attempt to withdraw or expunge the agreement after the divorce decree was entered did not invalidate it. McNeese v. McNeese, 119 So. 3d 264, 2013 Miss. LEXIS 172 (Miss. 2013).

Pursuant to Miss. Code Ann. § 93-5-2(2) and (3), a trial court chancellor did not err by only enforcing the property division provision of parties' property settlement agreement in their divorce action; the wife's claim that she was under duress when she signed the agreement lacked merit based on the circumstances. Wilson v. Wilson, 53 So. 3d 865, 2011 Miss. App. LEXIS 70 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

ALR.

Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce. 86 A.L.R.3d 1116.

What constitutes "incompatability" within statute specifying it as substantive ground for divorce. 97 A.L.R.3d 989.

Divorce: order requiring that party not compete with former marital business. 59 A.L.R.4th 1075.

Alimony as affected by recipient spouse's remarriage in absence of controlling specific statute. 47 A.L.R.5th 129.

Am. Jur.

8 Am. Jur. Pl & Pr Forms (Rev), Divorce and Separation, Form 43 (petition or application for dissolution of marriage).

19 Am. Jur. Proof of Facts 2d 221, Dissolution of Marriage on Statutory Ground of Incompatibility.

CJS.

27A C.J.S., Divorce § 66.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

1989 Mississippi Supreme Court Review: Child Support. 59 Miss. L. J. 891, Winter, 1989.

1989 Mississippi Supreme Court Review: Divorce. 59 Miss. L. J. 902, Winter, 1989.

§ 93-5-3. Not mandatory to deny divorce because of recrimination.

If a complainant or cross-complainant in a divorce action shall prove grounds entitling him to a divorce, it shall not be mandatory on any chancellor to deny such party a divorce, even though the evidence might establish recrimination on the part of such complainant or cross-complainant.

HISTORY:

Codes, 1942, § 2735.5; Laws, 1964, ch. 297, eff from and after passage (approved April 24, 1964).

Cross References —

Failure of offended spouse to leave marital domicile or separate from offending spouse as no impediment to divorce, see § 93-5-4.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Illustrative cases.

1. In general.

The defense of recrimination was not available to deny a divorce to a wife where the defense was based on the parties' son's testimony that he had seen his mother sit on a man's lap and kiss him, since this would not qualify as a ground for divorce; it did not constitute habitual cruel and inhuman treatment because there was no testimony as to the habitual nature of the act or that the husband even knew about the alleged relationship. Cherry v. Cherry, 593 So. 2d 13, 1991 Miss. LEXIS 964 (Miss. 1991).

Under the doctrine of recrimination, which is founded on the basis that the equal guilt of a complainant bars his or her right to a divorce, the complainant's offense need not be the same offense charged against his or her spouse, but it must be an offense sufficient to constitute a ground for divorce. Parker v. Parker, 519 So. 2d 1232, 1988 Miss. LEXIS 157 (Miss. 1988).

2. Illustrative cases.

Chancellor made specific findings of fact when he stated that the basis for granting the divorce was the wife's admission of uncondoned adultery; even though the husband admitted to having an affair, the chancellor was not required to deny him a divorce based on recrimination when he proved that the wife had also committed adultery. Dykes v. Dykes, 191 So. 3d 1287, 2016 Miss. App. LEXIS 289 (Miss. Ct. App. 2016).

Husband was properly granted a divorce on the ground of uncondoned adultery because the wife's recrimination defense failed since, even though the husband admitted having an affair, the chancery court was not required to deny the husband a divorce when the husband had proven that the wife had committed adultery. Ware v. Ware, 7 So. 3d 271, 2008 Miss. App. LEXIS 270 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

ALR.

Recrimination as defense to divorce sought on ground of incompatibility. 21 A.L.R.2d 1267.

Am. Jur.

24 Am. Jur. 2d, Divorce and Separation §§ 156 et seq.

§ 93-5-4. Offended spouse's failure to leave marital domicile or separate from offending spouse no impediment to divorce.

It shall be no impediment to a divorce that the offended spouse did not leave the marital domicile or separate from the offending spouse on account of the conduct of the offending spouse.

HISTORY:

Laws, 1976, ch. 451, § 2, eff from and after July 1, 1976.

JUDICIAL DECISIONS

1. In general.

A wife's condonation of her husband's "peculiar" sexual activities was not sufficient to deny her a divorce on the grounds of habitual cruel and inhuman treatment based on evidence that the husband was impotent and occasionally dressed in women's clothing, even though the wife continued to live with the husband and at least attempted to have sexual relations, since it was not proper for the wife to be penalized for attempting to save her marriage. Cherry v. Cherry, 593 So. 2d 13, 1991 Miss. LEXIS 964 (Miss. 1991).

The fact that a divorced plaintiff continued to live under the same roof with the defendant after filing the complaint is a heavy factor to be weighed in considering whether he or she has a valid cause, though it does not in and of itself compel a denial of divorce; it is conceivably possible for valid grounds for divorce to exist despite this. Lawyers representing persons seeking a divorce have the obligation to advise and warn them about the undesirability of continuing to live in the same household following the filing of the suit, and they have the obligation to seek and press for a temporary hearing before the chancellor to secure alimony pendente lite and temporary support money. Jethrow v. Jethrow, 571 So. 2d 270, 1990 Miss. LEXIS 700 (Miss. 1990).

A wife did not condone her husband's adultery as a matter of law by continuing to live in the same house with him and sleep in the same bed while waiting for a second indiscretion as proof of adultery after the initial indiscretion, which was not conclusive. Cheatham v. Cheatham, 537 So. 2d 435, 1988 Miss. LEXIS 627 (Miss. 1988).

RESEARCH REFERENCES

Am. Jur.
24 Am. Jur. 2d, Divorce and Separation § 151.

CJS.
27A C.J.S., Divorce §§ 123–126.

§ 93-5-5. Residence requirements for divorce.

The jurisdiction of the chancery court in suits for divorce shall be confined to the following cases:

(a) Where one (1) of the parties has been an actual bona fide resident within this state for six (6) months next preceding the commencement of the suit. If a member of the armed services of the United States is stationed in the state and residing within the state with his spouse, such person and his spouse shall be considered actual bona fide residents of the state for the purposes of this section, provided they were residing within the state at the time of the separation of the parties.

(b) In any case where the proof shows that a residence was acquired in this state with a purpose of securing a divorce, the court shall not take jurisdiction thereof, but dismiss the bill at the cost of complainant.

HISTORY:
Codes, 1892, § 1567; 1906, § 1675; Hemingway's 1917, § 1417; 1930, § 1415; 1942, § 2736; Laws, 1966, ch. 362, § 1; Laws, 1977, ch. 311, eff from and after July 1, 1977.

Cross References —
Constitutional provision on jurisdiction of chancery court, see Miss. Const. Art. 6, § 159.

Jurisdiction of chancery court in general, see § 9-5-81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Intent.
3. Foreign decree.

1. In general.
Chancellor's finding of 6 months residency of wife prior to commencement of divorce proceeding was manifestly in error and therefore jurisdiction of subject matter failed; residence of married woman is that of her husband during time they lived together as husband and wife, although married woman may establish residence upon separation from husband with intent to abandon her marital residence and establish independent residence; wife had left husband in Germany on August 19, with round trip ticket to return to Germany and filed original and amended bill alleging November 16 as date of separation of parties, although she filed affidavit and testified that she had never intended to change her residence from state of Mississippi; calculation of 6 months period prior to either August or November date failed to reveal 6 month period preceding date of commencement of action on December 28. O'Neill v. O'Neill, 515 So. 2d 1208, 1987 Miss. LEXIS 2922 (Miss. 1987).

In wife's action for divorce and other relief wherein summons upon the husband was issued by non-resident publication in a newspaper, with a copy of the publication notice being mailed, first class, to husband's address in another state, while the chancery court was without jurisdiction to render a personal monetary judgment against the non-resident husband, the court had jurisdiction over the subject matter of the divorce action and personal jurisdiction over one of the parties who met the residency requirements, and had authority to grant the divorce. Noble v. Noble, 502 So. 2d 317, 1987 Miss. LEXIS 2316 (Miss. 1987).

Iowa 1-year residency requirement for instituting divorce action held constitutional. Sosna v. Iowa, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532, 1975 U.S. LEXIS 19 (U.S. 1975).

Jurisdiction of Mississippi courts over a divorce suit brought by one who had become a resident of the state, upon personal service of process on defendant, is not affected by pendency of a divorce proceeding theretofore instituted in another state. Cox v. Cox, 234 Miss. 885, 108 So. 2d 422, 1959 Miss. LEXIS 564 (Miss. 1959).

There is no requirement that the bill of complaint should necessarily allege that one of the parties had been an actual bona fide resident for the period stated, and especially where the bill alleges that the parties had been living in the state for such a period of time as husband and wife, since their residence under such circumstances would have been presumed to have been bona fide in the absence of proof to the contrary. Horton v. Horton, 213 Miss. 768, 57 So. 2d 723, 1952 Miss. LEXIS 423 (Miss. 1952).

Where the jurat of the chancery clerk discloses that the complainant personally appeared before him and made an oath that the facts as stated in the above bill for divorce are true as stated therein and the bill was not filed by collusion with the defendant for the purposes of obtaining a divorce contrary to the laws, the affidavit to the bill of complaint was sufficient to give jurisdiction to the trial court despite the fact there was a failure to add the words but that the cause or causes for divorce are true as therein stated, in the language of the statute. Horton v. Horton, 213 Miss. 768, 57 So. 2d 723, 1952 Miss. LEXIS 423 (Miss. 1952).

The question of jurisdiction may be raised for the first time in the supreme court. Horton v. Horton, 213 Miss. 768, 57 So. 2d 723, 1952 Miss. LEXIS 423 (Miss. 1952).

Under divorce statute, domicile once acquired is presumed to continue, and burden of proving contrary is upon party alleging it. May v. May, 158 Miss. 68, 130 So. 52, 1930 Miss. LEXIS 17 (Miss. 1930).

Husband's absence from state for purpose of study pursuant to scholarship held not "abandonment" of domicile, and therefore chancery court had jurisdiction of divorce suit. May v. May, 158 Miss. 68, 130 So. 52, 1930 Miss. LEXIS 17 (Miss. 1930).

Party voluntarily appearing is subject to jurisdiction of court. Clay v. Clay, 134 Miss. 658, 99 So. 818, 1924 Miss. LEXIS 322 (Miss. 1924).

Divorce statutes as to residence inapplicable in annulment suit. Antoine v. Antoine, 132 Miss. 442, 96 So. 305, 1923 Miss. LEXIS 50 (Miss. 1923).

2. Intent.

That a man and wife move to another state, purchase a home, register to vote, and reside there for an extended period of time are circumstances indicative of an intention to abandon their domicil of origin and to establish a new domicil, but such facts are not conclusive in the face of uncontradicted evidence of an intention not to abandon the domicil of origin. Brookhaven Pressed Brick & Mfg. Co. v. Davis, 191 So. 2d 840, 1966 Miss. LEXIS 1225 (Miss. 1966).

A naval officer, married in Maryland and thereafter living at duty stations in various parts of the country to which he had been ordered, who claimed his parents' residence in Greenville, Mississippi as his legal residence on a driver's license and navy emergency data records, had established a domicile in Mississippi which met the jurisdictional requirements of this section [Code 1942, § 2736]. Bannan v. Bannan, 188 So. 2d 253, 1966 Miss. LEXIS 1376 (Miss. 1966).

In order for the court to have jurisdiction in a divorce action there must be bona fide domicile which means residence with intent to remain. Lynch v. Lynch, 210 Miss. 810, 50 So. 2d 378, 1951 Miss. LEXIS 315 (Miss. 1951).

Complainant must actually and voluntarily have established residence within the state for a year next preceeding commencement of a divorce suit, with a bona fide intention of remaining there at least indefinitely, in order to give the court jurisdiction. Lucia v. Lucia, 200 Miss. 520, 27 So. 2d 774, 1946 Miss. LEXIS 317 (Miss. 1946).

Once established, a domicile continues until another is acquired by removal to another locality with a bona fide intention to remain there at least indefinitely and to abandon the old domicile without intent to return thereto. Lucia v. Lucia, 200 Miss. 520, 27 So. 2d 774, 1946 Miss. LEXIS 317 (Miss. 1946).

Where the complainant first registered and paid poll tax in this state in 1943, overlooked payment of 1944 poll tax, paid 1945 poll tax, testified that he established his domicile in January, 1944, and otherwise testified that it was established a month or two later, and further stated that he did not decide to make this state his legal residence until after discovery that insanity was a ground for divorce in this state, the decree of the chancellor dismissing the bill was remanded for further investigation of evidence apparently obtainable. Lucia v. Lucia, 200 Miss. 520, 27 So. 2d 774, 1946 Miss. LEXIS 317 (Miss. 1946).

To constitute a complainant an actual bona fide resident of a county in this state, there must have been an actual residence voluntarily established in such county with the bona fide intention of remaining there, if not permanently, at least indefinitely. Smith v. Smith, 194 Miss. 431, 12 So. 2d 428, 1943 Miss. LEXIS 72 (Miss. 1943).

Intent necessary to establish a residence in this state is the intent that an established residence shall be reasonably permanent, and a mere intention to establish a residence at some future time is not sufficient. Smith v. Smith, 194 Miss. 431, 12 So. 2d 428, 1943 Miss. LEXIS 72 (Miss. 1943).

While a complainant's own testimony as to his intention is relevant in determining whether he has established a residence within the purview of this section [Code 1942, § 2736], a mere assertion of intention to establish a residence within the state is not in itself sufficient to comply with this section. Smith v. Smith, 194 Miss. 431, 12 So. 2d 428, 1943 Miss. LEXIS 72 (Miss. 1943).

3. Foreign decree.

Where divorce decree of another state purporting to affect or determine marital status and right of citizens of Mississippi is contrary to public policy of Mississippi, its courts will determine for themselves jurisdiction of court rendering such decree and consequent validity thereof, notwithstanding recitals of decree of jurisdictional fact of residence or domicile. Miller v. Miller, 173 Miss. 44, 159 So. 112, 1935 Miss. LEXIS 192 (Miss. 1935).

Mere rendition of Arkansas divorce decree raised no presumption that husband obtaining such decree was resident of Arkansas in good faith with intention of remaining and acquiring permanent domicile there, and therefore husband pleading such decree in bar of wife's divorce suit in Mississippi must prove that he acquired domicile in Arkansas. Miller v. Miller, 173 Miss. 44, 159 So. 112, 1935 Miss. LEXIS 192 (Miss. 1935).

RESEARCH REFERENCES

ALR.

Length or duration of domicil, as distinguished from fact of domicil, as a jurisdictional matter in divorce action. 2 A.L.R.2d 291.

Effect on jurisdiction of court to grant divorce, of plaintiff's change of residence pendente lite. 7 A.L.R.2d 1414.

Foreign divorce decree as subject to attack by spouse in state of which neither spouse is resident. 12 A.L.R.2d 382.

Residence or domicile, for purpose of divorce action, of one in armed forces. 21 A.L.R.2d 1163.

Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicile, since Williams' decision. 28 A.L.R.2d 1303.

Valid foreign divorce decree upon constructive service as precluding action by spouse for alimony, support, or maintenance. 28 A.L.R.2d 1378.

Applicability, to annulment actions, of residence requirements of divorce statutes. 32 A.L.R.2d 734.

Right of nonresident wife to maintain action for separate maintenance or alimony alone against resident husband. 36 A.L.R.2d 1369.

Lack or insufficiency of allegations of plaintiff's residence or domicil in suit for divorce as ground for vacation of, or collateral attack on, divorce decree. 55 A.L.R.2d 1263.

Valid foreign divorce as affecting local order previously entered for separate maintenance. 49 A.L.R.3d 1266.

What constitutes residence or domicil within state by citizen of another country for purpose of jurisdiction in divorce. 51 A.L.R.3d 223.

Validity of statute imposing durational residency requirements for divorce applicants. 57 A.L.R.3d 221.

Validity and construction of statutory provision relating to jurisdiction of court for purpose of divorce for servicemen. 73 A.L.R.3d 431.

"Domestic relations" exception to jurisdiction of federal courts under diversity of citizenship provisions of 28 USCS § 1332(a). 100 A.L.R. Fed. 700.

Am. Jur.

24 Am. Jur. 2d, Divorce and Separation §§ 171, 176, 177, 183.

16 Am. Jur. Proof of Facts 2d 175, Matrimonial Dispute: Vexatious Choice of Forum.

CJS.

27A C.J.S., Divorce §§ 147 et seq.

§ 93-5-7. Conduct of divorce proceedings.

The proceedings to obtain a divorce shall be by complaint in chancery, and shall be conducted as other suits in chancery, except that (1) the defendant shall not be required to answer on oath; (2) no judgment by default may be granted but a divorce may be granted on the ground of irreconcilable differences in termtime or vacation; (3) admissions made in the answer shall not be taken as evidence; (4) the clerk shall not set down on the issue docket any divorce case unless upon the request of one (1) of the parties; (5) the plaintiff may allege only the statutory language as cause for divorce in a separate paragraph in the complaint; provided, however, the defendant shall be entitled to discover any matter, not privileged, which is relevant to the issues raised by the claims or defenses of the other; (6) the court shall have full power in its discretion to grant continuances in such cases without the compliance by the parties with any of the requirements of law respecting continuances in other cases; and (7) in all cases, except complaints seeking a divorce on the ground of irreconcilable differences, the complaint must be accompanied with an affidavit of plaintiff that it is not filed by collusion with the defendant for the purpose of obtaining a divorce, but that the cause or causes for divorce stated in the complaint are true as stated.

HISTORY:

Codes, Hutchinson's 1848, ch. 34, art. 2 (2); 1857, ch. 40, art. 18; 1871, § 1773; 1880, § 1161; 1892, § 1568; 1906, § 1676; Hemingway's 1917, § 1418; 1930, § 1416; 1942, § 2737; Laws, 1922, ch. 233; Laws, 1924, ch. 151; Laws, 1958, ch. 272, § 2; Laws, 1974, ch. 556; Laws, 1976, ch. 451, § 3; Laws, 1991, ch. 573, § 129, eff from and after July 1, 1991.

Cross References —

Another section derived from same 1942 code section, see § 93-5-9.

JUDICIAL DECISIONS

ANALYSIS

1. In general; bill of complaint.
2. Other action, proceedings; res judicata.
3. Representation pro se.
4. Appearance in person.
5. Continuance.
6. Incidental or ancillary claims.
7. Burdens; proof; evidence.
8. Decree.
9. Notice of trial settings.
10. Admissions.

1. In general; bill of complaint.

Where a complaint was not accompanied by an affidavit signed by the plaintiff that the action was not filed in collusion with the defendant, the court did not err in requiring the submission of an amended complaint with a properly signed affidavit and then proceeding with the trial. Keller v. Keller, 763 So. 2d 902, 2000 Miss. App. LEXIS 228 (Miss. Ct. App. 2000).

An affidavit to a bill of complaint for divorce which contained all of the other essential averments but omitted "for the purpose of obtaining a divorce" is not defective. White v. Fillyaw, 272 So. 2d 924, 1973 Miss. LEXIS 1557 (Miss. 1973).

Fact that the affidavit attached to the amended cross bill of complaint failed to state that it was not filed in collusion with the complainant is not a basis for reversal where the objection was raised for the first time on appeal and both the original bill of complaint and the original cross bill were accompanied by an affidavit which affirmatively stated that neither was filed by collusion. Marshall v. Marshall, 205 So. 2d 644, 1968 Miss. LEXIS 1541 (Miss. 1968).

A bill for divorce is never taken as confessed whether answered or not. Ladner v. Ladner, 233 Miss. 222, 102 So. 2d 195, 1958 Miss. LEXIS 375 (Miss. 1958).

The purpose of requiring affidavit of complainant is to purge the conscience of complainant touching the question of collusion. Vance v. Vance, 197 Miss. 332, 20 So. 2d 825, 1945 Miss. LEXIS 293 (Miss. 1945).

Where a statute specifically prescribes who shall make a certain affidavit, it can be made by none other than the person specified, although there is nothing in the language of the statute to show that its designation was intended to be exclusive. Vance v. Vance, 197 Miss. 332, 20 So. 2d 825, 1945 Miss. LEXIS 293 (Miss. 1945).

Affidavit of complainant required under this section [Code 1942, § 2737] can only be made by complainant himself or herself, and not by an agent or attorney, that statute (Code 1942, § 1661), generally permitting an oath or affirmation to be made by an agent or attorney, being inapplicable. Vance v. Vance, 197 Miss. 332, 20 So. 2d 825, 1945 Miss. LEXIS 293 (Miss. 1945).

Where bill for divorce was sworn to by attorney of record and mother of ostensible complainant, who was in armed services overseas, and not by the complainant himself, and wife made timely objection to any hearing because of this failure, supreme court will dismiss decree for husband and remand the cause with direction that it may not be proceeded with further until the required affidavit is made by the complainant personally. Vance v. Vance, 197 Miss. 332, 20 So. 2d 825, 1945 Miss. LEXIS 293 (Miss. 1945).

2. Other action, proceedings; res judicata.

Wife's claims against her husband which she brought in circuit court that were more closely related to the parties' marital relationship and financial affairs had to be decided in chancery court; her claims against him for intentional and negligent infliction of emotional distress, along with her alienation of affection claims against his alleged paramour, were purely legal and were properly before the circuit court. Germany v. Germany, 123 So. 3d 423, 2013 Miss. LEXIS 545 (Miss. 2013).

As a wife's conversion claim against her husband was really a request for a award of marital assets that ordinarily would be distributed in the divorce action, the circuit court erred in denying the husband's motion to transfer that claim to the parties' divorce action which was pending in chancery court. Germany v. Germany, 123 So. 3d 423, 2013 Miss. LEXIS 545 (Miss. 2013).

Circuit court erred in denying a husband's motion to transfer his wife's claim for unjust enrichment to the parties' divorce action which was pending in chancery court, because 1) it was an equitable claim, and 2) to allow her to pursue that claim in circuit court could lead to a double recovery if she was awarded alimony by the chancery court. Germany v. Germany, 123 So. 3d 423, 2013 Miss. LEXIS 545 (Miss. 2013).

As the substance of a wife's breach-of-contract and fraud claims against her husband was related to divorce and alimony, the circuit court erred in denying the husband's motion to transfer those claims to the parties' divorce action which was pending in chancery court. Germany v. Germany, 123 So. 3d 423, 2013 Miss. LEXIS 545 (Miss. 2013).

Where a prenuptial agreement provided that a wife would receive equity in the marital home upon divorce, but did not provide remedies for a breach, the chancellor's remedy and credibility determinations would not be reversed on appeal. Doster v. Doster, 853 So. 2d 147, 2003 Miss. App. LEXIS 721 (Miss. Ct. App. 2003).

A chancellor's finding that a wife was entitled to distribution of marital property and/or lump sum alimony was premature where the husband's principal asset was in bankruptcy, since the value of the husband's estate was not before the court due to the bankruptcy proceedings; the issues of property division and lump sum alimony should have remained in the trial court pending the conclusion of the bankruptcy proceedings. Heigle v. Heigle, 654 So. 2d 895, 1995 Miss. LEXIS 228 (Miss. 1995).

A chancellor's determination that a wife was not entitled to periodic alimony was premature where the husband's principal asset was in bankruptcy, since the value of the husband's estate was not before the court due to the bankruptcy proceedings; the issue of periodic alimony should have remained in the trial court pending the conclusion of the bankruptcy proceedings. Heigle v. Heigle, 654 So. 2d 895, 1995 Miss. LEXIS 228 (Miss. 1995).

A chancery court abused its discretion in exercising jurisdiction over a divorce action brought by the wife where a divorce had been granted by a Maine court in an action filed by the husband; the wife was estopped from asserting the invalidity of the Maine decree since she remarried soon after the decree became final, thereby indicating her reliance on its validity. Scribner v. Scribner, 556 So. 2d 350, 1990 Miss. LEXIS 23 (Miss. 1990).

Where a wife filed a bill of complaint for divorce in one county and a hearing was held and a temporary decree was issued awarding the wife temporary custody of a child, and the issue was joined on the merits when the husband filed an answer and cross bill, a subsequent reconciliation of the parties in another county did not ipso facto dispose of the proceeding, and the chancery court of another county in which the wife subsequently filed a bill for divorce should have sustained the husband's plea in abatement. Lee v. Lee, 232 So. 2d 370, 1970 Miss. LEXIS 1627 (Miss. 1970).

A decree for separate support and maintenance is res judicata of the fact that the wife has not deserted the husband, and in a subsequent action by the husband for a divorce on the ground of desertion the issues are limited to that which has transpired subsequent to such decree. Wilson v. Wilson, 202 Miss. 540, 32 So. 2d 686, 1947 Miss. LEXIS 313 (Miss. 1947).

Dismissal of a bill for divorce and separate maintenance is res adjudicata of the issues of both divorce and maintenance, there being no showing of any change in condition of the parties. Lynch v. Lynch, 202 Miss. 500, 32 So. 2d 358, 1947 Miss. LEXIS 306 (Miss. 1947).

3. Representation pro se.

Mississippi Constitution Article III, § 24 and § 25 permit a party to proceed pro se. Thus, a husband and wife were permitted to proceed pro se in a divorce action. Bullard v. Morris, 547 So. 2d 789, 1989 Miss. LEXIS 355 (Miss. 1989).

4. Appearance in person.

Chancery court did not err in granting a divorce on the ground of desertion even though the proceedings were not heard in open court because the husband failed to answer the wife's complaint or enter an appearance. Luse v. Luse, 992 So. 2d 659, 2008 Miss. App. LEXIS 391 (Miss. Ct. App. 2008).

In an uncontested divorce action based on irreconcilable differences, it was within the chancellor's discretion to determine whether a personal appearance of a party or of an attorney was required since no proof is required under § 93-5-2, which governs a divorce sought on the grounds of irreconcilable differences, and neither § 93-5-7 nor 93-5-17, which govern the conduct of divorce proceedings, indicates a requirement that the person seeking the divorce must personally appear before the chancellor. The chancellor abused his discretion in refusing to grant the divorce without a personal appearance where the parties were proceeding pro se, the wife was a resident of California, and the husband was incarcerated in a correctional facility. Bullard v. Morris, 547 So. 2d 789, 1989 Miss. LEXIS 355 (Miss. 1989).

5. Continuance.

Where plaintiff, upon filing of answer denying allegation of divorce bill, set cause down for hearing without waiting period allowed for taking testimony, defendant was entitled to dismissal of bill or a continuance. Chisholm v. Chisholm, 114 Miss. 332, 75 So. 125, 1917 Miss. LEXIS 39 (Miss. 1917).

6. Incidental or ancillary claims.

A wife was entitled to proceed in Chancery Court against her husband for partition of jointly held property as an incident to her action for divorce. Johnson v. Johnson, 550 So. 2d 416, 1989 Miss. LEXIS 454 (Miss. 1989).

7. Burdens; proof; evidence.

Because a husband did not challenge the granting of a divorce itself or the chancery court's decision to try the case in his absence, the husband's attempt to defend the case for the first time on appeal was improper, and the issues he raised were procedurally barred by Miss. Code Ann. § 93-5-7 (Rev. 2004) and Miss. R. Civ. P. 55(e). Lee v. Lee, 78 So. 3d 337, 2011 Miss. App. LEXIS 131 (Miss. Ct. App. 2011), rev'd, 78 So. 3d 326, 2012 Miss. LEXIS 36 (Miss. 2012).

A divorce complainant must prove the allegations of the complaint even when the defendant has failed to answer; the complainant's proof requirement does not become lighter because the defendant fails to answer. Moeller v. Roy, 609 So. 2d 426, 1992 Miss. LEXIS 651 (Miss. 1992).

Section 93-5-7 does not bar a defendant in a divorce action from presenting proof rebutting the plaintiff's proof even if the defendant did not file an answer to the complaint; since the lack of an answer does not confess the allegations and the plaintiff is still required to place the necessary proof before the court, a defendant's failure to answer does not deprive the defendant of the right to put on evidence to rebut the allegations of the complaint, though the defendant cannot offer evidence outside the scope of the complaint and cannot offer any evidence supporting any affirmative charge. Moeller v. Roy, 609 So. 2d 426, 1992 Miss. LEXIS 651 (Miss. 1992).

Two photographs of a wife's bruised arms were not sufficient corroborating evidence of the wife's claim of habitual cruel and inhuman treatment to warrant the granting of a divorce on that ground where there were other witnesses to the marriage who were available to testify. Moeller v. Roy, 609 So. 2d 426, 1992 Miss. LEXIS 651 (Miss. 1992).

Divorce will not be granted on uncorroborated testimony of complainant unless the case is such that, in its nature or owing to the isolation of the parties, no corroborating proof is reasonably possible. Anderson v. Anderson, 190 Miss. 508, 200 So. 726, 1941 Miss. LEXIS 72 (Miss. 1941).

A case where corroborating proof is not reasonably possible is not made out where the parties lived throughout their married lives in a large and closely settled town, and moved almost daily among many who, in the various relations of life, could hardly have escaped observation of corroborative facts and circumstances. Anderson v. Anderson, 190 Miss. 508, 200 So. 726, 1941 Miss. LEXIS 72 (Miss. 1941).

Corroborating evidence will be sufficient if it proves such substantial facts and circumstances as will serve to engender in a sound and prudently cautious mind a confident conclusion that the testimony of the complainant is true in all the essential particulars. Anderson v. Anderson, 190 Miss. 508, 200 So. 726, 1941 Miss. LEXIS 72 (Miss. 1941).

8. Decree.

A trial court in a divorce action erred by failing to provide findings of fact and conclusions of law when requested to do so by one of the parties, and therefore the case would be reversed and remanded for the limited purpose of providing findings of fact and conclusions of law as required under Rule 52, Miss. R. Civ. P. Lowery v. Lowery, 657 So. 2d 817, 1995 Miss. LEXIS 332 (Miss. 1995).

It will be presumed from the entry of a decree of divorce that the court did its duty, that the ground for divorce was duly proven, and that the divorce was not the result of collusion. In re Estate of Kennington, 204 So. 2d 444, 1967 Miss. LEXIS 1194 (Miss. 1967).

Presumption of divorce and validity of woman's second marriage not overcome by court records of counties of her residence only. Pigford v. Ladner, 147 Miss. 822, 112 So. 785, 1927 Miss. LEXIS 307 (Miss. 1927).

Where the supreme court reversed that part of a decree in a divorce case which erroneously adjudged the guilty wife to have forfeited her interests in a life insurance policy on the life of her husband, it will not remand the cause for an amendment of the pleadings, so that a reformation of the policy may be sought, but will, on timely request, frame its judgment without prejudice of any right the husband may have to bring original suit for such relief. Grego v. Grego, 78 Miss. 443, 28 So. 817, 1900 Miss. LEXIS 86 (Miss. 1900).

9. Notice of trial settings.

Appellate court in no way suggests, intimates or holds that the date of a divorce trial must be set on the trial docket at least 20 days prior to trial. In many instances, if not most, complaints for divorce may be set for trial outside of the normal docket setting of the civil trial docket because a divorce case may not be set down on the issue docket unless at the request of one of the parties. Miss. Code Ann. § 93-5-7. The appellate court simply holds that once a party appears in a temporary phase of the divorce proceeding, the party is entitled to notice of the subsequent hearing on the underlying divorce proceeding unless the party is so notified during the temporary proceeding. Brown v. Brown, 872 So. 2d 787, 2004 Miss. App. LEXIS 439 (Miss. Ct. App. 2004).

10. Admissions.

In a divorce proceeding, where the husband failed to answer the wife's requests for admissions, and they were deemed admitted, it was not error to deny the wife's motion to alter or amend judgment in regard to the weight given to the admissions, because the admissions were taken into consideration, but they were not conclusive, in and of themselves, of the ultimate issue. Kumar v. Kumar, 976 So. 2d 957, 2008 Miss. App. LEXIS 156 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

ALR.

Denial of divorce in sister state or foreign country as res judicata in another suit for divorce between the same parties. 4 A.L.R.2d 107.

Restitution of property conveyed in consideration of previous reconciliation, as condition of entertaining divorce action. 4 A.L.R.2d 1210.

Right of attorney to continue divorce or separation suit against wishes of his client. 92 A.L.R.2d 1009.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation. 63 A.L.R.3d 373.

Admissibility of evidence to establish oral antenuptial agreement. 81 A.L.R.3d 453.

Divorce: excessiveness or adequacy of trial court's property award – modern cases. 56 A.L.R.4th 12.

Divorce: propriety of property distribution leaving both parties with substantial ownership interest in same business. 56 A.L.R.4th 862.

Right to jury trial in state court divorce proceedings. 56 A.L.R.4th 955.

Am. Jur.

24 Am. Jur. 2d, Divorce and Separation §§ 216 et seq., 238 et seq.

8A Am. Jur. Pl & Pr Forms (Rev), Divorce and Separation, Forms 21 et seq. (pleadings in actions for divorce and separation).

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue-Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

Practice References.

Young, Trial Handbook for Mississippi Lawyers § 3:2.

§ 93-5-9. Minors as parties to divorce proceedings.

A married minor may bring or defend a suit for divorce, separate maintenance and support, temporary maintenance or support, custody of children, or any other action involving marital rights without the necessity of a next friend or guardian ad litem, and a judgment in such cases shall be as effective as if the minor were an adult.

HISTORY:

Codes, Hutchinson's 1848, ch. 34, art. 2 (2); 1857, ch. 40, art. 18; 1871, § 1773; 1880, § 1161; 1892, § 1568; 1906, § 1676; Hemingway's 1917, § 1418; 1930, § 1416; 1942, § 2737; Laws, 1922, ch. 233; Laws, 1924, ch. 151; Laws, 1958, ch. 272, § 2; Laws, 1991, ch. 573, § 130, eff from and after July 1, 1991.

Cross References —

Appointment of guardian ad litem, see § 9-5-89.

Another section derived from same 1942 code section, see § 93-5-7.

Another section providing removal of disability of minority in marital actions, see § 93-19-11.

RESEARCH REFERENCES

ALR.

Statutory change of age of majority as affecting pre-existing status or rights. 75 A.L.R.3d 228.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree. 100 A.L.R.3d 1129.

§ 93-5-11. Filing of complaints; transfer of venue.

All complaints, except those based solely on the ground of irreconcilable differences, must be filed in the county in which the plaintiff resides, if the defendant be a nonresident of this state, or be absent, so that process cannot be served; and the manner of making such parties defendants so as to authorize a judgment against them in other chancery cases, shall be observed. If the defendant be a resident of this state, the complaint shall be filed in the county in which such defendant resides or may be found at the time, or in the county of the residence of the parties at the time of separation, if the plaintiff be still a resident of such county when the suit is instituted.

A complaint for divorce based solely on the grounds of irreconcilable differences shall be filed in the county of residence of either party where both parties are residents of this state. If one (1) party is not a resident of this state, then the complaint shall be filed in the county where the resident party resides.

Transfer of venue shall be governed by Rule 82(d) of the Mississippi Rules of Civil Procedure.

HISTORY:

Codes, Hutchinson's 1848, ch. 34, art. 2 (10); 1857, ch. 40, art. 21; 1871, § 1776; 1880, § 1164; 1892, § 1569; 1906, § 1677; Hemingway's 1917, § 1419; 1930, § 1417; 1942, § 2738; Laws, 1978, ch. 368, § 1; Laws, 1991, ch. 573, § 131; Laws, 2005, ch. 448, § 1, eff from and after July 1, 2005.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction and application.

1. In general.

Trial court, in a divorce proceeding, exercised jurisdiction over the parties it did not have and had to be dismissed; even though the wife brought the action in DeSoto County and the husband waived process and voluntarily attempted to submit to the jurisdiction, jurisdiction could not be agreed on. Roberts v. Roberts, 2003 Miss. App. LEXIS 487 (Miss. Ct. App. June 3, 2003), op. withdrawn, sub. op., 866 So. 2d 474, 2003 Miss. App. LEXIS 915 (Miss. Ct. App. 2003).

If proper venue is lacking in a divorce proceeding, the bill for divorce must be dismissed and can not be transferred. Stark v. Stark, 755 So. 2d 31, 1999 Miss. App. LEXIS 371 (Miss. Ct. App. 1999).

This section [Code 1942, § 2738] is mandatory, and statute (Code 1942, § 1441) providing for the transfer of causes to the proper venue where the court lacks venue jurisdiction does not apply to divorce actions. Price v. Price, 202 Miss. 268, 32 So. 2d 124, 1947 Miss. LEXIS 270 (Miss. 1947); Cruse v. Cruse, 202 Miss. 497, 32 So. 2d 355, 1947 Miss. LEXIS 305 (Miss. 1947).

The court is without authority to transfer a cause to another county on the ground of defendant's residence and citizenship there. Cruse v. Cruse, 202 Miss. 497, 32 So. 2d 355, 1947 Miss. LEXIS 305 (Miss. 1947).

If proper venue is lacking, the bill must be dismissed; the action cannot be transferred to the proper venue. Cruse v. Cruse, 202 Miss. 497, 32 So. 2d 355, 1947 Miss. LEXIS 305 (Miss. 1947).

This statute is not a mere statute of venue that may be waived but one of jurisdiction of the subject matter of the suit. Price v. Price, 202 Miss. 268, 32 So. 2d 124, 1947 Miss. LEXIS 270 (Miss. 1947).

2. Construction and application.

Statute governs the venue of a divorce action and limits the chancery court's exercise of personal jurisdiction over the defendant; the Mississippi Rules of Civil Procedure control the procedure to be utilized when venue is improper. Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

Cruse v. Cruse, 202 Miss. 497 (1947), Price v. Price, 202 Miss. 268 (1947), Carter v. Carter, 278 So. 2d 394 (Miss. 1973), Miller v. Miller, 323 So. 2d 533 (Miss. 1975), Stark v. Stark, 755 So. 2d 31 (Miss. Ct. App. 1999), Slaughter v. Slaughter, 869 So. 2d 386 (Miss. 2004), and Bush v. Bush, 903 So. 2d 700 (Miss. 2005) are overruled to the extent they hold the statute confers subject-matter jurisdiction on chancery courts; such jurisdiction is conveyed by the Mississippi Constitution. Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

Substantial evidence supported the chancery court's finding that a husband resided in Harrison County, Mississippi with the intention to remain there when the divorce was filed because the husband listed his address as Harrison County, and he testified in a deposition that he lived in Harrison County; the wife testified that when the husband left the marital home he left to live at his aunt's condominium in Harrison County. Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

Wife's divorce action against nonresident husband was filed as required by Miss. Code Ann. § 93-5-11 because it was filed in the county in which the wife was residing, notwithstanding that the couple's former home, which the wife had not yet sold and on which a homestead exemption was claimed, was in another county. Hampton v. Hampton, 977 So. 2d 1181, 2007 Miss. App. LEXIS 507 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 129 (Miss. 2008).

Where the parties resided in Rankin County, Mississippi, prior to and at the time of separation, the Chancery Court in Rankin County had subject matter jurisdiction over their divorce filed on the ground of adultery. Bush v. Bush, 903 So. 2d 700, 2005 Miss. LEXIS 315 (Miss. 2005).

A proper reading of all the three statutes, Miss. Code Ann. §§ 93-5-11, 93-5-23 and 93-11-65, does not provide for a custody matter to proceed under Miss. Code Ann. § 93-11-65 when a divorce is pending. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

The mandatory filing provisions for contested and irreconcilable differences divorces are clearly stated in Miss. Code Ann. § 93-5-11. The statutory requirements for proper filing of a divorce action are straightforward and clear and may not be circumvented by an attempt to expand § 93-5-11 through the use of Miss. Code Ann. § 93-11-65, nor indirectly through Miss. Code Ann. § 93-5-23; to find otherwise would negate the need for Miss. Code Ann. § 93-5-11 and create judicial conflict. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

Filing of the contested divorce in Coahoma County was incorrect in light of the mandatory requirements of Miss. Code Ann. § 93-5-11 as a contested divorce had to be filed in the county of defendant's residence, which was Chickasaw County, and the trial court correctly determined that Coahoma County did not have jurisdiction over the contested divorce, but the trial court erred in attempting to cure the jurisdictional error by simply dismissing the contested divorce and retaining the irreconcilable differences divorce, which could have been filed in Coahoma County as the wife was a resident of that county; thus, because the trial court had no jurisdiction over the contested divorce, it had no jurisdiction over the entire action and the trial court erred by failing to grant the husband's motion to dismiss in toto. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

Where wife first filed for divorce in Tate County, and the Tate County Chancellor denied a divorce, but granted custody of the parties' children to the father, and the wife then moved to DeSoto County, and filed for divorce, and the Desoto County Chancellor granted the parties' a divorce, incorporating the Tate County Chancellor's orders, and where the wife then asserted the judgment was void for lack of jurisdiction in Desoto County, the appellate court agreed that pursuant to the jurisdiction and venue requirements of Miss. Code Ann. § 93-5-11, the judgment was void, however, the wife was subject to sanctions for manipulation of the judicial system. Roberts v. Roberts, 866 So. 2d 474, 2003 Miss. App. LEXIS 915 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473, 2004 Miss. LEXIS 169 (Miss. 2004), cert. denied, 2004 Miss. LEXIS 170 (Miss. Feb. 5, 2004).

Where the defendant in a divorce action was a resident of the state, but was absent so that process could not be served, Code 1972 § 93-5-11 permitted the plaintiff to file suit in the county of her residence, and authorized service on the defendant by publication pursuant to Code 1972 § 13-3-19. Miller v. Miller, 323 So. 2d 533, 1975 Miss. LEXIS 1563 (Miss. 1975).

In order to rebut the presumption arising from a subsequent marriage that the former marriage has been terminated by divorce, the prior spouse must show where each party to the prior marriage had resided up to the time of the second marriage, and then procure from the clerk of the proper court in each county a certificate of search showing that no divorce or annulment has been granted by the court. In re Estate of Erwin, 317 So. 2d 55, 1975 Miss. LEXIS 1731 (Miss. 1975).

The words "county in which such defendant resides or may be found at the time" should be construed in accordance with the policy of this state and, accordingly, the word "residence" means the "domicile" of the defendant, while the words "or may be found at the time" apply either to a nonresident of the state or to a citizen of the state who has no actual domicile or fixed place of residence. Mississippi State Highway Com. v. Brown, 208 So. 2d 194, 1968 Miss. LEXIS 1404 (Miss. 1968).

Where the defendant has a domicile within the state the bill of complaint must be filed in the county of his domicile and not in some other county where he may temporarily be served with process. Mississippi State Highway Com. v. Brown, 208 So. 2d 194, 1968 Miss. LEXIS 1404 (Miss. 1968).

A suit for alimony pendente lite, separate maintenance, and attorneys' fees which was brought in Tate County, the residence of the wife, should have been transferred to the chancery court of Alcorn County where the evidence established that the latter county was the residence of the husband, and the husband had made timely objection to the venue. Trainum v. Trainum, 234 Miss. 448, 105 So. 2d 628, 1958 Miss. LEXIS 516 (Miss. 1958).

Wife's separate maintenance suit should be brought in county of which husband is resident. Trainum v. Trainum, 234 Miss. 448, 105 So. 2d 628, 1958 Miss. LEXIS 516 (Miss. 1958).

The general rule is that the word "residence," as used in divorce statutes, should be construed as equivalent to "domicile." Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772, 1938 Miss. LEXIS 4 (Miss. 1938).

Evidence disclosing that husband had maintained residence in Pearl River County since 1908, that in 1923 he was defeated as candidate for governor and on next day announced his candidacy for same office in 1927 election and moved to Hinds County in interest of that campaign, that he moved into executive mansion in Hinds County in 1928, and that separation of husband and wife occurred while they were living in the executive mansion in 1931, established that the legal "residence" of the parties was in Pearl River County when they moved into the executive mansion and continued while they sojourned there until their separation was consummated, so that chancery court of Pearl River County had jurisdiction of husband's suit for divorce. Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772, 1938 Miss. LEXIS 4 (Miss. 1938).

Under divorce statute, domicile once acquired is presumed to continue, and burden of proving contrary is upon party alleging it. May v. May, 158 Miss. 68, 130 So. 52, 1930 Miss. LEXIS 17 (Miss. 1930).

Husband's absence from state for purpose of study pursuant to scholarship held not "abandonment" of domicile, and therefore chancery court had jurisdiction of divorce suit. May v. May, 158 Miss. 68, 130 So. 52, 1930 Miss. LEXIS 17 (Miss. 1930).

RESEARCH REFERENCES

ALR.

Power to grant annulment of marriage against nonresident on constructive service. 43 A.L.R.2d 1086.

Venue of divorce action in particular county as dependent on residence or domicil for specified length of time. 54 A.L.R.2d 898.

"Domestic relations" exception to jurisdiction of federal courts under diversity of citizenship provisions of 28 USCS § 1332(a). 100 A.L.R. Fed. 700.

Am. Jur.

24 Am. Jur. 2d, Divorce and Separation §§ 191 et seq.

16 Am. Jur. Proof of Facts 2d 175, Matrimonial Dispute: Vexatious Choice of Forum.

CJS.

27A C.J.S., Divorce §§ 147 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-5-13. Guardian ad litem.

If the defendant is an infant or a person with mental illness, the court may appoint a guardian ad litem for the defendant.

HISTORY:

Codes, 1857, ch. 40, art. 22; 1871, § 1777; 1880, § 1165; 1892, § 1570; 1906, § 1678; Hemingway's 1917, § 1420; 1930, § 1418; 1942, § 2739; Laws, 2008, ch. 442, § 26, eff from and after July 1, 2008.

Cross References —

Appointment of guardian ad litem, see § 9-5-89.

Removal of disability of minority in marital actions, see §§ 93-5-9, 93-19-11.

RESEARCH REFERENCES

ALR.

Power of incompetent spouse's guardian, committee, or next friend to sue for granting or vacation of divorce or annulment of marriage, or to make a compromise or settlement in such suit. 6 A.L.R.3d 681.

Am. Jur.

24 Am. Jur. 2d, Divorce and Separation §§ 201-203, 216-218.

§ 93-5-15. Guardian for spouse who becomes mentally ill may sue for divorce.

From and after March 15, 1934, any marital contract previously or hereafter solemnized by and under which parties have been duly and legally married, and one (1) of the parties to the marriage contract has become or becomes mentally ill to such an extent that it is necessary for a guardian to be appointed for that party, and the other party to the marital contract has committed any act that constitutes ground for divorce under the present laws, the guardian for the party with mental illness to the contract of marriage shall have the right to file a bill as the guardian, in the name of his ward, for the dissolution of the marriage, in the same way and manner and at the same place and on the same process that the person with mental illness could have done, if he had not become mentally ill.

HISTORY:

Codes, 1942, § 2740; Laws, 1934, ch. 306; Laws, 2008, ch. 442, § 27, eff from and after July 1, 2008.

RESEARCH REFERENCES

ALR.

Power of incompetent spouse's guardian, committee, or next friend to sue for granting or vacation of divorce or annulment of marriage, or to make a compromise or settlement in such suit. 6 A.L.R.3d 681; 32 A.L.R.5th 673.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make compromise or settlement in such suit. 32 A.L.R.5th 673.

Am. Jur.

24 Am. Jur. 2d, Divorce and Separation § 200.

§ 93-5-17. Proceedings to be had in open court.

(1) The proceedings to obtain a divorce shall not be heard or considered nor a judgment of divorce entered except in open court. A chancellor may, in his

discretion, hear or consider proceedings to obtain a divorce in vacation and make and enter judgments of divorce in the same manner as he may in other cases that may be heard in vacation pursuant to Section 9-5-91. Any judgment made or entered contrary to the provisions of this section shall be null and void.

(2) The chancellor in vacation may, upon reasonable notice, hear complaints for temporary alimony, temporary custody of children and temporary child support and make all proper orders and judgments thereon.

(3) As used in this section, the term "chancellor in vacation" shall include any chancellor who is holding court at any location in any county in his district.

HISTORY:

Codes, Hutchinson's 1848, ch. 34, art. 2 (2); 1857, ch. 40, art. 18; 1871, § 1773; 1880, § 1161; 1892, § 1568; 1906, § 1676; Hemingway's 1917, § 1418; 1930, § 1420; 1942, § 2742; Laws, 1922, ch. 233; Laws, 1974, ch. 482; Laws, 1976, ch. 451, § 4; Laws, 1985, ch. 432; Laws, 1990, ch. 428, § 1; Laws, 1991, ch. 573, § 132, eff from and after July 1, 1991.

Editor's Notes —

Section 9-5-91, referred to in subsection (1) of this section, was repealed effective July 1, 1991.

Cross References —

Final decree in divorce cases alleging irreconcilable differences being entered, pro confesso, notwithstanding provisions of this section, see § 93-5-2.

JUDICIAL DECISIONS

ANALYSIS

1. Proceeding held in vacation — In general.
2. —Divorce.
3. —Temporary orders.
4. —Permanent orders.
5. —Other proceedings.
6. Jurisdictional issues.
7. Modification of decree.
8. Miscellaneous matters.

1. Proceeding held in vacation — In general.

In a case where a divorce decree was entered against a wife based on the ground of adultery, the wife impliedly consented to a hearing in vacation by failing to contest the divorce and make a timely appearance, and the repeal of Miss. Code Ann. § 9-5-93, referenced in Miss. Code Ann. § 93-5-17(1), did not mean that the chancellor did not have the authority to hear the divorce matter in vacation. Lindsey v. Lindsey, 818 So. 2d 1191, 2002 Miss. LEXIS 52 (Miss. 2002).

Chancery court has a broad discretion in determining the factual issues as to custody of a minor but that discretion should be exercised in the light of an established rule of this and other courts in such cases. Kennedy v. Kennedy, 222 Miss. 469, 76 So. 2d 375, 1954 Miss. LEXIS 666 (Miss. 1954).

2. —Divorce.

Chancery court did not err in granting a divorce on the ground of desertion even though the proceedings were not heard in open court as required by Miss. Code Ann. § 93-5-17(1); there was nothing in the record to contradict the chancellor's finding regarding the wife's grounds for divorce, and the husband, who failed to answer or appear, failed to follow Miss. R. App. P. 10(c), which might have created a record on appeal. Luse v. Luse, 992 So. 2d 659, 2008 Miss. App. LEXIS 391 (Miss. Ct. App. 2008).

The trial court did not err in granting a divorce decree in vacation without having previously taken the case under advisement for a ruling in vacation, where the wife requested additional time to present argument to the court, the court granted the request and instructed her to prepare an order so that the case could be taken under advisement, as required by § 93-5-17, she did not follow the instruction, either through oversight or inadvertence, and the order was never entered, and where, further, the parties consented to take the decree in vacation, and their understanding had the effect of retaining jurisdiction in the court until the decree nunc pro tunc was entered, the necessity for which was prompted by the wife's oversight in failing to prepare the order. Chaffin v. Chaffin, 437 So. 2d 384, 1983 Miss. LEXIS 2819 (Miss. 1983).

In a divorce action the court improperly held that a divorce decree was void on the basis that the decree set a date certain in vacation when the matters pertaining to alimony and child support and property rights would be heard but the decree rendered thereon was another date, where none of the proceedings in the case after the date on which the divorce was granted involved "proceedings to obtain a divorce" as envisioned by § 93-5-17. Bornaschella v. Orcutt, 418 So. 2d 768, 1982 Miss. LEXIS 2099 (Miss. 1982).

Chancellor had jurisdiction to hear in vacation petition, contained in wife's suit for separate maintenance, for temporary alimony and counsel fees, where petition alleged that the granting of such relief in vacation was urgent and necessitous, notwithstanding that it developed at the vacation hearing that the wife was receiving a monthly allowance from the federal government allotted to her at the instance of a son-in-law in the military service. Berryhill v. Berryhill, 198 Miss. 759, 23 So. 2d 889, 1945 Miss. LEXIS 244 (Miss. 1945).

3. —Temporary orders.

Based on the evidence presented, the chancellor did not err in awarding the ex-wife rehabilitative alimony as it served the purpose of helping the ex-wife become self-supporting and prevented her from becoming destitute while doing so. The chancellor possessed the authority to order temporary alimony and make all proper orders and judgments thereon and the ex-husband was required to comply with previous orders of the court made prior to the final decree. McCarrell v. McCarrell, 19 So. 3d 168, 2009 Miss. App. LEXIS 703 (Miss. Ct. App. 2009).

Where, in a divorce action, it appeared that the pleadings showed a valid marriage, that an application for temporary alimony was made in good faith, and that the court had jurisdiction, the court erred in denying temporary relief as a matter of law, without hearing the testimony. Neely v. Neely, 52 So. 2d 501, 1951 Miss. LEXIS 530 (Miss. 1951).

In passing on petition for temporary alimony under this section [Code 1942, § 2742], chancellor is not required to investigate the merits or inquire into the truth of the facts alleged, but is only required to determine whether a case for relief is stated on the face of the petition. Berryhill v. Berryhill, 198 Miss. 759, 23 So. 2d 889, 1945 Miss. LEXIS 244 (Miss. 1945).

If it should develop at a vacation hearing that the granting of petition for temporary alimony and counsel fee is not urgent and necessitous, the chancellor should decline to grant relief until term time. Berryhill v. Berryhill, 198 Miss. 759, 23 So. 2d 889, 1945 Miss. LEXIS 244 (Miss. 1945).

Vacation decree awarding wife temporary alimony of $50 per month minus such payment as may be collected by the wife each month from the federal government on allotment by son-in-law in military service was too indefinite and uncertain, and therefor unenforceable. Berryhill v. Berryhill, 198 Miss. 759, 23 So. 2d 889, 1945 Miss. LEXIS 244 (Miss. 1945).

Petition for temporary alimony wherein complainant alleged that he was without means for support and that "this is an urgent and necessitous case for temporary alimony," and praying for general relief and that the defendant be required to show cause why a reasonable amount could not be adjudged to be paid by the defendant for the support and maintenance of petitioner, while inartificially drawn, was susceptible of construction and acceptance as a bill for separate maintenance; and demurrer thereto should not have been sustained on the ground that a decree for temporary alimony could not be entered save where complainant seeks either a divorce or separate maintenance. Rutland v. Rutland, 192 Miss. 613, 7 So. 2d 553, 1942 Miss. LEXIS 64 (Miss. 1942).

Chancellor could hear in vacation petition for temporary alimony and solicitor's fee and temporary order regarding custody of children. Johnston v. Johnston, 182 Miss. 1, 179 So. 853, 1938 Miss. LEXIS 135 (Miss. 1938).

4. —Permanent orders.

A decree of permanent custody cannot be made in vacation. Gordon v. Gordon, 196 Miss. 476, 17 So. 2d 191, 1944 Miss. LEXIS 217 (Miss. 1944).

5. —Other proceedings.

The hearing on a defendant's motion to dismiss a bill for divorce on the ground of lack of jurisdiction of the parties may not be held in vacation, and even though the hearing is held by agreement the complainant is not barred from contesting its validity on appeal, for no proceedings in a divorce action, save those specifically excepted in this section [Code 1942, § 2742] may be heard or considered except in open court. Moran v. Moran, 252 Miss. 890, 173 So. 2d 916, 1965 Miss. LEXIS 1158 (Miss. 1965).

6. Jurisdictional issues.

The hearing on a defendant's motion to dismiss a bill for divorce on the ground of lack of jurisdiction of the parties may not be held in vacation, and even though the hearing is held by agreement the complainant is not barred from contesting its validity on appeal, for no proceedings in a divorce action, save those specifically excepted in this section [Code 1942, § 2742] may be heard or considered except in open court. Moran v. Moran, 252 Miss. 890, 173 So. 2d 916, 1965 Miss. LEXIS 1158 (Miss. 1965).

A custodial decree made by a court not having jurisdiction of the person of the minor whose custody is sought thereby to be determined is void. Montgomery v. Walker, 227 Miss. 552, 86 So. 2d 502, 1956 Miss. LEXIS 725 (Miss. 1956).

7. Modification of decree.

Emergency order modifying custody decree may not be entered in absence of urgent and necessitous circumstances, particularly where no notice is given to custodial parent who has permitted noncustodial parent to have children consistent with provisions of original custody decree. Robinson v. Robinson, 481 So. 2d 855, 1986 Miss. LEXIS 2339 (Miss. 1986).

Fact that custodial parent is receiving aid for dependent children, and social services from federal and state programs, including housing, does not disqualify parent from having custody of children and does not constitute material change adversely affecting children which may be basis for modification of custody decree, either by emergency order or by final decree. Robinson v. Robinson, 481 So. 2d 855, 1986 Miss. LEXIS 2339 (Miss. 1986).

Although a proceeding to obtain a divorce must be heard at a regular or special term of the court, a hearing for modification of an award of alimony in an original divorce proceeding may, in the discretion of the chancellor, be set for hearing in vacation. Spradling v. Spradling, 362 So. 2d 620, 1978 Miss. LEXIS 2117 (Miss. 1978).

Under this section [Code 1942, § 2742] the chancery court may modify a decree under certain circumstances, but a subject concerning which no decree was made in the divorce proceeding may not be the subject of a later decree in a divorce cause on the theory of modification of a divorce decree. Montgomery v. Walker, 227 Miss. 552, 86 So. 2d 502, 1956 Miss. LEXIS 725 (Miss. 1956).

When a decree of custody is to be made or modified in substantial or major aspects, a proper notice and opportunity to be heard must be given to the adverse party. Gordon v. Gordon, 196 Miss. 476, 17 So. 2d 191, 1944 Miss. LEXIS 217 (Miss. 1944).

Decree in vacation awarding permanent custody of child to mother, modifying original decree dividing custody of child equally between parents, without notice to father was void. Gordon v. Gordon, 196 Miss. 476, 17 So. 2d 191, 1944 Miss. LEXIS 217 (Miss. 1944).

This section [Code 1942, § 2742] does not authorize modification of original decree of divorce and alimony in wife's favor by decree in vacation, over objection of husband, dealing with the rights of the parties, not only with reference to alimony but also to the custody and care of the children and the rights of the parties as to the real estate and insurance of the husband. Lanham v. Lanham, 194 Miss. 872, 14 So. 2d 215, 1943 Miss. LEXIS 113 (Miss. 1943).

Original decree of divorce and alimony in wife's favor, providing that changes might be made therein with reference to alimony and property rights and custody of the children on five days' notice to either party, did not authorize hearing in vacation and decree modifying original decree, in the absence of specific provision in such decree for modification proceedings in vacation. Lanham v. Lanham, 194 Miss. 872, 14 So. 2d 215, 1943 Miss. LEXIS 113 (Miss. 1943).

8. Miscellaneous matters.

Chancellor was within the chancellor's discretion when the chancellor found a spouse in contempt for violating a temporary support order because the spouse admitted that the spouse did not pay the credit-card debts, child support, or medical costs not covered by insurance as mandated in the temporary support order. Apparently, the chancellor considered the spouse's unemployment as a basis to not hold the spouse in wilful contempt and to permit the arrearage to be paid in monthly installments. O'Brien v. O'Brien, 149 So. 3d 508, 2014 Miss. App. LEXIS 69 (Miss. Ct. App.), cert. denied, 151 So. 3d 1017, 2014 Miss. LEXIS 523 (Miss. 2014).

In an uncontested divorce action based on irreconcilable differences, it was within the chancellor's discretion to determine whether a personal appearance of a party or of an attorney was required since no proof is required under § 93-5-2, which governs a divorce sought on the grounds of irreconcilable differences, and neither § 93-5-7 nor 93-5-17, which govern the conduct of divorce proceedings, indicates a requirement that the person seeking the divorce must personally appear before the chancellor. The chancellor abused his discretion in refusing to grant the divorce without a personal appearance where the parties were proceeding pro se, the wife was a resident of California, and the husband was incarcerated in a correctional facility. Bullard v. Morris, 547 So. 2d 789, 1989 Miss. LEXIS 355 (Miss. 1989).

Chancellor consulted by wife in divorce case regarding choice of attorneys should, in order to avoid even appearance of impropriety, recuse himself from further proceedings between parties. Haralson v. Haralson, 483 So. 2d 378, 1986 Miss. LEXIS 2382 (Miss. 1986).

Spouse who is aware that divorce case is to be heard by master, not chancellor, but nevertheless proceeds before master without objection has waived objections to appointment or order of reference. Massey v. Massey, 475 So. 2d 802, 1985 Miss. LEXIS 2213 (Miss. 1985).

Where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. Cupit v. Brooks, 223 Miss. 887, 79 So. 2d 478, 1955 Miss. LEXIS 452 (Miss. 1955).

RESEARCH REFERENCES

ALR.

Power of court, in absence of express authority, to grant relief from judgment by default in divorce action. 22 A.L.R.2d 1312.

Entering judgment or decree of divorce nunc pro tunc. 19 A.L.R.3d 648.

Excessiveness or adequacy of money awarded as temporary alimony. 26 A.L.R.4th 1218.

Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce. 67 A.L.R.4th 237.

Excessiveness or inadequacy of lump-sum alimony award. 49 A.L.R.5th 441.

Am. Jur.

24 Am. Jur. 2d, Divorce and Separation § 283.

8A Am. Jur. Pl & Pr Forms (Rev), Divorce and Separation, Forms 401 et seq. (temporary alimony, child support, attorneys' fees and suit money).

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-5-19. Witnesses; depositions.

In the trial of suits for divorce, witnesses may be summoned, and examined in open court, as in the trial of issues of fact in the circuit court, or depositions may be taken and read as in other cases and the parties shall be competent witnesses for or against each other.

HISTORY:

Codes, 1880, § 1166; 1892, § 1571; 1906, § 1679; Hemingway's 1917, § 1421; 1930, § 1419; 1942, § 2741.

Cross References —

Another section derived from same 1942 code section, see § 93-5-21.

JUDICIAL DECISIONS

1. In general.

There can be no per se prohibition against a child witness testifying in a divorce case between the child's parents. The right of every litigant to compulsory process for witnesses and to have them testify under oath in court is so well grounded that any per se exclusion simply because he or she is a child of the divorcing parents risks offending the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Mississippi Constitution Art 3, § 14. Before excluding the testimony of a child witness of tender years in a divorce proceeding, the chancellor, at a minimum, should follow the procedure required by Crownover v. Crownover (1975) 33 Ill App 3d 327, 337 NE2d 56. Although no parent can be precluded from having a child of the marriage testify in a divorce proceeding simply because of that fact, parents in a divorce proceeding should, if at all possible, refrain from calling children of their marriage as witnesses, and counsel should advise their clients against doing so except in the most exigent cases. Jethrow v. Jethrow, 571 So. 2d 270, 1990 Miss. LEXIS 700 (Miss. 1990).

RESEARCH REFERENCES

ALR.

Divorce: spouse's right to order that other spouse pay expert witness fees. 4 A.L.R.5th 403.

§ 93-5-21. Exclusion of spectators from courtroom.

The court may, in its discretion, exclude all persons from the court room during the trial except the officers of the court, attorneys engaged in the case, parties to the suit and the witness being examined.

HISTORY:

Codes, 1880, § 1166; 1892, § 1571; 1906, § 1679; Hemingway's 1917, § 1421; 1930, § 1419; 1942, § 2741.

Cross References —

Another section derived from same 1942 code section, see § 93-5-19.

JUDICIAL DECISIONS

1. In general.

Statute provided wide discretion for a chancellor to close trials in divorce and custody cases. In re Memphis Publ'g Co., 823 So. 2d 1150, 2001 Miss. LEXIS 267 (Miss. 2001).

§ 93-5-23. Custody of children; alimony; effect of military duty on custody and visitation.

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. Orders touching on the custody of the children of the marriage shall be made in accordance with the provisions of Section 93-5-24. For the purposes of orders touching the maintenance and alimony of the wife or husband, "property" and "an asset of a spouse" shall not include any interest a party may have as an heir at law of a living person or any interest under a third-party will, nor shall any such interest be considered as an economic circumstance or other factor. The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support.

Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other guarantee has been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefor may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services. At the time of ordering such continuance, the court may direct the party and his attorney making such allegation of child abuse to report in writing and provide all evidence touching on the allegation of abuse to the Department of Human Services. The Department of Human Services shall investigate such allegation and take such action as it deems appropriate and as provided in such cases under the Youth Court Law (being Chapter 21 of Title 43, Mississippi Code of 1972) or under the laws establishing family courts (being Chapter 23 of Title 43, Mississippi Code of 1972).

If after investigation by the Department of Human Services or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or public.

The duty of support of a child terminates upon the emancipation of the child. The court may determine that emancipation has occurred pursuant to Section 93-11-65.

Custody and visitation upon military temporary duty, deployment or mobilization shall be governed by Section 93-5-34.

HISTORY:

Codes, Hutchinson's 1848, ch. 34, art. 2 (7); 1857, ch. 40, art. 17; 1871, § 1772; 1880, § 1159; 1892, § 1565; 1906, § 1673; Hemingway's 1917, § 1415; 1930, § 1421; 1942, § 2743; Laws, 1954, ch. 228; Laws, 1979, ch. 497; Laws, 1983, ch. 513, § 3; Laws, 1985, ch. 518, § 15; Laws, 1989, ch. 434, § 1; Laws, 1993, ch. 558, § 2; Laws, 1994, ch. 591, § 6; Laws, 1996, ch. 345, § 1; Laws, 2000, ch. 453,

§ 2; Laws, 2006, ch. 565, § 1; Laws, 2008, ch. 389, § 2; Laws, 2008, ch. 547, § 2; Laws, 2009, ch. 367, § 3, eff from and after July 1, 2009.

Joint Legislative Committee Note —

Section 2 of ch. 389, Laws of 2008, effective from and after July 1, 2008 (approved March 31, 2008), amended this section. Section 2 of ch. 547, Laws of 2008, effective from and after July 1, 2008 (approved May 10, 2008) also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at its August 5, 2008, meeting.

Editor's Notes —

Laws, 1999, ch. 432, § 1, provides that:

"SECTION 1. From and after the date Laws, 1999, ch. 432, is effectuated under Section 5 of the Voting Rights Act of 1965, all family courts are abolished. All matters pending in any family court abolished shall be transferred to the county court of the county wherein the family court was located without the necessity for any motion or order of court for such transfer."

Cross References —

Prohibition on divorce on grounds of irreconcilable differences in absence of written agreement providing for custody and maintenance of children and settlement of property rights, see § 93-5-2.

Custody and support of minor children and additional remedies, see § 93-11-65.

Provisions relative to orders for withholding amounts of overdue child support payments from income of obligors, see §§ 93-11-101 through 93-11-119.

Criminal sanctions against noncustodial parent or relative for removal of child under age of fourteen from state in violation of court order, see § 97-3-51.

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I. ALIMONY.

1. In general.

Appellate court reversed trial court's denial of a husband's motion to terminate his spousal support payments to his former wife, and remanded the matter to the trial court, as it was unclear from the agreement as to whether the payments were to be considered alimony and whether the husband's obligations would continue after his death. Beezley v. Beezley, 917 So. 2d 803, 2005 Miss. App. LEXIS 704 (Miss. Ct. App. 2005).

Where the record showed that the parties had been married almost 20 years and that the wife had primarily worked at a few part-time jobs, in addition to raising two children, the appellate court held: (1) as to the husband's part ownership in the business, the chancellor was within his discretion in finding that there was no goodwill, because said air conditioning business had numerous skilled employees, the husband was not an essential, irreplaceable part of said business, and the business would have operated normally if the husband left the business; (2) even though the husband was granted primary physical custody of the parties' minor child, the award of child support to the wife was not improper based on the criteria for overcoming the presumption that the guidelines were appropriate; (3) the award of periodic alimony to the wife was proper given the length of the marriage, given the fact that the parties had enjoyed a high standard of living, and given that the wife had very little education or work experience; and (4) the wife's acts of infidelity which occurred while the parties were separated was not a ground for denying alimony. Rush v. Rush, 932 So. 2d 800, 2005 Miss. App. LEXIS 533 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 932 So. 2d 794, 2006 Miss. LEXIS 354 (Miss. 2006).

Where the father was severely in arrears as to his child support obligation and had voluntarily left his employment for early retirement, he came into court with unclean hands. Thus, the chancellor properly denied his motion for modification of child support. Leiden v. Leiden, 902 So. 2d 582, 2004 Miss. App. LEXIS 879 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 331 (Miss. 2005).

Chancellor erred in changing the alimony from rehabilitative to permanent periodic alimony at a review hearing where a motion for modification was never filed. Further, the chancellor erred in focusing on the husband's financial condition; the focus should have been on the wife's financial condition, as the fact that the husband's financial condition was about the same as it had been earlier had no bearing on whether the wife had arrived at a point that the wife no longer needed financial help. Oster v. Oster, 876 So. 2d 428, 2004 Miss. App. LEXIS 377 (Miss. Ct. App. 2004).

Trial court applied the incorrect legal standard in determining if alimony was reasonable; the Ferguson factors were used to determine whether alimony was proper in a case, except the chancellor did not use these factors, but instead used the Hemsley factors, which were used to determine if alimony is reasonable, such that since he applied the wrong legal standard, the determination of alimony was reversed and remanded. Smith v. Smith, 856 So. 2d 717, 2003 Miss. App. LEXIS 904 (Miss. Ct. App. 2003).

Ex-husband argued that that in addition to the seven year bar under Miss. Code Ann. § 15-1-43, laches and/or equitable estoppel should have precluded ex-wife from enforcing any of the 1981 settlement agreement's financial provisions, except those that he had already met, and that the parties had a verbal understanding that, while he would continue paying $ 3,900 per month in alimony, the ex-wife would not seek to enforce the escalator and retirement fund provisions of the settlement agreement. However, by the husband's threats, the husband came into court with "unclean hands," which prevented the husband from being able to assert equitable defenses, there was no fraud or overreaching on the ex-wife's part with respect to the 1981 settlement agreement, and the contempt order for the ex-husband to pay alimony, and stock dividend division arrearages, of almost one-half million, was proper. Nicholas v. Nicholas, 841 So. 2d 1208, 2003 Miss. App. LEXIS 287 (Miss. Ct. App. 2003).

Property settlement provided for payments consistent with nonmodifiable lump-sum alimony, rather than periodic alimony, even though they were to end upon death of the payor husband and were to be replaced by potentially lesser amount of life insurance proceeds, where agreement designated payments as lump-sum alimony, provided for payment of fixed sum, clearly stated that said payments were not modifiable, and very significantly, did not provide for termination of payments upon wife's death. McDonald v. McDonald, 683 So. 2d 929, 1996 Miss. LEXIS 633 (Miss. 1996).

Lump-sum alimony is not in the nature of continuing support, but rather, is a property transfer which is vested in recipient spouse at the time said alimony is awarded. McDonald v. McDonald, 683 So. 2d 929, 1996 Miss. LEXIS 633 (Miss. 1996).

"Rehabilitative periodic alimony," synonymous with "periodic transitional alimony," is a separate and equitable tool for chancellors to use in their discretion, and allows a party needing assistance to become self-supporting without becoming destitute in the interim. Hubbard v. Hubbard, 656 So. 2d 124, 1995 Miss. LEXIS 283 (Miss. 1995).

"Periodic alimony" and "rehabilitative periodic alimony" vest as they become due and are modifiable; however, periodic alimony is for an indefinite period of time, while rehabilitative alimony is for a fixed period. Hubbard v. Hubbard, 656 So. 2d 124, 1995 Miss. LEXIS 283 (Miss. 1995).

While both rehabilitative periodic alimony and lump sum alimony which is not paid all at once can share the same characteristic of being a certain amount of money paid over a definite period of time, they are distinguishable in their modifiability, respective purposes, and by the intent for which the chancellor grants them; rehabilitative periodic alimony is not intended as an equalizer between the parties but is for the purpose of allowing the less able party to start anew without being destitute in the interim, while lump sum alimony is intended as an equalizer between the parties to serve equity between them completely, once and for all. Hubbard v. Hubbard, 656 So. 2d 124, 1995 Miss. LEXIS 283 (Miss. 1995).

A wife's lump sum alimony award of $24,000 was grossly inadequate and constituted an abuse of discretion where the husband had a net worth of at least $315,000 due to an inheritance from his family, the wife's estimated minimum monthly expenses totalled $1,600, she was awarded $500 per month in child support payments, and she earned gross monthly wages of $340, since the award did not allow the wife to maintain her accustomed standard of living and did not reflect a consideration of her lack of available resources or the husband's ability to pay. Creekmore v. Creekmore, 651 So. 2d 513, 1995 Miss. LEXIS 110 (Miss. 1995).

When the equitable distribution of property acquired during the marriage is accomplished, the resultant division of assets and liabilities must be factored into the determination of other financial matters such as alimony and child support. Bennett v. Bennett, 650 So. 2d 517, 1995 Miss. LEXIS 86 (Miss. 1995).

In determining an award of alimony upon divorce, homemaker contributions are not to be measured by a mechanical formula, but on the contribution to the economic and emotional well-being of the family unit. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

An antenuptial contract is like any other contract and as such is subject to the same rules of construction and interpretation applicable to contracts. Estate of Hensley v. Estate of Hensley, 524 So. 2d 325, 1988 Miss. LEXIS 212 (Miss. 1988).

After Mississippi divorce proceeding in which wife neither seeks alimony nor reserves right to do so becomes final, wife is precluded from seeking alimony in Louisiana. Mitchell v. Mitchell, 483 So. 2d 1152, 1986 La. App. LEXIS 6165 (La.App. 5 Cir. 1986).

Prior to statutory revision, in a divorce action instituted by a husband against his wife, the trial court erred in granting alimony to the wife where she had filed an answer but had not filed a cross-bill for affirmative relief. Diamond v. Diamond, 403 So. 2d 129, 1981 Miss. LEXIS 2159 (Miss. 1981), but see Queen v. Queen, 551 So. 2d 197, 1989 Miss. LEXIS 363 (Miss. 1989).

A husband's challenge to the constitutionality of the statute was untimely where no such challenge had been raised in the original divorce proceedings or in several subsequent proceedings in which he had attempted to defeat or reduce the alimony award. Walker v. Walker, 389 So. 2d 502, 1980 Miss. LEXIS 2112 (Miss. 1980).

Where neither party is entitled to a divorce under the evidence, no alimony can be allowed. Burnett v. Burnett, 271 So. 2d 90, 1972 Miss. LEXIS 1269 (Miss. 1972).

The duty of the husband to support his wife is not abrogated by the fact that the wife is capable of earning her own living. McInnis v. McInnis, 227 So. 2d 116, 1969 Miss. LEXIS 1335 (Miss. 1969).

The right to alimony is controlled generally by statute. King v. King, 246 Miss. 798, 152 So. 2d 889, 1963 Miss. LEXIS 506 (Miss. 1963).

A chancellor may allow past-due alimony to be paid in installments. Rubisoff v. Rubisoff, 242 Miss. 225, 133 So. 2d 534, 1961 Miss. LEXIS 548 (Miss. 1961).

A court cannot give relief from civil liability for accrued alimony. Rainwater v. Rainwater, 236 Miss. 412, 110 So. 2d 608, 1959 Miss. LEXIS 334 (Miss. 1959).

In a general sense, alimony is an allowance authorized by law to be made to the wife out of her husband's estate for her support, the amount of his property, whether exempt or not from sale under an ordinary execution, being taken into account in determining such allowance. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss. 1943).

Alimony not awarded where prayer therefor is dependent on decree of divorce which cannot be granted. Walker v. Walker, 140 Miss. 340, 105 So. 753, 1925 Miss. LEXIS 267 (Miss. 1925), overruled, Davis v. Davis, 194 Miss. 343, 12 So. 2d 435, 1943 Miss. LEXIS 75 (Miss. 1943).

The allowance of alimony is justified by the natural obligation of the husband, as the bread winner of the family, to support his wife. Robinson v. Robinson, 112 Miss. 224, 72 So. 923, 1916 Miss. LEXIS 93 (Miss. 1916).

The wife's right to alimony is not affected by her statutory emancipation from the disabilities of coverture. Verner v. Verner, 62 Miss. 260, 1884 Miss. LEXIS 67 (Miss. 1884).

2. Factors in determining whether alimony should be granted.

Because the broad, inherent equity powers of a chancery court establish its authority to divide marital assets, and because a chancellor supported the chancellor's findings by substantial credible evidence in the record, the court did not err in the calculation of marital assets on remand by finding a second mortgage to be a marital debt and a joint obligation of the parties. Gutierrez v. Gutierrez, 233 So. 3d 797, 2017 Miss. LEXIS 247 (Miss. 2017).

Because the broad, inherent equity powers of a chancery court establish its authority to divide marital assets, and because a chancellor supported the chancellor's findings by substantial credible evidence in the record, the court did not err in the calculation of marital assets on remand by finding a second mortgage to be a marital debt and a joint obligation of the parties. Gutierrez v. Gutierrez, 233 So. 3d 797, 2017 Miss. LEXIS 247 (Miss. 2017).

There was no abuse of discretion in a chancellor's award of periodic alimony to a wife because the chancellor noted that the wife was in her fifties, that the wife and husband had been married for thirty-three years, there was a disparity in the incomes between the parties, the wife's education level was low, and she had a sparse employment history, which would likely make it difficult for her to obtain gainful employment; there was no error in the chancellor's determination of fault or misconduct by the husband during the marriage, and the chancellor's finding of "fault or misconduct" was not the sole reason for awarding periodic alimony but was merely considered in conjunction with the other factors discussed above. George v. George, 22 So. 3d 424, 2009 Miss. App. LEXIS 856 (Miss. Ct. App. 2009).

Chancellor did not err in awarding the wife $500 a month in permanent alimony and properly considered all factors, finding that the wife suffered a defect in her ability to meet her reasonable living expenses after the equitable division of the martial property. Elliott v. Elliott, 11 So. 3d 784, 2009 Miss. App. LEXIS 353 (Miss. Ct. App. 2009).

Award of periodic alimony to the wife was appropriate because the chancellor addressed the Armstrong factors in making the determination, including the length of the marriage, the fault of the parties, the lack of children, the health of the parties, the age of the parties, and the income and expenses of the parties in the alimony determination. Goellner v. Goellner, 11 So. 3d 1251, 2009 Miss. App. LEXIS 346 (Miss. Ct. App. 2009).

Chancellor did not abuse his discretion in awarding the wife rehabilitative alimony as it would serve the purpose of preparing her to reenter the work force when their son reached the age of eighteen. Smith v. Smith, 25 So. 3d 369, 2009 Miss. App. LEXIS 283 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 17 (Miss. 2010).

In a case where a divorce was granted to a wife based on a husband's habitual drunkenness, a chancellor did not err by denying the wife periodic alimony because the parties would have made almost the exact same amount if the wife had worked 40 hours as a nurse; it was within the chancellor's discretion to weigh each party's fault. Also, lump sum alimony was also properly denied since the marital residence, as well as the wife's education, was paid for by the husband's parents. Dorsey v. Dorsey, 972 So. 2d 48, 2008 Miss. App. LEXIS 18 (Miss. Ct. App. 2008).

Alimony award had to be reversed and the case remanded to the chancery court for a determination of whether periodic or rehabilitative alimony was needed because: (1) neither the bench opinion nor the final decree granting the divorce indicated whether an analysis of the factors for granting alimony was made; (2) the chancellor himself stated that he was astounded that the ex-wife testified she only earned $250 to $270 every two weeks in take home pay; (3) the wife was 41 years old at the time of the trial, and since then the couple's only child had married and left the marital home; (4) the record indicated that the ex-husband had essentially become voluntarily unemployed in an effort to avoid showing any means to pay the wife the alimony ordered; and (5) from the record it was impossible to see why the wife would need $4,000 per month in periodic alimony, unless the award was meant as an equitable distribution. Carroll v. Carroll, 976 So. 2d 880, 2007 Miss. App. LEXIS 301 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 107 (Miss. 2008).

Chancery court did not err by awarding a wife alimony in the amount of $375 per month, after she received a lump sum representing her share of the marital property, based on her age, the fact that the parties were married for 29 years, and her limited earning capacity; the chancery court's failure to make record consideration of these factors was not error based on the facts. Roberson v. Roberson, 949 So. 2d 866, 2007 Miss. App. LEXIS 75 (Miss. Ct. App. 2007).

Appellate court affirmed the trial court's decision as it was clear that the trial court factors such as the length of the marriage, the parties' respective ages, the income received by both parties, and the fact that the husband would retain the marital home while the wife did not have a home; thus, the appellate court found that the chancellor's findings were supported by credible evidence in the record, and that she did not abuse her discretion or commit manifest error in awarding alimony. Blalack v. Blalack, 938 So. 2d 909, 2006 Miss. App. LEXIS 721 (Miss. Ct. App. 2006).

Trial court did not err in awarding the wife alimony in the amount of $1,000 per month pursuant to Miss. Code Ann. § 93-5-23, as the trial court considered all the proper factors before awarding the alimony, and the award of alimony was consistent with the testimony presented. Dobbs v. Dobbs, 912 So. 2d 491, 2005 Miss. App. LEXIS 709 (Miss. Ct. App. 2005).

In a divorce action, a wife was properly awarded $250 per month in alimony where the evidence showed that she had worked on the husband's chicken farm for many years, had declining health, and worked part-time as a massage therapist; the chancery court properly applied the factors under Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993), and reviewed the parties' financial statements. Stuart v. Stuart, 956 So. 2d 295, 2006 Miss. App. LEXIS 759 (Miss. Ct. App. 2006).

Trial court did not err in refusing to award alimony to a wife even though the husband's income was substantially higher as the couple's marriage was very short, and most, if not all, of the wife's requests were met through the trial court's property distribution. Larney v. Record, 908 So. 2d 171, 2005 Miss. App. LEXIS 487 (Miss. Ct. App. 2005).

In a no-fault divorce, the record showed that the line of questioning at issue (primarily cross-examination of the husband), was not intended to establish that he had abandoned the wife by his leaving the marital home before the marriage, but was for the purpose of establishing time lines and the financial contributions of the parties. The questioning was also to determine how the payments of the wife's vehicle were being made, not to establish fault; there was no indication that the husband's having left the marital home was the driving factor in establishing the alimony award to the wife, and in any event, the fact that both spouses agreed to a divorce did not eliminate the consideration of the fault factor. Patterson v. Patterson, 917 So. 2d 111, 2005 Miss. App. LEXIS 432 (Miss. Ct. App.), cert. denied, 921 So. 2d 1279, 2005 Miss. LEXIS 812 (Miss. 2005).

While the chancery court did not specifically mention the Armstrong factors, the chancery court did find: (1) that the divorce was a result of the husband's adultery; (2) that the wife's earnings were about half of her husband's; (3) that her cancer and other health problems prohibited her from seeking other employment; and (4) that the parties were married for 29 years. Those factors all favored an award of periodic alimony for the wife and there was no manifest error. White v. White, 913 So. 2d 323, 2005 Miss. App. LEXIS 250 (Miss. Ct. App. 2005).

Alimony the husband was ordered to pay met only the reasonable needs of the wife and barely allowed her to pay her living expenses; no evidence indicated that the wife was living extravagantly or wasting the husband's alimony checks and even though the trial court did not properly consider fault as a factor in awarding alimony, the alimony award was not rendered improper, and the wife had established her inability to pay her own attorney's fees and rejected the husband's argument that her inability to pay her legal bills was due to her costly vices. Lawton v. Lawton, 905 So. 2d 723, 2004 Miss. App. LEXIS 1067 (Miss. Ct. App. 2004).

Where a trial court did not delineate its reasoning and analysis regarding the amount and type of alimony to be distributed, and its award of rehabilitative periodic alimony to the wife was arguably inappropriate because she had a stable, professional job and did not put her career on hold during the marriage, the case was remanded to the trial court for determination of the appropriate type and amount of alimony. Holley v. Holley, 892 So. 2d 183, 2004 Miss. LEXIS 1171 (Miss. 2004).

Court erred in its alimony award where the income that the chancellor did not consider in the original award to the wife did not serve to convince him to lower alimony; instead, he raised it; therefore, the same debt served to advantage the wife twice; first, to increase her award of assets, and second, to increase her award of alimony. Watson v. Watson, 882 So. 2d 95, 2004 Miss. LEXIS 709 (Miss. 2004).

Where the parties were married approximately 36 years, in awarding the wife more than two-thirds of the marital estate, the chancellor clearly recognized the wife's contributions to the financial well-being of the marriage. The great majority of the assets awarded the wife were unencumbered while most of the property awarded the husband held mortgages; further, the wife had the ability to resume a nursing career, and on those facts the chancellor's decision denying alimony was not erroneous. Marsh v. Marsh, 868 So. 2d 394, 2004 Miss. App. LEXIS 202 (Miss. Ct. App. 2004).

Chancellor did not abuse his discretion in finding that a wife was not entitled to an award of alimony where the chancellor conducted a thorough analysis of all the relevant factors. Tynes v. Tynes, 860 So. 2d 325, 2003 Miss. App. LEXIS 1065 (Miss. Ct. App. 2003).

Where the parties were in their late 50s, and husband's net income was over double that of the wife, an award of the parties' home, one-half of the husband's 401K, and periodic alimony to wife was proper, especially since the wife was going to lose health coverage through the husband's employer; the husband's support of a girlfriend was not grounds to reduce alimony, and a recitation of facts in the judgment showed the chancellor covered most, if not all the Ferguson and Armstrong factors, so that no reversal was required. Palmer v. Palmer, 841 So. 2d 185, 2003 Miss. App. LEXIS 244 (Miss. Ct. App. 2003).

Factors to be in awarding alimony include parties' income and expenses, parties' health and earning, parties' needs, parties' obligations and assets, presence or absence of minor children in the home, parties' ages, parties' standard of living during marriage and at time of support determination, tax consequences of spousal support order, parties' fault or misconduct, any wasteful dissipation of assets by either party, and any other factor deemed by the court to be just and equitable. Parsons v. Parsons, 678 So. 2d 701, 1996 Miss. LEXIS 410 (Miss. 1996).

3. —Spouse's infidelity.

Alimony was denied to a former wife in a divorce matter after a consideration of the factors under Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993); a chancery court did not just look to the wife's adultery in making its decision, but also relied on her work history, her extreme behavior, and her unwillingness to contribute either directly or indirectly to the marriage. Brabham v. Brabham, 950 So. 2d 1098, 2007 Miss. App. LEXIS 128 (Miss. Ct. App. 2007).

Court of appeals erred in holding that the trial court had improperly imposed alimony to punish the husband for his adultery, as the trial court specifically stated that it was not doing so; therefore, alimony, although incorrect as to its specific type, was awarded for its proper purpose. Holley v. Holley, 892 So. 2d 183, 2004 Miss. LEXIS 1171 (Miss. 2004).

Where alimony is otherwise appropriate, it should not be denied a wife solely because she is adjudged at fault in the divorce judgment; adultery should not stand as an absolute bar to alimony, especially when denial of alimony would render the wife destitute; thus, a wife who committed adultery was entitled to minimal alimony in an amount which would not leave her in a state of financial misfortune where she contributed substantially to the total accumulation of marital assets, the marriage lasted approximately 25 years, the wife had no separate income or estate while the husband's was substantial, and the wife lacked any financial security without alimony. Hammonds v. Hammonds, 597 So. 2d 653, 1992 Miss. LEXIS 195 (Miss. 1992).

A husband who was granted a divorce on the ground of the wife's adultery would not be required to pay the wife periodic alimony where the wife was a college graduate, she was capable of full-time employment, and she owned 49.8 percent of the shares in the corporate owner of 5 commercially successful McDonald's restaurants. Retzer v. Retzer, 578 So. 2d 580, 1990 Miss. LEXIS 858 (Miss. 1990).

It was an abuse of discretion on the part of the trial court to refuse to grant alimony to complainant wife when the long marriage of the parties, the conduct accorded the wife by her husband, the admission of adultery in open court on his part, as well as the ages of the parties, including the likelihood of unemployment by reason thereof, were taken into consideration. Horton v. Horton, 269 So. 2d 347, 1972 Miss. LEXIS 1224 (Miss. 1972).

Where, in a divorce action, the wife's infidelity was overwhelmingly established by the evidence and at least in part was not condoned, it was error for the court to make an allowance for her support. King v. King, 191 So. 2d 409, 1966 Miss. LEXIS 1213 (Miss. 1966).

When a divorce has been properly granted because of the adultery of the wife, she is not entitled either to alimony or to the custody of the children. Keyes v. Keyes, 252 Miss. 138, 171 So. 2d 489, 1965 Miss. LEXIS 1084 (Miss. 1965).

When divorce has been properly granted because of the adultery of the wife, she is not entitled either to alimony or to the custody of the children, save temporarily as to an infant so young as not to permit separation from its mother, and save in exceptional circumstances. Winfield v. Winfield, 203 Miss. 391, 35 So. 2d 443, 1948 Miss. LEXIS 285 (Miss. 1948).

Where decree of divorce in favor of husband was sustainable on ground of wife's adultery, award of alimony and custody of the youngest of three children, aged six years, to the wife was wholly reversed and vacated and a decree entered awarding the custody of the children to the father, leaving the privilege of visitation to the children open for the chancellor to determine on remand. Winfield v. Winfield, 203 Miss. 391, 35 So. 2d 443, 1948 Miss. LEXIS 285 (Miss. 1948).

4. —Spouse's desertion.

As a general rule, even in cases of divorce, no alimony is allowed to a wife who has abandoned her husband and remains away without legal justification. Wilson v. Wilson, 198 Miss. 334, 22 So. 2d 161, 1945 Miss. LEXIS 202 (Miss.), modified, 198 Miss. 334, 23 So. 2d 303, 1945 Miss. LEXIS 203 (Miss. 1945).

Wife who separated from husband and refused to return except on condition that he send away a girl adopted by them is not entitled to alimony. Hilton v. Hilton, 88 Miss. 529, 41 So. 262, 1906 Miss. LEXIS 174 (Miss. 1906).

A husband who deserts his wife because of rumors affecting her chastitiy before marriage, which rumors are disproved, is liable for alimony. Verner v. Verner, 62 Miss. 260, 1884 Miss. LEXIS 67 (Miss. 1884).

5. —Spouse's mental condition.

Chancery court could render decree for alimony to quondam wife, subsequent to absolute divorce decree granted husband while wife was in insane hospital. Crawford v. Crawford, 158 Miss. 382, 130 So. 688, 1930 Miss. LEXIS 75 (Miss. 1930).

6. —Financial considerations.

Trial court did not err in awarding a wife $1,000 per month as permanent alimony because the parties were married 26 years, the majority of marital assets received by the wife consisted of retirement accounts that she could not use for living expenses without incurring substantial tax penalties, the husband earned considerably more income than the wife and had the potential for his income to increase further through promotions, and the husband was primarily at fault for the collapse of the marriage. Myrick v. Myrick, 122 So. 3d 93, 2013 Miss. App. LEXIS 258 (Miss. Ct. App. 2013).

Because an award of lump-sum alimony pursuant to Miss. Code Ann. § 93-5-23, albeit deemed periodic alimony, was based on an errant division of marital property, if the chancellor found on remand that the wife's wasteful dissipation of assets through gambling exceeded one-half of the value of the marital estate, no more need be done as to equitable distribution of marital assets. Lowrey v. Lowrey, 25 So. 3d 274, 2009 Miss. LEXIS 549 (Miss. 2009).

Chancellor did not err in awarding lump-sum alimony of $60,000 to the wife to counterbalance the award of real property, the marital estate's only asset, to the husband because the wife had no separate estate since she contributed her entire inheritance from her mother–approximately $80,000–to the family and those funds had been used to purchase the home. Further, the wife lacked financial security because she had repeatedly sacrificed her career to help her husband advance his, had supported her husband while he went to school, and was in remission after surviving breast cancer. Palculict v. Curtis-Palculict, 22 So. 3d 293, 2009 Miss. App. LEXIS 307 (Miss. Ct. App. 2009).

Where the husband's adulterous conduct was the sole cause of the breakup of the nineteen-year marriage, the evidence supported the chancellor's order requiring the husband to pay $ 750 per month in periodic alimony and $ 500 per month in alimony arrearages; the chancellor correctly applied the Armstrong factors. The husband's net income was greater than the wife's; her expenses were higher; the children lived with the wife; without alimony, she could not maintain her previous standard of living. Holley v. Holley, 969 So. 2d 842, 2007 Miss. LEXIS 675 (Miss. 2007).

In a divorce case, a chancery court did not err by awarding a former wife $700 in monthly alimony where an elderly former husband had extra monthly income, his elderly former wife did not have enough money to meet her monthly expenses, and she was unable to work due to her health conditions; the husband failed to show that the wife's expenses should have been rejected as unreasonable. LaRue v. LaRue, 969 So. 2d 99, 2007 Miss. App. LEXIS 338 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

Ex-husband had, shortly before trial, over $500,000 in his personal possession, a working farm, a helicopter, and a mistress with whom he continued to live and financially support after the divorce; thus, the chancellor did not err in finding that the husband had the ability to pay the spousal support ordered in the final judgment. Carroll v. Carroll, 976 So. 2d 880, 2007 Miss. App. LEXIS 301 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 107 (Miss. 2008).

Where evidence indicated that a former wife and her boyfriend were mutually supportive of one another, the trial court did not err in ruling that the wife was not entitled to rehabilitative alimony. Alexis v. Tarver, 879 So. 2d 1078, 2004 Miss. App. LEXIS 750 (Miss. Ct. App. 2004).

Where a former wife's net income slightly exceeded her former husband's, and she was awarded over $300,000, or 51.7 percent, of the marital property, which adequately provided for her needs, the chancellor did not err in denying her alimony. McLaurin v. McLaurin, 853 So. 2d 1279, 2003 Miss. App. LEXIS 787 (Miss. Ct. App. 2003).

Evidence supported determination that wife was entitled to alimony, notwithstanding husband's testimony concerning amount of his expenses; husband's testimony that he had $500 monthly "expenses" consisting of money put aside for "emergency" showed that such "expenses" actually were "savings" and husband's failure to document other claimed expenses, $400 per month of which were unnecessary, rendered those claims highly suspect. Parsons v. Parsons, 678 So. 2d 701, 1996 Miss. LEXIS 410 (Miss. 1996).

Wife's financial declaration, reverse side of which revealed itemized list of wife's monthly expenses, was sufficient evidence of wife's needs to justify award of alimony. Parsons v. Parsons, 678 So. 2d 701, 1996 Miss. LEXIS 410 (Miss. 1996).

A chancellor was correct in awarding lump sum alimony to a wife, even though she did not contribute to the husband's accumulation of wealth, where the husband's wealth was inherited from his family, the wife's wages during the first 5 years of the marriage helped to conserve the husband's estate, she worked during most of the marriage while he did not, she quit her job after both parties agreed that she should stay home with their daughter, her separate income and estate were meager in comparison to his, and she would enjoy no financial security without lump sum alimony. Creekmore v. Creekmore, 651 So. 2d 513, 1995 Miss. LEXIS 110 (Miss. 1995).

An award of alimony to a wife would be reversed and remanded for reconsideration in light of the division of marital property accomplished by the parties' stipulation where the chancellor failed to take into consideration the extent of the assets awarded to the wife and the income therefrom when determining the award of alimony. Bennett v. Bennett, 650 So. 2d 517, 1995 Miss. LEXIS 86 (Miss. 1995).

A trial court did not err in refusing to award alimony to a 62-year-old wife where the parties were married for only 6 years, the wife left the marriage economically stronger than she entered, she worked part time and received monthly social security income, the 67-year-old husband did not intend to resume his carpentry work full time and had recently undergone surgery for a hernia repair, and there was no jointly acquired property. Ethridge v. Ethridge, 648 So. 2d 1143, 1995 Miss. LEXIS 16 (Miss. 1995).

A wife was entitled to lump sum alimony where the parties were married for 22 years, the wife worked to help support the family seemingly at the expense of her own education, she stayed home to care for the children when the couple decided that was best, she worked on and off throughout the marriage for the husband's medical practice, and there was a large disparity between the parties' estates. Tilley v. Tilley, 610 So. 2d 348, 1992 Miss. LEXIS 780 (Miss. 1992).

In determining an award of lump sum alimony, the following factors should be considered: (1) substantial contribution to accumulation of total wealth of the payor, either by quitting a job to become a homemaker or by assisting in the spouse's business; (2) a long marriage; (3) the recipient spouse has no separate income or the separate income is meager by comparison; and (4) without the lump sum award, the receiving spouse would lack financial security. Bishop v. State, 607 So. 2d 122, 1992 Miss. LEXIS 649 (Miss. 1992).

A chancellor abused his discretion in denying periodic alimony to a wife where the chancellor awarded a divorce to the wife on the ground of the husband's habitual cruel and inhuman treatment, the duration of the marriage was 22 years, the husband had a "healthy income" and was able to afford alimony in a reasonable amount, and some form of alimony was required in order to prevent the wife from being in desperate need. Gammage v. Gammage, 599 So. 2d 569, 1992 Miss. LEXIS 215 (Miss. 1992).

A husband who was granted a divorce on the ground of the wife's adultery would not be required to pay the wife periodic alimony where the wife was a college graduate, she was capable of full-time employment, and she owned 49.8 percent of the shares in the corporate owner of 5 commercially successful McDonald's restaurants. Retzer v. Retzer, 578 So. 2d 580, 1990 Miss. LEXIS 858 (Miss. 1990).

A wife was not entitled to alimony and child support where she received ½ of the proceeds from the operation of the parties' chicken farm, which was their most valuable asset, she was provided with substantial income for her and the children, and the property was divided equally between the parties with the exception of a 101-acre tract of land in which the wife had a lesser interest. Martin v. Martin, 566 So. 2d 704, 1990 Miss. LEXIS 466 (Miss. 1990).

An award of lump sum alimony to a wife was not an abuse of discretion, even though the wife would not have lacked financial security without the lump sum award, where the wife resigned from her employment at the request of her husband to assist him in the operation of his real estate business 6 months after the parties' marriage, she was able to contribute more to the business after she received her license to sell real estate, she resigned from her employment with another realtor at the request of her husband because the realtor was a competitor, she promoted her husband's business through her home and social life, she assumed all of the duties associated with running the family's household, the parties were married for 19 years, and the wife's estate was substantially less than the husband's net worth. White v. White, 557 So. 2d 480, 1989 Miss. LEXIS 516 (Miss. 1989).

A divorcing spouse, who has assisted his wife or her husband in the accumulation of wealth during the marriage as reflected by an increase in net worth, may be awarded lump sum alimony reflecting an equitable portion of the increase. Moreover, a substantial lump sum award of alimony is similarly appropriate where one spouse has accumulated considerable property and the other spouse has contributed by doing his or her part as a homemaker. White v. White, 557 So. 2d 480, 1989 Miss. LEXIS 516 (Miss. 1989).

In determining whether to award lump sum alimony, the single most important factor to be considered is the disparity of the separate estates. Cheatham v. Cheatham, 537 So. 2d 435, 1988 Miss. LEXIS 627 (Miss. 1988).

Chancery Court did not commit error in denying alimony to wife where parties were unable to meet expenses with current income. McNally v. McNally, 516 So. 2d 499, 1987 Miss. LEXIS 2956 (Miss. 1987).

Chancery Court did not err in refusing to award wife lump sum alimony where husband's financial circumstances were such that his current income was insufficient to meet his monthly expenses, although wife was in need of alimony. McNally v. McNally, 516 So. 2d 499, 1987 Miss. LEXIS 2956 (Miss. 1987).

Incident to judgment for divorce, Chancery Court has authority to award alimony after considering, weighing, and balancing among other factors, (1) health and earning capacity of husband, (2) health and earning capacity of wife, (3) entire sources of income of both parties, and (4) such other facts and circumstances bearing on subject that might be shown by evidence. McNally v. McNally, 516 So. 2d 499, 1987 Miss. LEXIS 2956 (Miss. 1987).

Even in cases where the wife has been guilty of fault justifying granting the husband a divorce, alimony, if allowed at all, should be reasonable in amount, commensurate with wife's accustomed standard of living, minus her own resources, and considering the husband's ability to pay. Wood v. Wood, 495 So. 2d 503, 1986 Miss. LEXIS 2691 (Miss. 1986).

Where a couple had been married for approximately 24 years, at the beginning of the marriage they had no assets and the husband made a salary of $85 per week, and at the time of the divorce the husband admitted assets of $800,000, and the wife's worth was meager by comparison, since the wife had contributed to the accumulation of the property of her husband, doing her part as a housewife, it would not be improper that she be allowed a reasonable amount as lump-sum alimony in conjunction with an award of monthly alimony. Jenkins v. Jenkins, 278 So. 2d 446, 1973 Miss. LEXIS 1445 (Miss. 1973).

It was an abuse of discretion on the part of the trial court to refuse to grant alimony to complainant wife when the long marriage of the parties, the conduct accorded the wife by her husband, the admission of adultery in open court on his part, as well as the ages of the parties, including the likelihood of unemployment by reason thereof, were taken into consideration. Horton v. Horton, 269 So. 2d 347, 1972 Miss. LEXIS 1224 (Miss. 1972).

Where a divorce was granted to the husband because of the wife's fault, although the record revealed that the wife was not entirely to blame for the dissolution of the marriage, and where the wife received income from a prior husband for the support of her children and the prior husband also had arranged a home for the children, and it appeared that the wife was able to earn her own living, a decree awarding alimony to the wife would be reversed. Russell v. Russell, 241 So. 2d 366, 1970 Miss. LEXIS 1339 (Miss. 1970).

It was not abuse of discretion to deny alimony to a divorced wife, where following their separation, the wife removed the furniture and appliances from the home of the parties and sold most of the cattle of the husband, retaining the proceeds for her own use, and also kept the automobile, the payments for which the husband was directed by the court to pay. Gatlin v. Gatlin, 234 So. 2d 634, 1970 Miss. LEXIS 1418 (Miss. 1970).

Evidence that a wife has a separate income may be shown to determine her urgent needs, but it is not an absolute defense to her claim for support. McInnis v. McInnis, 227 So. 2d 116, 1969 Miss. LEXIS 1335 (Miss. 1969).

Where the record shows that the husband was at least partially at fault and that the wife was sick and unable to earn a living and had no means of support other than living with her parents, this evidence was adequate to warrant the finding of the chancellor that the wife was entitled to alimony. Fleming v. Fleming, 213 Miss. 74, 56 So. 2d 35, 1952 Miss. LEXIS 334 (Miss. 1952).

Fact that wife obtaining divorce has substantial separate estate does not require denial of alimony. Miller v. Miller, 173 Miss. 44, 159 So. 112, 1935 Miss. LEXIS 192 (Miss. 1935).

7. —Other considerations.

Where the parties agreed to an irreconcilable differences divorce, the wife was awarded $2,615,815 upon the distribution of the parties' $ 5.1 million marital estate. In light of the wife's property settlement, the chancellor's alimony award of $7,000 per month was against the overwhelming weight of the evidence and not supported by the record. Cosentino v. Cosentino, 986 So. 2d 1065, 2008 Miss. App. LEXIS 386 (Miss. Ct. App. 2008).

Denial of alimony to the mother was improper where reversal was warranted on the custody issue and the presence of children was a factor in the decision concerning an award of alimony. Watts v. Watts, 854 So. 2d 11, 2003 Miss. App. LEXIS 143 (Miss. Ct. App.), cert. denied, 859 So. 2d 392, 2003 Miss. LEXIS 378 (Miss. 2003).

Award of periodic alimony in the amount of $375 per month was appropriate based on the disparity in the earning capacity of the parties, the fact that a wife had fewer work prospects, the parties had been married for 29 years, and the wife had nowhere to live as a result of the judgment; moreover, it was of no consequence that the husband was unemployed at the time of the award because he was a skilled carpenter who could have easily found work. Roberson v. Roberson, 949 So. 2d 866, 2007 Miss. App. LEXIS 75 (Miss. Ct. App. 2007).

In determining whether to award alimony, trial court could consider fact that wife, who was 60 years old at time of divorce, had given up her job based on husband's insistence that he did not want his wife working and promise that he would take care of wife. Parsons v. Parsons, 678 So. 2d 701, 1996 Miss. LEXIS 410 (Miss. 1996).

The source of one party's ownership of assets is not a factor in the determination of a lump sum alimony award. Creekmore v. Creekmore, 651 So. 2d 513, 1995 Miss. LEXIS 110 (Miss. 1995).

A wife was entitled to lump sum alimony where the parties were married for 22 years, the wife worked to help support the family seemingly at the expense of her own education, she stayed home to care for the children when the couple decided that was best, she worked on and off throughout the marriage for the husband's medical practice, and there was a large disparity between the parties' estates. Tilley v. Tilley, 610 So. 2d 348, 1992 Miss. LEXIS 780 (Miss. 1992).

A wife could not be awarded lump sum alimony where the husband was granted the divorce because of the wife's wrongdoing. Retzer v. Retzer, 578 So. 2d 580, 1990 Miss. LEXIS 858 (Miss. 1990).

A provision in a divorce decree which directed the husband to pay the wife a sum certain and specified regular installment payments was a final settlement of all of the husband's financial obligations to the wife, and therefore the wife's subsequent action for a share of the husband's military retirement pension was precluded; it should have been known at the time of the divorce that the husband would ultimately become eligible for military retirement pay and, since there was nothing to indicate otherwise, it had to be assumed that in fixing the financial terms of the original divorce judgment the chancery court considered all relevant facts, including the husband's ultimate eligibility for military retirement. Bowe v. Bowe, 557 So. 2d 793, 1990 Miss. LEXIS 53 (Miss. 1990).

A divorcing spouse, who has assisted his wife or her husband in the accumulation of wealth during the marriage as reflected by an increase in net worth, may be awarded lump sum alimony reflecting an equitable portion of the increase. Moreover, a substantial lump sum award of alimony is similarly appropriate where one spouse has accumulated considerable property and the other spouse has contributed by doing his or her part as a homemaker. White v. White, 557 So. 2d 480, 1989 Miss. LEXIS 516 (Miss. 1989).

Incident to judgment for divorce, Chancery Court has authority to award alimony after considering, weighing, and balancing among other factors, (1) health and earning capacity of husband, (2) health and earning capacity of wife, (3) entire sources of income of both parties, and (4) such other facts and circumstances bearing on subject that might be shown by evidence. McNally v. McNally, 516 So. 2d 499, 1987 Miss. LEXIS 2956 (Miss. 1987).

Where a couple had been married for approximately 24 years, at the beginning of the marriage they had no assets and the husband made a salary of $85 per week, and at the time of the divorce the husband admitted assets of $800,000, and the wife's worth was meager by comparison, since the wife had contributed to the accumulation of the property of her husband, doing her part as a housewife, it would not be improper that she be allowed a reasonable amount as lump-sum alimony in conjunction with an award of monthly alimony. Jenkins v. Jenkins, 278 So. 2d 446, 1973 Miss. LEXIS 1445 (Miss. 1973).

It was an abuse of discretion on the part of the trial court to refuse to grant alimony to complainant wife when the long marriage of the parties, the conduct accorded the wife by her husband, the admission of adultery in open court on his part, as well as the ages of the parties, including the likelihood of unemployment by reason thereof, were taken into consideration. Horton v. Horton, 269 So. 2d 347, 1972 Miss. LEXIS 1224 (Miss. 1972).

Where a wife who was drawing alimony from her divorced husband entered into a second marriage which was annulled because of fraud on the part of the second husband, she may not thereafter draw alimony from the first husband, for by entering into the second marriage she made an election as to the man to whom she would look for her support. Bridges v. Bridges, 217 So. 2d 281, 1968 Miss. LEXIS 1261 (Miss. 1968).

Generally, husband cannot relieve himself from payment of alimony pursuant to divorce decree by incurring obligations resulting from a subsequent marriage, since the claim of the divorced wife, under alimony award, on his earnings ordinarily would take precedence over that of the second wife. De Marco v. De Marco, 199 Miss. 165, 24 So. 2d 358, 1946 Miss. LEXIS 184 (Miss. 1946).

Woman not legally married to defendant is not entitled to alimony. Aldridge v. Aldridge, 116 Miss. 385, 77 So. 150, 1917 Miss. LEXIS 314 (Miss. 1917).

8. Duration of payments.

Where a wife was 59, had no medical disabilities, had skills as an insurance agent and computer operator, and was awarded property worth $ 133,000 plus other real estate, the chancellor did not err in awarding her rehabilitative alimony of $500 per month for one year. Ferro v. Ferro, 871 So. 2d 753, 2004 Miss. App. LEXIS 90 (Miss. Ct. App. 2004).

The duration of a periodic alimony award, which directed the husband to pay monthly alimony of $700 until July, 2001, at which time the sum would be reduced to $550, was not excessive where the husband made no showing that the chancellor should have deviated from the general rule which dictates that periodic alimony terminates upon death or remarriage. Boykin v. Boykin, 565 So. 2d 1109, 1990 Miss. LEXIS 290 (Miss. 1990).

Periodic or permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. However, lump sum alimony, which may be paid in installments, becomes vested in the party to whom it is awarded and it does not terminate upon remarriage or death. Holleman v. Holleman, 527 So. 2d 90, 1988 Miss. LEXIS 270 (Miss. 1988).

Provision and award that periodic alimony payments would terminate upon ex-wife reaching age 65 was error, and it was ordered that support continue until her death or remarriage. Skinner v. Skinner, 509 So. 2d 867, 1987 Miss. LEXIS 2549 (Miss. 1987).

A 57-year old husband was not entitled to have a time limit fixed on the periodic monthly alimony payments, because of his age and eventual retirement, especially since it appeared that he had more than sufficient net worth and investment returns to enable him to continue making the payments without suffering any hardship. Tutor v. Tutor, 494 So. 2d 362, 1986 Miss. LEXIS 2639 (Miss. 1986).

Husband's obligation to pay periodic alimony ceases upon the wife's remarriage or his death, and the parties cannot by contract deprive the court, and it is doubtful if any court can deprive itself, of the future authority to modify ordinary periodic alimony, or to make it continue beyond the wife's remarriage or the husband's death. East v. East, 493 So. 2d 927, 1986 Miss. LEXIS 2564 (Miss. 1986).

Chancery court has discretionary authority and power to award lump sum alimony in a sum certain, or alimony in gross, as it is sometimes called, and permit the payment to be made in periodic, sum certain installments which will terminate on some future date, and having done so, these will become fixed obligations of the divorced husband, the same as any other indebtedness, and the death or remarriage of the wife will not terminate or alter the obligation to pay. Wray v. Wray, 394 So. 2d 1341, 1981 Miss. LEXIS 1954 (Miss. 1981).

Remarriage of the divorced wife relieved her former husband of all duties to support and maintain her thereafter, and the divorced wife was not entitled after the date of her remarriage to the monthly payments for her support or to mortgage instalment payments against the former home. East v. Collins, 194 Miss. 281, 12 So. 2d 133, 1943 Miss. LEXIS 58 (Miss. 1943).

9. Amount of payments; generally.

Chancellor was neither manifestly wrong nor did he abuse his discretion when he awarded a wife only $300 a month in periodic alimony because the award was not oppressive, unjust, or grossly inadequate. The alimony award was reasonable, especially in light of the wife's receipt of nearly half of the marital estate. Rodriguez v. Rodriguez, 2 So. 3d 720, 2009 Miss. App. LEXIS 25 (Miss. Ct. App. 2009).

Chancery court did not abuse its discretion in awarding the ex-wife only $4,000 each month in alimony because: (1) the standard of living that she was accustomed to was about 50% of the ex-husband's reported income; (2) the chancellor found that her monthly expenses were greatly exaggerated; and (3) the chancellor determined that the ex-husband did not have the ability to continue paying $10,000 monthly in temporary alimony the ex-wife had been receiving. Wilson v. Wilson, 975 So. 2d 261, 2007 Miss. App. LEXIS 681 (Miss. Ct. App. 2007).

Chancellor properly awarded the mother $3,000 per month alimony, while placing the tax deduction for the three children and the responsibility to pay the marital debts with the father; these awards were supported by the facts of the case where the father maintained the mother in a high standard of living. Lauro v. Lauro, 924 So. 2d 584, 2006 Miss. App. LEXIS 161 (Miss. Ct. App. 2006).

In the division of property, the former husband was awarded ownership of the home, valued at $ 40,000, and an airplane, valued at $ 7,000, but he was directed to pay the parties' marital debt of almost $ 26,000 as well as the wife's $ 3,025 in attorney fees; the former wife was awarded the lawn mower, valued at $ 500, the four-wheeler, valued at $ 1,000, and was allowed to remain in the marital home for two years rent free, valued at $ 9,600. When the two estates were reviewed in combination with the two year rehabilitative alimony of $ 200 per month, the wife's estate was valued at $ 15,900 and the husband's estate was valued at $ 10,175, which did not even include the amount of temporary support the wife had received since the parties' separation, the value of living in the marital residence over the period of the parties' separation, or the value of all the personal property in the marital residence awarded to the wife; thus, the chancery court did not abuse its discretion in its award of rehabilitative alimony of $ 200 per month. Fogarty v. Fogarty, 922 So. 2d 836, 2006 Miss. App. LEXIS 139 (Miss. Ct. App. 2006).

In a divorce case, while the trial court concluded that it could be said that alimony should have decreased in recent years because of decreases in the ex-husband's income, it could also be said that alimony should have increased for two other years because of his increased income for those two years; thus, the trial court's decision not to modify the periodic alimony award was not manifestly wrong. Brennan v. Ebel, 880 So. 2d 1058, 2004 Miss. App. LEXIS 233 (Miss. Ct. App.), cert. denied, 882 So. 2d 234, 2004 Miss. LEXIS 1084 (Miss. 2004).

Where the wife's assets could not produce income sufficient to meet her recurring monthly living expenses, requiring the husband to continue to contribute an amount of $ 850 per month in alimony to permit his former wife to continue to meet her recurring expenses could not be considered excessive and did not demonstrate an abuse of discretion by the chancellor. Seale v. Seale, 863 So. 2d 996, 2004 Miss. App. LEXIS 3 (Miss. Ct. App. 2004).

Although the husband failed to make all the mandated alimony payments to the wife, the wife admitted to receiving various benefits from the husband after he stopped submitting checks marked "alimony;" the chancery court had to classify each of the payments made and determine whether or not they were court-ordered expenses, such as medical or dental expenses, for which the husband would not be entitled to a credit, and others not specifically ordered but that were of benefit to the wife, such as payment of her household utilities. Franklin v. Franklin, 864 So. 2d 970, 2003 Miss. App. LEXIS 1113 (Miss. Ct. App. 2003).

The totality of a chancellor's awards of alimony and property to a wife was excessive where the wife was awarded periodic alimony which exceeded the husband's net income as well as his gross income, she was granted greater than 50 percent of the marital property, and she was awarded substantial lump sum alimony. Brooks v. Brooks, 652 So. 2d 1113, 1995 Miss. LEXIS 152 (Miss. 1995).

Alimony should be reasonable in amount, "first deducting the resources of the wife and then finding an amount commensurate with the wife's accustomed standard of living, and considering the ability of the husband to pay." As long as the chancellor follows this general standard, the amount of the award is largely within his or her discretion. The chancellor should consider the reasonable needs of the wife and the right of the husband to lead as normal a life as possible with a decent standard of living. Brendel v. Brendel, 566 So. 2d 1269, 1990 Miss. LEXIS 539 (Miss. 1990).

In awarding the original sum of alimony and child support, the factors which must be considered are the health of the husband and his earning capacity, the health of the wife and her earning capacity, the entire sources of income of both parties, the reasonable needs of the wife, the reasonable needs of the child, the necessary living expenses of the husband, the estimated amount of income taxes the respective parties must pay on their income, the fact that the wife has the free use of the home, furnishings, and automobile, and such other facts and circumstances bearing on the subject as might be shown by the evidence. Carpenter v. Carpenter, 519 So. 2d 891, 1988 Miss. LEXIS 49 (Miss. 1988).

Award of alimony and child support must be made to wife who for some 13 years has used her income to pay household bills so that husband could invest his income; husband cannot be permitted to reap all benefits of increase in income and net worth simply by divesting himself of assets to avoid appearance of income. Rudder v. Rudder, 467 So. 2d 675, 1985 Miss. LEXIS 2024 (Miss. 1985).

Chancery court may allow such alimony as is equitable and just with regard to circumstances; wife's ability to earn something by her own labor to be considered. Ramsay v. Ramsay, 125 Miss. 185, 87 So. 491, 1921 Miss. LEXIS 113 (Miss. 1921).

10. — Periodic payments.

In a dissolution matter, a chancery court did not abuse its discretion in awarding a wife $ 1,500 per month in periodic alimony because the parties were married eleven years, the wife suffered from a genetic illness and was unable to work, and the husband earned $ 84,000 per year while the wife's annual $ 9,324 Social Security disability benefit was her only source of income; the husband was fully aware of the wife's illness prior to their marriage. Rogillio v. Rogillio, 101 So. 3d 150, 2012 Miss. LEXIS 493 (Miss. 2012).

Mississippi Supreme Court properly classified the award of alimony to the mother as permanent periodic alimony and did not instruct the chancellor to award rehabilitative alimony; rehabilitative alimony was not considered during equitable division. Lauro v. Lauro, 924 So. 2d 584, 2006 Miss. App. LEXIS 161 (Miss. Ct. App. 2006).

Award of $1,000 in temporary spousal support was upheld on review where the evidence showed that a former husband had the ability to pay this due to his employment as a doctor; the trial court reviewed the financial situations of the parties, including the fact that the wife had returned to work as a nurse, and moreover the husband was properly found in contempt for failing to make this payment for seven months. Henderson v. Henderson, 952 So. 2d 273, 2006 Miss. App. LEXIS 869 (Miss. Ct. App. 2006), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 165 (Miss. 2007).

Chancellor did not abuse his discretion in awarding the wife alimony where the record was clear that the wife's income along with her share of marital property and child support would not cover the basic monthly expenses for herself and her children; the addition of $1,000 per month in alimony left the wife with only a moderate surplus after paying the basic monthly expenses for her and her children. Seymour v. Seymour, 960 So. 2d 513, 2006 Miss. App. LEXIS 805 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 382 (Miss. 2007).

Chancellor did not err by awarding a former wife $2,500 per month in periodic alimony where the evidence showed that a former husband was capable of earning more than $12,000 per month; moreover, it was not error to order that twenty-five percent of the earnings over $150,000 be awarded to the wife to account for the husband's fluctuating income. Yelverton v. Yelverton, 961 So. 2d 48, 2006 Miss. App. LEXIS 613 (Miss. Ct. App. 2006), rev'd, 961 So. 2d 19, 2007 Miss. LEXIS 414 (Miss. 2007).

Chancellor did not err in a divorce case by refusing to award a wife periodic payments of rehabilitative alimony; the wife's situation was not the type that warranted such an award because she did not need retraining to reenter the workforce after being a stay at home mother for three years, and she failed to substantiate money borrowed to pay debts. LeBlanc v. Andrews, 931 So. 2d 683, 2006 Miss. App. LEXIS 462 (Miss. Ct. App. 2006).

A chancellor did not err in awarding a wife periodic alimony in the amount of $300 per month where the parties were married for 10 years, the husband was retired, the wife was permanently disabled, the wife's monthly income was $525 and her monthly expenses were approximately $1100, the husband's monthly income was $1413 and his monthly expenses were approximately $1120, and both parties were awarded exclusive use of an unencumbered home and at least one automobile. Crowe v. Crowe, 641 So. 2d 1100, 1994 Miss. LEXIS 378 (Miss. 1994).

A chancellor did not abuse his discretion in awarding a wife $1,400 per month in periodic alimony where the husband had a net income of approximately $4,000 per month, and the wife had a net income of $1,540 per month. Hemsley v. Hemsley, 639 So. 2d 909, 1994 Miss. LEXIS 351 (Miss. 1994).

A chancellor abused his discretion in awarding a wife only $500 per month in periodic alimony where the husband's adjusted gross income was in excess of $8,000 per month while the wife earned $150 per month. Brennan v. Brennan, 638 So. 2d 1320, 1994 Miss. LEXIS 331 (Miss. 1994).

A chancellor committed a severe abuse of discretion when he awarded a wife only $12,000 in lump sum alimony and refused to grant her any periodic payment alimony where there was a large disparity between the parties' income and earning capacity, the husband would have no difficulty contributing monthly support payments to the wife given his significant income, the wife supported the couple for the first 11 years of their 17-year marriage which enabled the husband to obtain a medical degree, and the wife had experienced a deterioration in her mental state as evidenced by her psychological and emotional treatment at a hospital on 2 different occasions; the chancellor had a duty to attempt to see that the wife, who had a history of emotional problems, be provided for in her present and future mentally disturbed state. Monroe v. Monroe, 612 So. 2d 353, 1992 Miss. LEXIS 789 (Miss. 1992).

A chancellor abused his discretion in apparently attempting to punish the husband for his actions during the parties' marriage by ordering the husband to pay aggregate monthly alimony and child support in the amount of $11,038.34 a month when the husband had a monthly net income of $7,306.00. Tilley v. Tilley, 610 So. 2d 348, 1992 Miss. LEXIS 780 (Miss. 1992).

An award of $500 per month in alimony and $950 per month in child support was not an abuse of discretion where the wife, who had custody of the parties' child, was a school teacher with a net income of $832.18 per month, a check spread indicated that the monthly living expenses for the wife and the child was $2,625.93, the husband was a certified public accountant who had a total personal net taxable income of $58,688 in 1987, the wife was not awarded any part of the husband's oil share investment, resident real estate investment, commercial building, or an equitable interest in 8 acres and a house which the husband inherited, and the award was not so high that it would provide the wife and child with a higher standard of living than the husband. Powers v. Powers, 568 So. 2d 255, 1990 Miss. LEXIS 278 (Miss. 1990).

An award of periodic alimony to a wife in the amount of $700 per month was not excessive where both parties were in good health and of approximately the same age, the husband earned an annual salary of $41,000, the wife earned an annual salary of $13,624, the husband attended high school through the 10th grade, the wife graduated high school, the wife received use of the parties' home and automobile but was responsible for paying the notes on both, and the husband had no responsibility for payment of the note on the home or the automobile; the terms of the decree placed both parties in nearly identical financial positions. Even if the award provided the wife with slightly more disposable income than the husband, such a disparity would not be sufficient to prove an abuse of discretion. Boykin v. Boykin, 565 So. 2d 1109, 1990 Miss. LEXIS 290 (Miss. 1990).

Chancellor did not err in awarding wife $60 per week child support and $65 per week temporary alimony, subsequently changed to $250 per month alimony for 24 months, granting wife possession and use of family's automobile, and providing that equity, if any, from foreclosure of family home would be divided equally between parties, where wife was qualified school teacher and husband was attorney at law. Jordan v. Jordan, 510 So. 2d 131, 1987 Miss. LEXIS 2628 (Miss. 1987).

Award of $2,158.52 per month periodic alimony was proper where earning capacity of wife, in accordance with testimony given, had obviously been considered. Skinner v. Skinner, 509 So. 2d 867, 1987 Miss. LEXIS 2549 (Miss. 1987).

Where husband, who was 57 years old in excellent health for his age, was a board certified neurosurgeon with an annual income of close to $300,000 and net worth well in excess of $900,000, while the wife, who was 59 years old without significant health problems had completed 2 years of college and had no special skills, her work experience being that of a sales clerk with limited clerical training, and whose earning, exclusive of alimony, was about $11,000 per year, an award to wife of periodic monthly alimony of $2,500 was not an abuse of discretion, but a $50,000 lump sum alimony award was so inadequate as to constitute an abuse of discretion and husband would be required to pay her $150,000 as lump sum alimony. Tutor v. Tutor, 494 So. 2d 362, 1986 Miss. LEXIS 2639 (Miss. 1986).

A divorce action would be remanded to the trial court for further consideration of the alimony award to the wife upon additional evidence being taken of the husband's ability to pay, since the award of $300 per month alimony and the use of the jointly owned home was grossly inadequate for a wife of 34 years, provided the former husband had earning ability or assets indicative of greater ability to pay. Smith v. Smith, 429 So. 2d 588, 1983 Miss. LEXIS 2577 (Miss. 1983).

Where a decree required the divorced husband to pay $50 each month to the divorced wife "for the support of herself" and their children, the language of the decree intended that the award be for the support of both the mother and children. Duett v. Duett, 285 So. 2d 140, 1973 Miss. LEXIS 1270 (Miss. 1973).

An award of $1,000 per month for the support of the wife was not equitable and just since it was insufficient to maintain her in accord with her station and condition in life and in harmony with the estate of her husband, particularly since the monthly payments were subject to be terminated by the death of the husband, leaving the wife with no security in that event, an insurance policy upon the husband's life with the wife being one of the beneficiaries, was subject to termination by the company which the husband controlled, and the monthly award was insufficient to support the wife with basic necessities and to maintain the home as existed prior to the divorce. Jenkins v. Jenkins, 278 So. 2d 446, 1973 Miss. LEXIS 1445 (Miss. 1973).

An award of $275 per month for the support and maintenance of the wife, and the parties' two minor children, was not excessive where the husband was a strong able bodied man with a good earning capacity, and was the owner of considerable property. Blount v. Blount, 231 Miss. 398, 95 So. 2d 545, 96 So. 2d 232, 97 So. 2d 240, 1957 Miss. LEXIS 525, 1957 Miss. LEXIS 526, 1957 Miss. LEXIS 527 (Miss. 1957).

Under a showing that the divorced wife, in addition to owning her own home and 367 acres of land, also owned personal property of the value of several thousand dollars, and prior to the separation she had been employed at a salary of more than $200 per month, while the husband earned slightly more than $422 a month and owned no property except an automobile which was used in his employment, an award to the wife of $200 per month as alimony and support of the parties' minor child was unjust and oppressive and the supreme court could reduce the amount to $150 a month, without remanding the case for rehearing, since all of the facts necessary to enable the court to make a determination were in the record. Lowry v. Lowry, 229 Miss. 376, 90 So. 2d 852, 1956 Miss. LEXIS 617 (Miss. 1956).

Allowance of $150 per month alimony and $50 per month for support of minor child is not so excessive as to justify reversal of finding of chancellor, especially since allowance may be modified under future changed conditions. Brown v. Ohman, 43 So. 2d 727 (Miss. 1949).

Where alimony decree relieving husband of all future obligations to support wife by paying $1250 and allowing her the use of the home for one year, was unjust under the circumstances, supreme court decreed that husband pay her $60 per month and permit her to occupy the home, or, at her option, to pay her $100 per month without the use of the home, to continue until a change in circumstances justified a modification of the order. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

Supreme court cannot say $100 per month permanent alimony is erroneous because only $40 a month temporary alimony allowed. Hamblin v. Hamblin, 107 Miss. 113, 65 So. 113, 1914 Miss. LEXIS 59 (Miss. 1914).

11. — Lump sum payments.

Mississippi chancery court's order requiring a Chapter 7 debtor to pay his ex-wife $550,000 as "lump-sum alimony" and $35,110 in attorney's fees created debts that were nondischargeable under former 11 U.S.C.S. § 523; the court's award was intended as support in the nature of alimony so the debtor's ex-wife could retain the standard of living she enjoyed while she was married to the debtor. Rustin v. Rustin (In re Rustin), 2011 Bankr. LEXIS 5728 (Bankr. S.D. Miss. Nov. 9, 2011).

Chancellor did not err by awarding a former wife lump sum alimony in the amount of $250,000 where the evidence showed that a former husband earned more than $400,000 in 2001 and more than $800,000 in 2002 while the wife only worked part-time and depleted her savings account when the husband failed to pay his support obligations. Yelverton v. Yelverton, 961 So. 2d 48, 2006 Miss. App. LEXIS 613 (Miss. Ct. App. 2006), rev'd, 961 So. 2d 19, 2007 Miss. LEXIS 414 (Miss. 2007).

Chancellor had not erroneously classified the payment of one half of the husband's military retirement as lump sum alimony because the payment of one-half of the husband's military retirement had no fixed duration, nor, as of the time of the proceedings sub judice, a fixed amount. However, the instant property settlement agreement granted the wife one-half of the military retirement, and the chancellor correctly stated in his final judgment that the husband's payment of such benefits was a "substitute for a property division" and thus characterized as lump sum alimony. Chroniger v. Chroniger, 914 So. 2d 311, 2005 Miss. App. LEXIS 788 (Miss. Ct. App. 2005).

Chancellor had not erroneously classified the 36 fixed alimony payments as lump sum alimony. The 36 monthly payments, in fixed amount, agreed to in the property settlement agreement were clearly lump sum alimony and thus not subject to modification or termination. Chroniger v. Chroniger, 914 So. 2d 311, 2005 Miss. App. LEXIS 788 (Miss. Ct. App. 2005).

Chancellor did not abuse his discretion in awarding the ex-wife lump sum alimony rather than permanent alimony because (1) the wife was assuming a greater debt than the husband; (2) the wife needed assistance in caring for the children; (3) the wife had been out of the work force for a few years; and (4) the husband's financial means were greater. White v. White, 868 So. 2d 1054, 2004 Miss. App. LEXIS 229 (Miss. Ct. App. 2004).

In a divorce case, the judgment regarding the lump sum alimony award was final and not subject to further litigation. Brennan v. Ebel, 880 So. 2d 1058, 2004 Miss. App. LEXIS 233 (Miss. Ct. App.), cert. denied, 882 So. 2d 234, 2004 Miss. LEXIS 1084 (Miss. 2004).

Where a chancellor awarded a wife lump sum alimony, based, inter alia, on the 32-year marriage, the husband's fault in causing the divorce by committing a crime that caused him to be imprisoned, and his assets, which included a life estate property interest, the alimony award of $ 12,600 was not so exorbitant as to constitute an abuse of discretion. Avery v. Avery, 864 So. 2d 1054, 2004 Miss. App. LEXIS 91 (Miss. Ct. App. 2004).

In a divorce case, a chancery court erred in failing to analyze the four factors considered in lump sum alimony awards; the appellate court noted that such an award did not seem appropriate because the parties each had separate assets and households, and the chancery court seemed to base its award on the fact that the wife had extensive medical problems. Haney v. Haney, 881 So. 2d 862, 2003 Miss. App. LEXIS 1114 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 907 So. 2d 948, 2005 Miss. LEXIS 441 (Miss. 2005).

An award to a wife of $12,000 in lump sum alimony was grossly inadequate and constituted an abuse of discretion where the wife's separate income and estate were meager in comparison to the husband's, the wife had permanent custody of the party's minor child, the husband's monthly child support payments would terminate at his death and his life expectancy was not long, and the amount of the award constituted only 2.6 percent of the husband's estate. Creekmore v. Creekmore, 651 So. 2d 513, 1995 Miss. LEXIS 110 (Miss. 1995).

A wife's lump sum alimony award of $24,000 was grossly inadequate and constituted an abuse of discretion where the husband had a net worth of at least $315,000 due to an inheritance from his family, the wife's estimated minimum monthly expenses totalled $1,600, she was awarded $500 per month in child support payments, and she earned gross monthly wages of $340, since the award did not allow the wife to maintain her accustomed standard of living and did not reflect a consideration of her lack of available resources or the husband's ability to pay. Creekmore v. Creekmore, 651 So. 2d 513, 1995 Miss. LEXIS 110 (Miss. 1995).

A chancellor did not err in awarding lump sum alimony to a wife in the amount of $4500, in addition to periodic alimony in the amount of $300 per month, where the parties were married for 10 years, the wife had assisted in the husband's business, the husband's monthly income was $1413 while the wife's was $525, the husband had obtained $10,000 from the couple's joint checking account while the wife had removed $5,000, and the husband was awarded sole ownership of 2 vehicles used during the marriage while the wife received only one. Crowe v. Crowe, 641 So. 2d 1100, 1994 Miss. LEXIS 378 (Miss. 1994).

A chancellor did not abuse her discretion in awarding a wife lump sum alimony in the amount of $25,020 where the parties were married for approximately 18 years, the wife worked for many years in the husband's businesses without receiving a salary, there was no indication that she was not a dutiful and faithful wife, the husband's income was more than twice that of the wife's, the chancellor was skeptical as to the husband's true earnings and the evidence suggested that the husband had some alternative source of support that he had not disclosed, and the wife would lack financial security without the award. Grogan v. Grogan, 641 So. 2d 734, 1994 Miss. LEXIS 315 (Miss. 1994).

A chancellor's award of lump sum alimony to a wife would be affirmed, even though the post-divorce disparity of the parties' separate estates demonstrated that the award was skewed slightly in favor of the husband, where it was apparent that the chancellor had been mindful of each party's circumstances when he made the award. Brennan v. Brennan, 638 So. 2d 1320, 1994 Miss. LEXIS 331 (Miss. 1994).

An award to a wife of $600.00 per month in the form of "periodic transitional alimony" for 30 months, which was actually a lump sum award payable in fixed periodic installments, was not excessive where the wife's net income was $896.00 per month, her monthly expenses totalled $2,843.00, the husband's net income was approximately $5,075.00 per month, and his monthly expenses amounted to approximately $2,539.00. Dufour v. Dufour, 631 So. 2d 192, 1994 Miss. LEXIS 41 (Miss. 1994).

A chancellor committed a severe abuse of discretion when he awarded a wife only $12,000 in lump sum alimony and refused to grant her any periodic payment alimony where there was a large disparity between the parties' income and earning capacity, the husband would have no difficulty contributing monthly support payments to the wife given his significant income, the wife supported the couple for the first 11 years of their 17-year marriage which enabled the husband to obtain a medical degree, and the wife had experienced a deterioration in her mental state as evidenced by her psychological and emotional treatment at a hospital on 2 different occasions; the chancellor had a duty to attempt to see that the wife, who had a history of emotional problems, be provided for in her present and future mentally disturbed state. Monroe v. Monroe, 612 So. 2d 353, 1992 Miss. LEXIS 789 (Miss. 1992).

A lump sum alimony award to a wife in the amount of $60,000 was so low as to be an abuse of discretion where the parties had been married for approximately 14 years, the husband had had assets worth $817,000 before the marriage, the wife had had assets worth $30,000 before the marriage, the husband's worth had increased $446,000 during the course of the marriage, the wife's assets had increased by $110,754.11, and though the wife's contributions to her husband's construction business had not been significant, her efforts had been concentrated more as a homemaker. Branton v. Branton, 559 So. 2d 1038, 1990 Miss. LEXIS 193 (Miss. 1990).

A trial court abused its discretion in limiting a wife's lump sum alimony award to $50,000 where the evidence showed a substantial increase in wealth obtained during the course of the parties' marriage, the wife's contributions to the marriage and promotion of the husband's business were worth substantially more, the wife quit 2 jobs to assist in her husband's business, and she was instrumental in the public relations aspect of the business. White v. White, 557 So. 2d 480, 1989 Miss. LEXIS 516 (Miss. 1989).

An award to a wife of $5,400 as lump-sum alimony was inadequate and amounted to an abuse of discretion where the wife had contributed $28,000 to the husband while he was in law school, she had contributed $11,000 to a joint savings account upon his completion of law school, $6,900 was put into IRA accounts by the wife in the husband's name, and the wife contributed $1,200 to office furniture for the husband's law office. Robinson v. Irwin, 546 So. 2d 683, 1989 Miss. LEXIS 321 (Miss. 1989).

A divorcing spouse who has assisted his wife or her husband in the accumulation of wealth during the marriage as reflected by an increase in net worth may be awarded lump sum alimony reflecting an equitable portion of the increase. Jones v. Jones, 532 So. 2d 574, 1988 Miss. LEXIS 488 (Miss. 1988).

Lump-sum award of $75,000 was not so low as to constitute abuse of discretion, where ex-husband's assets totaled between $700,000 and $900,000, all accumulated during the marriage, and ex-wife's total assets at end of marriage were approximately $40,000, reflecting her one-half interest in marital home, although lump-sum award would be payable immediately, instead of upon ex-wife reaching age 65. Skinner v. Skinner, 509 So. 2d 867, 1987 Miss. LEXIS 2549 (Miss. 1987).

Where husband, who was 57 years old in excellent health for his age, was a board certified neurosurgeon with an annual income of close to $300,000 and net worth well in excess of $900,000, while the wife, who was 59 years old without significant health problems had completed 2 years of college and had no special skills, her work experience being that of a sales clerk with limited clerical training, and whose earning, exclusive of alimony, was about $11,000 per year, an award to wife of periodic monthly alimony of $2,500 was not an abuse of discretion, but a $50,000 lump sum alimony award was so inadequate as to constitute an abuse of discretion and husband would be required to pay her $150,000 as lump sum alimony. Tutor v. Tutor, 494 So. 2d 362, 1986 Miss. LEXIS 2639 (Miss. 1986).

There was no merit to a former husband's contention that an award of lump-sum alimony in the amount of $240,000 was oppressive or would present the likelihood of the necessity that he liquidate assets, where his net worth had been determined to be not less than $750,000. Schilling v. Schilling, 452 So. 2d 834, 1984 Miss. LEXIS 1654 (Miss. 1984).

A lump sum award of alimony, if reasonable in amount as determined from the circumstances of the parties, does not violate the terms of the statute even though made in conjunction with other alimony, and an order was proper requiring a husband, whose average earnings were in excess of $630 per month and who together with his wife was able to accumulate in excess of $25,000 in savings during the period of the marriage, to pay to the wife the lump sum of $5,325 together with monthly payments of $150. Harrell v. Harrell, 231 So. 2d 793, 1970 Miss. LEXIS 1609 (Miss. 1970).

Where the divorce is granted for the husband's adultery, the conduct of the wife being unexceptionable, and the husband being an active businessman with no children, one-third of his estate was not deemed too much alimony. Armstrong v. Armstrong, 32 Miss. 279, 1856 Miss. LEXIS 201 (Miss. 1856).

12. Interest on alimony.

Each unpaid installment of alimony bears legal interest from its due date. Rubisoff v. Rubisoff, 242 Miss. 225, 133 So. 2d 534, 1961 Miss. LEXIS 548 (Miss. 1961).

Accrued alimony is a vested right, and interest is allowable thereon. Rainwater v. Rainwater, 236 Miss. 412, 110 So. 2d 608, 1959 Miss. LEXIS 334 (Miss. 1959).

Interest, as a general rule, runs on alimony after it is due. Schaffer v. Schaffer, 209 Miss. 220, 46 So. 2d 443, 1950 Miss. LEXIS 381 (Miss. 1950).

13. Separate maintenance.

Because the appellate court affirmed the chancellor's grant of divorce based on the husband's habitual cruel and inhuman treatment of the wife, which materially contributed to their separation, the husband's claim for separate maintenance was a moot issue. G.B.W. v. E.R.W., 9 So. 3d 1200, 2009 Miss. App. LEXIS 285 (Miss. Ct. App. 2009).

Wife was not entitled to periodic, lump sum, or rehabilitative alimony because the chancellor essentially split the marital estate equally, the disparity between the parties' estate was less than five hundred dollars, the equitable division of the marital property resulted in no appreciable deficit for either party, and at the time of both of the hearings, the wife was employed full-time as a school teacher. McIntosh v. McIntosh, 977 So. 2d 1257, 2008 Miss. App. LEXIS 184 (Miss. Ct. App. 2008).

Wife was not entitled to separate maintenance because she testified that during their separation the husband continued to pay the majority of the household bills. Likewise, the husband testified that he was "willing to pay anything." McIntosh v. McIntosh, 977 So. 2d 1257, 2008 Miss. App. LEXIS 184 (Miss. Ct. App. 2008).

Where a married couple separated, the chancellor properly granted the wife's request for separate maintenance. The the husband had almost $ 4,000 a month in "spendable" income; therefore, a separate maintenance award of $1800 to his wife would not deplete his estate. Honea v. Honea, 888 So. 2d 1192, 2004 Miss. App. LEXIS 958 (Miss. Ct. App. 2004).

Where a married couple decided mutually that the wife would quit her job because the husband's income was sufficient to support them, upon their separation the wife was entitled to a separate maintenance award. The wife had access to $ 3,600 a month before the separation; she met the qualifications for separate maintenance in that no fault was alleged on her part for the separation. Honea v. Honea, 888 So. 2d 1192, 2004 Miss. App. LEXIS 958 (Miss. Ct. App. 2004).

Wife need not be totally blameless for an award of separate maintenance to be allowed, but her misconduct must not have materially contributed to the separation. A wife was entitled to a separate maintenance award where the couple's separation was due to the husband's desire to spend more time with his children from a previous marriage. Honea v. Honea, 888 So. 2d 1192, 2004 Miss. App. LEXIS 958 (Miss. Ct. App. 2004).

In order to award separate maintenance, a court must find a separation without fault on the wife's part, and willful abandonment of her by the husband with refusal to support her. Honea v. Honea, 888 So. 2d 1192, 2004 Miss. App. LEXIS 958 (Miss. Ct. App. 2004).

Separate maintenance does not have only one purpose. The purpose of separate maintenance should be to provide, as nearly as may be possible, the same sort of normal support and maintenance for the wife, all things considered, as she would have received in the home if the parties had continued normal cohabitation and the wife had helped in a reasonable way, in view of her health and physical condition, to earn her own support and that of the family. Honea v. Honea, 888 So. 2d 1192, 2004 Miss. App. LEXIS 958 (Miss. Ct. App. 2004).

Six criteria must be considered in setting awards of separate maintenance: (1) the health of the husband and the wife; (2) their combined earning capacity; (3) the reasonable needs of the wife and children; (4) the necessary living expenses of the husband; (5) the fact that the wife has free use of the home and furnishings; and (6) other such facts and circumstances. Honea v. Honea, 888 So. 2d 1192, 2004 Miss. App. LEXIS 958 (Miss. Ct. App. 2004).

While the amount of separate maintenance should provide for the wife as if the couple were still cohabiting, the allowance should not unduly deplete the husband's estate. Honea v. Honea, 888 So. 2d 1192, 2004 Miss. App. LEXIS 958 (Miss. Ct. App. 2004).

Chancellor's award of separate maintenance to the wife was not excessive where the chancellor took into consideration all the relevant factors when determining the appropriate amount of the payments; the award was equitable due to the wife's poor health and the great disparity between their respective incomes. Myers v. Myers, 881 So. 2d 220, 2003 Miss. App. LEXIS 1165 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 881 So. 2d 180, 2004 Miss. LEXIS 711 (Miss. 2004).

A chancellor properly set aside a separate maintenance agreement where the parties' marriage was void under § 93-1-1 because they were uncle and niece; equitable estoppel was not available, since the parties had equal access to all the facts and ample opportunity to investigate the legality of the marriage, and public policy prevented validation of the void marriage by the doctrine of estoppel. Weeks v. Weeks, 654 So. 2d 33, 1995 Miss. LEXIS 200 (Miss. 1995).

A chancellor did not err in ordering a wife to "maintain medical insurance" for the parties' 2 children as a form of separate maintenance where the wife's income exceeded the husband's throughout the marriage, the wife's income was $2932 per month, the husband's income was $2166 per month, there was no indication that the wife could not secure medical insurance through her employment, and it was the chancellor's intention to encourage the parties to resume cohabitation. Steen v. Steen, 641 So. 2d 1167, 1994 Miss. LEXIS 371 (Miss. 1994).

A wife was not entitled to separate maintenance where her efforts, attitude and desires to live beyond her husband's financial means contributed to the parties' separation because of the psychological makeup of her husband and the husband's leaving the marriage was justified, even though the wife made efforts to salvage the marriage after the separation by seeking marital counseling. Ramsey v. State, 554 So. 2d 300, 1989 Miss. LEXIS 601 (Miss. 1989).

An award of separate maintenance and child support to the wife and the parties' 3 children of approximately 41 percent of the husband's $88,700 annual salary was reasonable where both parties were in good health, the husband's earning power was approximately 4 times as great as the wife's, and the needs of the wife and the children were reasonable in light of the style of living to which they had become accustomed. Ramsey v. State, 554 So. 2d 300, 1989 Miss. LEXIS 601 (Miss. 1989).

A separate maintenance award in the form of a "lump sum" is inappropriate as it runs contrary to the basic purpose of separate maintenance, which is to order the husband to re-enter the marital relationship or pay support to the wife. Presumably, if "lump sum" separate maintenance were allowed, the husband would continue to owe his wife this vested amount even if he resumed the marital relationship, which runs contrary to the policies concerning separate maintenance. Williams v. Williams, 528 So. 2d 296, 1988 Miss. LEXIS 330 (Miss. 1988).

Separate maintenance is a monetary amount for support and does not extend to division of marital assets. As a Chancery Court has no authority to divest title to property from the husband on an order of separate maintenance, it likewise lacks authority to vest title to property in the husband in a separate maintenance award. Thompson v. Thompson, 527 So. 2d 617, 1988 Miss. LEXIS 202 (Miss. 1988).

An earlier decree of separate maintenance did not bar the relitigation of the issue of maintenance in a divorce decree but, rather, the earlier decree for separate maintenance could be modified upon a showing of a material or substantial change of circumstances arising subsequent to the date of that decree. Rodriquez v. State, 498 So. 2d 1230, 1986 Miss. LEXIS 2807 (Miss. 1986).

In setting amount to be paid by husband to wife as separate maintenance, court may not deprive husband of reasonable standard of living in effort to force reconciliation of parties desired by wife; nor may husband be ordered to pay unspecified sum for utilities, upon submission of bills to him by wife. Tanner v. Tanner, 481 So. 2d 1063, 1985 Miss. LEXIS 2340 (Miss. 1985).

Wife is entitled to separate maintenance where husband leaves wife and refuses to return, while she states that she is willing to accept him back. Kergosien v. Kergosien, 471 So. 2d 1206, 1985 Miss. LEXIS 2133 (Miss. 1985).

Wife need not be granted separate maintenance where both spouses are about equally to blame for separation. Churchill v. Churchill, 467 So. 2d 948, 1985 Miss. LEXIS 2039 (Miss. 1985).

Where a wife's conduct materially contributes to a separation she is not entitled to separate support and maintenance. Cox v. Cox, 279 So. 2d 612, 1973 Miss. LEXIS 1476 (Miss. 1973).

Where the complainant-husband's charges of his wife's infidelity were overwhelmingly established by the evidence and her conduct, at least in part, was not condoned, and the wife filed a cross-action for divorce on the ground of her husband's alleged cruelty, it was error on the part of the trial court to refuse to grant either party a divorce but, instead, to enter a decree of separate maintenance requiring the husband to support his wife; and on appeal the decree of separate maintenance was set aside and the husband was awarded a divorce on his original bill of complaint. King v. King, 191 So. 2d 409, 1966 Miss. LEXIS 1213 (Miss. 1966).

Where a wife was guilty of desertion in leaving her husband in the first place and had no intention of returning, the subsequent filing by her of a bill for separate maintenance did not toll the statute. Leggett v. Leggett, 185 So. 2d 431, 1966 Miss. LEXIS 1503 (Miss. 1966).

Separate maintenance should not be awarded to a wife whose separation from her husband is in part attributable to her fault. King v. King, 246 Miss. 798, 152 So. 2d 889, 1963 Miss. LEXIS 506 (Miss. 1963).

Decree in separate maintenance suit is conclusive, as res adjudicata, in subsequent divorce suit, so far as concerns any issue which was litigated between parties in separate maintenance suit, and if issue was decided in favor of wife in that suit, it bars husband in any subsequent divorce suit brought by him predicated on facts which were in existence at time of maintenance decree and which were put in issue and decided in favor of wife therein. Van Norman v. Van Norman, 205 Miss. 114, 38 So. 2d 452, 1949 Miss. LEXIS 416 (Miss. 1949).

This section [Code 1942, § 2743] applies only in divorce cases, and not in cases involving separate maintenance only. Wilson v. Wilson, 198 Miss. 334, 22 So. 2d 161, 1945 Miss. LEXIS 202 (Miss.), modified, 198 Miss. 334, 23 So. 2d 303, 1945 Miss. LEXIS 203 (Miss. 1945).

Suits for separate maintenance, wherein there is no prayer by bill or cross-bill for divorce, are not based upon this section [Code 1942, § 2743] or any other statute, but are lodged in the equity jurisdiction of the chancery courts and are regulated by equitable principles independently of, and apart from, statutes of divorce. Wilson v. Wilson, 198 Miss. 334, 22 So. 2d 161, 1945 Miss. LEXIS 202 (Miss.), modified, 198 Miss. 334, 23 So. 2d 303, 1945 Miss. LEXIS 203 (Miss. 1945).

Alimony may be decreed upon a bill by which no divorce is sought. Crawford v. Crawford, 158 Miss. 382, 130 So. 688, 1930 Miss. LEXIS 75 (Miss. 1930).

14. Court's power or discretion.

While a chancellor was within the authority granted the chancellor by the parties when the chancellor ordered the husband to maintain a life-insurance policy with the wife named as the beneficiary, the amount that the husband was required to maintain was unreasonable and excessive. On remand the chancellor was to take a new look at the amount of life insurance that was required to protect the wife's alimony interest. Griner v. Griner, — So. 3d —, 2017 Miss. App. LEXIS 388 (Miss. Ct. App. June 27, 2017).

Substantial credible evidence supported the chancellor's decision to award the wife $ 300 per month in periodic alimony and an additional award to pay the note on her mobile home, including any delinquent payments; the wife had several physical conditions that limited her ability to work, and the husband's behavior was also a factor in the parties' decision to divorce. Beddingfield v. Beddingfield, 11 So. 3d 780, 2009 Miss. App. LEXIS 348 (Miss. Ct. App. 2009).

Chancellor did not err in denying the husband an award of alimony where the trial court properly applied the correct factors to the evidence and determined that an award of alimony was not appropriate. Ericson v. Tullos, 876 So. 2d 1038, 2004 Miss. App. LEXIS 595 (Miss. Ct. App. 2004).

A chancellor errs in making an alimony determination where he fails to follow the proper procedure to determine the appropriate division of marital property and award of alimony: (1) the chancellor is to classify the parties' assets as marital or nonmarital; (2) the chancellor is to evaluate and equitably divide the marital property employing the Ferguson factors as guidelines in light of each party's nonmarital property, but property division should be based upon a determination of fair market value of the assets, these valuations should be the initial step before determining division, and the chancellor must assume that the contributions and efforts of the marital partners, whether economic, domestic, or otherwise, are of equal value in determining a division of assets; (3) if the marital assets, after equitable division and in light of the parties' nonmarital assets, will adequately provide for both parties, then no more need be done; and (4) if an equitable division of marital property, considered with each party's nonmarital assets, leaves a deficit for one party, then alimony should be considered. A chancellor erred where he failed to consider a wife's domestic contributions equally with her husband's economic contributions, where he improperly applied an alimony standard of "semblance of living" rather than "standard of living to which the wife was accustomed", where he failed to properly apply the Hemsley factors to division of marital property, and where he failed to properly apply the Ferguson factors as guidelines to dividing that property. Johnson v. Johnson, 877 So. 2d 485, 2003 Miss. App. LEXIS 1203 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 862 (Miss. 2004).

In the context of property division or alimony in a divorce proceeding, when a chancellor provides a recitation of facts in his judgment that covers most, if not all the Ferguson and Armstrong factors, no reversal is required; a chancellor is in the best position to hear the testimony and view the evidence. Palmer v. Palmer, 841 So. 2d 185, 2003 Miss. App. LEXIS 244 (Miss. Ct. App. 2003).

Where trial court took into consideration wife's need for financial security in regards to her lack of earning capacity, as well as the prior property settlement agreement of the parties, there was no abuse of discretion in the trial court's award of alimony to the wife. Riley v. Riley, 846 So. 2d 282, 2003 Miss. App. LEXIS 163 (Miss. Ct. App. 2003).

Whether to award alimony and amount of alimony to be awarded are largely within chancellor's discretion. Parsons v. Parsons, 678 So. 2d 701, 1996 Miss. LEXIS 410 (Miss. 1996).

A chancellor may place a time limitation on periodic alimony which is called "rehabilitative periodic alimony" for rehabilitative purposes. Hubbard v. Hubbard, 656 So. 2d 124, 1995 Miss. LEXIS 283 (Miss. 1995).

Broad authority is vested in the chancery courts to provide for the material needs of spouses incident to divorce; there are several forms of aid including, but not limited to: (a) periodic alimony, sometimes called permanent or continuing alimony; (b) lump sum alimony or alimony in gross; (c) division of jointly accumulated property; and (d) award of equitable interest in property. There are no clear lines of demarcation between these, nor should there be, and courts are authorized in their sound discretion to use one or several or all in combination. What is commonly referred to as periodic alimony terminates automatically upon the death of the obligor or the remarriage of the obligee. Periodic alimony is subject to modification or termination in the event of a material change of circumstances subsequent to the decree awarding alimony; such a modification may be made only upon order of the chancery court. Periodic alimony becomes vested only on the date each periodic payment becomes due. In contrast, what is commonly referred to as lump sum alimony is that ordered by the court in such form and manner that from the outset it becomes fixed and irrevocable. Lump sum alimony may be payable in a single lump sum or in fixed periodic installments. It may be payable in cash or in kind or in combination thereof. It is a final settlement between the husband and wife and may not be changed or modified by either party, absent fraud. Lump sum alimony is vested in the obligee when the judgment awarding it becomes final, retroactive to the date the judgment is entered. It becomes an obligation of the estate of the obligor if he or she dies before payment. Because of these important differences between the 2 forms of alimony, chancery courts are urged to be as clear as possible in providing the terms and effects of an alimony award. Bowe v. Bowe, 557 So. 2d 793, 1990 Miss. LEXIS 53 (Miss. 1990).

Failure to award any alimony is not necessarily an abuse of discretion. Dickerson v. Dickerson, 245 Miss. 370, 148 So. 2d 510, 1963 Miss. LEXIS 524 (Miss. 1963).

Court's power to award alimony does not extend to requiring husband to join wife in conveyance of jointly owned timber so that wife may receive the entire proceeds. Jones v. Jones, 234 Miss. 461, 106 So. 2d 134, 1958 Miss. LEXIS 518 (Miss. 1958).

Award of permanent alimony is discretionary with court. Winkler v. Winkler, 104 Miss. 1, 61 So. 1, 1913 Miss. LEXIS 3 (Miss. 1913); Yelverton v. Yelverton, 200 Miss. 569, 28 So. 2d 176, 1946 Miss. LEXIS 324 (Miss. 1946).

Matter of awarding alimony, both temporary and permanent, is largely within discretion of trial court, and is not subject to revision and correction on appeal unless it is erroneous on its face, or unjust to either party, or oppressive. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

15. Alimony pendente lite.

The fact that a divorced plaintiff continued to live under the same roof with the defendant after filing the complaint is a heavy factor to be weighed in considering whether he or she has a valid cause, though it does not in and of itself compel a denial of divorce; it is conceivably possible for valid grounds for divorce to exist despite this. Lawyers representing persons seeking a divorce have the obligation to advise and warn them about the undesirability of continuing to live in the same household following the filing of the suit, and they have the obligation to seek and press for a temporary hearing before the chancellor to secure alimony pendente lite and temporary support money. Jethrow v. Jethrow, 571 So. 2d 270, 1990 Miss. LEXIS 700 (Miss. 1990).

Noncompliance with order to pay solicitors' fees and alimony pendente lite is ground for dismissal of appeal. Creel v. Creel, 29 So. 2d 838 (Miss. 1947).

Refusal to allow alimony pendente lite and attorney's fees to woman who married permanently insane person, when she knew he was in institution for insane, and did not live with such person for more than a few days, held not abuse of discretion. Parkinson v. Mills, 172 Miss. 784, 159 So. 651, 1935 Miss. LEXIS 128 (Miss. 1935).

Whether wife's bill presents cause for temporary alimony, whether she requires it, and husband's pecuniary circumstances are to be considered; wife's misconduct not subject of inquiry. Elam v. Elam, 129 Miss. 36, 91 So. 702, 1922 Miss. LEXIS 19 (Miss. 1922).

Where husband sues for divorce, on wife's bill for alimony and to set aside husband's fraudulent conveyance, she should be allowed attorney's fees and alimony pendente lite. McNeil v. McNeil, 127 Miss. 616, 90 So. 327, 1921 Miss. LEXIS 265 (Miss. 1922).

Wife not entitled to alimony pendente lite, where her estate sufficient. Evans v. Evans, 126 Miss. 1, 88 So. 481 (Miss. 1921).

In suit to annul defendant wife not entitled to temporary alimony unless marriage prima facie void. Sims v. Sims, 122 Miss. 745, 85 So. 73, 1920 Miss. LEXIS 474 (Miss. 1920).

16. Practice and procedure.

In a divorce case, a former husband's Sixth Amendment right to counsel was not triggered because he would not have lost his physical liberty if he had not prevailed in a temporary support hearing; the right was implicated in contempt proceedings, but the husband was represented by counsel during those hearings. Bougard v. Bougard, 991 So. 2d 646, 2008 Miss. App. LEXIS 578 (Miss. Ct. App. 2008).

Record made it clear that the parties reached their property settlement agreement by and through the negotiations of their attorneys and the court was not persuaded that the language proposed by the former husband reflected the original intent of the parties; a thorough comparison of the documents provided in the record did not lend the court to agree with the husband's contention that the final agreement should have been reformed due to a mutual mistake to reflect the understanding and intent of the parties. Pratt v. Pratt, 977 So. 2d 386, 2007 Miss. App. LEXIS 606 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 94 (Miss. 2008).

When the chancellor, in the judgment of divorce, ordered the husband to pay rehabilitative alimony for six months and neither the husband nor the wife appealed, that judgment became final. The review provision was contained in the judgment of divorce, not in a separate temporary order, and the consequences flowing from the finality of that judgment were binding on both parties; thus, the chancellor erred in converting the rehabilitative alimony into permanent periodic alimony. Oster v. Oster, 876 So. 2d 428, 2004 Miss. App. LEXIS 377 (Miss. Ct. App. 2004).

In wife's action for delinquent child support and delinquent spousal support, there were two judgments, an interim judgment, which did not mention the husband's motion for modification, and the final judgment which stated that the motion for modification was denied; applying Brennan v. Brennan, the appellate court held the entry of the latter judgment, effective retroactively to the former judgment, cleansed the husband's hands, since it was the first judgment that was entered after the trial court specifically refused to hear the husband's motion for modification due to the fact that the husband came into court with unclean hands. Cook v. Whiddon, 866 So. 2d 494, 2004 Miss. App. LEXIS 130 (Miss. Ct. App. 2004).

In a case involving a dispute over a lump sum alimony award, a chancery court should have considered the changed financial circumstances of the parties when the case was remanded for further proceedings. Haney v. Haney, 881 So. 2d 862, 2003 Miss. App. LEXIS 1114 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 907 So. 2d 948, 2005 Miss. LEXIS 441 (Miss. 2005).

In a case involving a dispute over an alimony award, a chancery court erred in awarding attorney's fees to a former wife because the wife had the ability to pay the fees based on separate assets and an award of lump sum alimony. Haney v. Haney, 881 So. 2d 862, 2003 Miss. App. LEXIS 1114 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 907 So. 2d 948, 2005 Miss. LEXIS 441 (Miss. 2005).

Where a case was remanded because the chancellor failed to make sufficient findings in support of his division and classification of marital property, the chancellor also had to revisit his award of permanent periodic alimony to the former wife, as equitable division and alimony were linked and when one expanded, the other had to recede. Lauro v. Lauro, 847 So. 2d 843, 2003 Miss. LEXIS 272 (Miss. 2003).

Chancellor abused her discretion by allowing a wife to put forward evidence of her need for temporary rehabilitative alimony, in order "to be fair to both parties and to do equity," where there had been no mention of alimony in the pre-trial statement. Singley v. Singley, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

A chancellor's determination that a wife was not entitled to periodic alimony was premature where the husband's principal asset was in bankruptcy, since the value of the husband's estate was not before the court due to the bankruptcy proceedings; the issue of periodic alimony should have remained in the trial court pending the conclusion of the bankruptcy proceedings. Heigle v. Heigle, 654 So. 2d 895, 1995 Miss. LEXIS 228 (Miss. 1995).

In a divorce case, there was no need for a chancellor to apply the factors under Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), or Armstrong v. Armstrong, 618 So. 2d 1278 (Miss. 1993), because the parties entered into settlement agreement regarding property division and alimony. Bougard v. Bougard, 991 So. 2d 646, 2008 Miss. App. LEXIS 578 (Miss. Ct. App. 2008).

An award of lump sum alimony was not beyond the scope of the pleadings, even though the complaint did not specifically request lump sum or periodic alimony, but instead requested permanent support and maintenance and other general relief, since the husband could not reasonably be said to have been surprised by the award of alimony in a divorce action. Crowe v. Crowe, 641 So. 2d 1100, 1994 Miss. LEXIS 378 (Miss. 1994).

A judgment of alimony was properly awarded, even though the original complaint was for separate maintenance and was not formally amended, where there was nothing inherent in the substance of the claim to prevent the separate maintenance action from being converted to one for alimony, and the issue of alimony was tried by consent. Weiss v. Weiss, 579 So. 2d 539, 1991 Miss. LEXIS 238 (Miss. 1991).

A court's exercise of jurisdiction to determine alimony was not improper where the parties were previously granted a foreign divorce with reservation of the right to litigate alimony, and the statutory residency jurisdictional requirement was satisfied. Weiss v. Weiss, 579 So. 2d 539, 1991 Miss. LEXIS 238 (Miss. 1991).

Where parties incomes were not sufficient to meet expenses at time of trial, Chancery Court should have retained jurisdiction over question of alimony and if at later date husband's dental practice became successful financially, court would have authority to award such alimony as may at that time be fair and equitable; in cases where facts do not justify present award of alimony, Chancery Court generally ought to retain jurisdiction over question of alimony, and need not award nominal alimony in order to allow for modification in event that earning power of one spouse increases. McNally v. McNally, 516 So. 2d 499, 1987 Miss. LEXIS 2956 (Miss. 1987).

Award to wife of alimony and child support where such is not sought in pleadings is error, because it deprives husband of due process, although such judgments are not void; therefore, where husband paid alimony and child support for 3 years before complaining about due process violation, decree is final and due process right has been waived. Miller v. Miller, 512 So. 2d 1286, 1987 Miss. LEXIS 2815 (Miss. 1987).

In a divorce action instituted by a husband against his wife, provisions of the decree requiring the husband to furnish an automobile and to make mortgage payments would be upheld where these allowances were elements of child support, and the husband had injected the question of custody and support of the minor child in his original bill of complaint. Diamond v. Diamond, 403 So. 2d 129, 1981 Miss. LEXIS 2159 (Miss. 1981), but see Queen v. Queen, 551 So. 2d 197, 1989 Miss. LEXIS 363 (Miss. 1989).

II. CUSTODY.

17. In general.

Father did not make explicit charges of abuse or neglect against the mother, and the record did not support the mother's claim that the appointment of a guardian ad litem was mandatory; while the mother's residence was not an ideal living condition for the child, a report did not show that she was abused or neglected, nor did a doctor who treated the child find that she was abused or neglected, and the chancellor did not abuse his discretion in failing to appoint a guardian. The Court of Appeals' decision was overruled to the extent it announced a new standard requiring mandatory appointment of a guardian ad litem in child-custody proceedings. Carter v. Carter, 204 So. 3d 747, 2016 Miss. LEXIS 489 (Miss. 2016).

Chancellor did not err in choosing the guardian ad litem's alternative option of liberal visitation because it explained that the circumstances presented made alternating weeks too difficult. Sullivan v. Sullivan, 180 So. 3d 695, 2015 Miss. App. LEXIS 155 (Miss. Ct. App. 2015), cert. denied, 181 So. 3d 1010, 2016 Miss. LEXIS 13 (Miss. 2016).

Trial court had authority to award a mother sole legal and physical custody of the couple's two children even though a guardian ad litem had recommended that the husband and wife each have joint custody. Henderson v. Henderson, 952 So. 2d 273, 2006 Miss. App. LEXIS 869 (Miss. Ct. App. 2006), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 165 (Miss. 2007).

Father who was awarded custody of the parties' son argued that the chancellor's award of the daughter's custody to the mother was clearly contrary to her best interest, primarily because of the mother's adulterous relationship. However, the record demonstrated that the chancellor had found that neither parent was unfit to have custody, that he considered the children's preferences, and that he had determined that given the age and sex of the children it would be beneficial for them to have respective male and female role models; thus, there was no manifest error. Sandlin v. Sandlin, 906 So. 2d 39, 2004 Miss. App. LEXIS 1115 (Miss. Ct. App. 2004).

Trial court did not abuse its discretion in awarding primary physical custody of minor children to the mother because there was evidence in the record to support the findings that the continuity of care prior to the separation favored the mother because she had been the primary caretaker, and the mother's parenting skills favored her as well, and evidence raised by the father of the mother's gambling activities and relationships with other men did not demonstrate the mother's unfitness as a custodial parent; while there was evidence that tended to weigh in favor of the father's ability to be the preferred caregiver of the children, it was the trial court's duty to weigh the evidence, make witness credibility assessments, and reach a determination that best served the interests of the children, and because it appeared that this was done, the judgment was affirmed. Ivy v. Ivy, 863 So. 2d 1010, 2004 Miss. App. LEXIS 11 (Miss. Ct. App. 2004).

No indication existed that the chancellor considered the appointment of a guardian ad litem to be mandatory based on allegations of neglect or abuse of the child; Miss. Code Ann. § 93-5-23 afforded the chancellor some discretion in whether there was a legitimate issue of neglect or abuse, and the father's representations to the chancellor, even if exaggerated, were not so egregious as to render him unfit to serve as a custodial parent. Johnson v. Johnson, 872 So. 2d 92, 2004 Miss. App. LEXIS 370 (Miss. Ct. App. 2004).

Because of the apparently limited assistance a guardian ad litem could have rendered, the chancellor's decision against making such an appointment did not constitute such an abuse of discretion as to constitute reversible error; the guardian ad litem would have considered the same information that was presented to the chancellor in open court and that would have offered an opinion as to what arrangement would best serve the child's interest. Loomis v. Bugg, 872 So. 2d 694, 2004 Miss. App. LEXIS 376 (Miss. Ct. App. 2004).

The chancellor erred in determining that he did not have the power to make a custody award to a stepparent and thus make no custody decision whatsoever even after expressly finding the natural parent unfit; where it is in the best interests of the child, temporary custody/guardianship should be given to a stepparent, until such time as the biological parent can be located and given proper notice. Logan v. Logan, 730 So. 2d 1124, 1998 Miss. LEXIS 626 (Miss. 1998).

In all child custody cases, polestar consideration is the best interest of the child. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

In all child custody cases, polestar consideration is best interest of child. Riley v. Doerner,

677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

A court order requiring a custodial mother to obtain court approval before she could move her residence was erroneous and unenforceable. It is an incident of custody that the parent having physical custody provide a residence for the child where he or she thinks is appropriate; the location of this residence is a matter committed to the discretion of the custodial parent in the first instance. A court may only intervene where there has been a material change in circumstances which adversely affect the child and it is shown that the best interests of the child require a modification of custody; a change of residence is not per se a change of circumstance. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

An award of child custody to the mother was not manifestly wrong, even though there was testimony that the children at times went unsupervised, where the court did not find that the mother was unfit to have the care and custody of the children. Martin v. Martin, 566 So. 2d 704, 1990 Miss. LEXIS 466 (Miss. 1990).

County agency had no duty, under due process clause of Federal Constitution's Fourteenth Amendment, to protect child against abuse by his father while child was in father's custody. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249, 1989 U.S. LEXIS 1039 (U.S. 1989).

In a divorce suit wherein the husband answered and cross-claimed for divorce and for custody of the parties' minor child and, where in the interim, the child was found to be a neglected child while in mother's custody and custody was given to child's maternal grandfather by youth court referee, the chancellor, who, at the divorce hearing, refused to hear testimony on child's custody, left child in custody of maternal grandfather, and granted divorce on irreconcilable differences, was without authority to substitute youth court referee's judgment, and in so doing, he deprived natural father of right to be heard on the custody of his son. Keely v. Keely, 495 So. 2d 452, 1986 Miss. LEXIS 2652 (Miss. 1986).

The object of any child custody and support decree is the accomplishment of that which is in the best interest of the child. Leonard v. Leonard, 486 So. 2d 1240, 1986 Miss. LEXIS 2426 (Miss. 1986).

The trial court is authorized by this statute to reexamine the question of child custody or support at any time on a showing of changed circumstances, regardless of the pendency of an appeal. Smith v. Necaise, 357 So. 2d 931, 1978 Miss. LEXIS 2516 (Miss. 1978).

In arriving at the proper solution of a custodial problem the chancellor is in a particularly advantageous position, and under evidence in a proceeding to modify a final divorce decree as to custody of four minor children, the chancellor did not abuse his discretion in determining that both parents were personally unfit and unsuitable for custody, and in granting temporary care, custody, and control to the maternal grandparents, leaving the door open for the parents to come back into court if there should be a material change in their circumstances and if they should rehabilitate and prove themselves. Morris v. Morris, 245 So. 2d 22, 1971 Miss. LEXIS 1350 (Miss. 1971).

The chancery court has the inherent power, and it is its duty, where the issue is before the court by proper pleadings, supported by competent evidence, in proceedings in which it has jurisdiction of the parties and subject matter, to make such orders and decrees from time to time as will protect and promote the best interest of minor children. Webb v. State, 186 So. 2d 462, 1966 Miss. LEXIS 1311 (Miss. 1966).

The question of a child's custody is an issue of fact for the trial court. Rubisoff v. Rubisoff, 242 Miss. 225, 133 So. 2d 534, 1961 Miss. LEXIS 548 (Miss. 1961).

Subsequent abandonment of a child does not indicate fraud in obtaining an award of custody. Rubisoff v. Rubisoff, 242 Miss. 225, 133 So. 2d 534, 1961 Miss. LEXIS 548 (Miss. 1961).

The chancery court has a broad discretion in awarding custody of children. Brown v. Brown, 237 Miss. 53, 112 So. 2d 556, 1959 Miss. LEXIS 448 (Miss. 1959).

The chancery court has a broad discretion in determining the issue of custody of child in reference of what is best for the welfare of the child. Boswell v. Pope, 213 Miss. 31, 56 So. 2d 1, 1952 Miss. LEXIS 328 (Miss. 1952).

Decree of chancery court awarding custody of children must be given due recognition and its provisions be protected against modification save by court which made initial award. Hinman v. Craft, 204 Miss. 568, 37 So. 2d 770, 1948 Miss. LEXIS 390 (Miss. 1948).

A decree of permanent custody cannot be made in vacation. Gordon v. Gordon, 196 Miss. 476, 17 So. 2d 191, 1944 Miss. LEXIS 217 (Miss. 1944).

Court can inquire into custody of child as between parents divorced in foreign state. Haynie v. Hudgins, 122 Miss. 838, 85 So. 99, 1920 Miss. LEXIS 481 (Miss. 1920).

The statute annuls the paramount right of the father, as it existed at the common law, to the custody of the children. Cocke v. Hannum, 39 Miss. 423, 1860 Miss. LEXIS 71 (Miss. 1860).

18. Factors in determining award of custody.

Substantial evidence supported the chancery court's decision to award the mother custody of the children because the chancery court provided a thorough analysis of the Albright factors and found that they favored awarding custody to the mother, and the mother had custody of the children's siblings. Miller v. Smith, 229 So. 3d 148, 2016 Miss. App. LEXIS 749 (Miss. Ct. App. 2016), aff'd, 229 So. 3d 100, 2017 Miss. LEXIS 427 (Miss. 2017).

Because the chancery court met the statutory requirements, it acted within its discretion in ruling contrary to the recommendation of the guardian ad litem (GAL); the chancery court based her decision on the testimony she heard during the trial and the reports detailing the child's interviews with police and the Mississippi Department of Human Services, and it specifically discussed the GAL's recommendation and its analysis under each of the Albright factors. Miller v. Smith, 229 So. 3d 148, 2016 Miss. App. LEXIS 749 (Miss. Ct. App. 2016), aff'd, 229 So. 3d 100, 2017 Miss. LEXIS 427 (Miss. 2017).

In a child custody dispute where a guardian ad litem was appointed after a mother raised allegations of child abuse, a chancellor was not required to accept the recommendations of the guardian ad litem that the mother receive primary physical custody of the children; the chancellor stated that he considered the recommendations, but determined that it was in the best interest of the children for the father to receive primary custody after considering the appropriate factors. Borden v. Borden, 130 So. 3d 1168, 2014 Miss. App. LEXIS 36 (Miss. Ct. App.), rev'd, 167 So. 3d 238, 2014 Miss. LEXIS 498 (Miss. 2014).

Chancellor erred by awarding a maternal grandmother custody of a child because the chancellor failed to apply the legal presumption that it was in the child's best interest for her father to have custody; the chancellor treated the particular custody battle as a modification, failing to recognize that the grandmother had no right to custody as against the father. Wilson v. Davis, 111 So. 3d 1280, 2013 Miss. App. LEXIS 222 (Miss. Ct. App. 2013), aff'd in part and rev'd in part, 181 So. 3d 991, 2016 Miss. LEXIS 4 (Miss. 2016).

Chancellor's judgment awarding the father primary physical custody of the three minor children was affirmed because: (1) the record reflected that the chancellor specifically considered the potential effect that the separation of the mother's child from a prior relationship from the other children might have had on the children, but she determined it did not outweigh the other factors favoring the father; (2) the chancellor did not err when she failed to provide the mother with the tender-years advantage with respect to the five-year old boy because she did specifically acknowledge the tender-years doctrine and cited case law addressing its diminished application; and (3) the chancellor's finding that the stability of home environment factor favored the father was supported by credible evidence that the father had maintained a stable routine and ensured the children were cared for by his mother while he was at work. Montgomery v. Montgomery, 20 So. 3d 39, 2009 Miss. App. LEXIS 663 (Miss. Ct. App. 2009).

In a custody proceeding, the chancellor properly considered the Albright factors because, inter alia, the mother testified concerning her home's close proximity to the child's school and the presence of family members who cared for the child while the mother was at work, and the chancellor concluded from the testimony that there was a strong relationship between the child and his half-sister and that any great reduction in his time with her would adversely impact the child. Collins v. Collins, 20 So. 3d 683, 2008 Miss. App. LEXIS 739 (Miss. Ct. App. 2008), cert. denied, 2009 Miss. LEXIS 542 (Miss. Nov. 5, 2009).

Where a father was granted a divorce on the ground of adultery, substantial evidence supported the decision to grant the father custody of the parties' child because, inter alia, despite a temporary agreed order, the mother maintained a sexual relationship with a boyfriend throughout the trial and testified that the boyfriend regularly slept at the mother's house while the child was in the mother's custody. Thurman v. Johnson, 998 So. 2d 1026, 2008 Miss. App. LEXIS 523 (Miss. Ct. App. 2008).

Chancellor did not err in failing to find a change in material circumstances sufficient to support a modification of a child custody agreement because even though there was evidence that the mother interfered with the father's visitation rights, there was also evidence that he had, to some degree, interfered with her rights as well. Bittick v. Bittick, 987 So. 2d 1058, 2008 Miss. App. LEXIS 402 (Miss. Ct. App. 2008).

Chancellor, in awarding custody of a 20-month-old child to the child's father, did not give insufficient weight to the fact that the child was of tender years because: (1) the once strong presumption that a mother was generally best suited to raise a young child had been significantly weakened; and (2) the chancellor properly weighed the age of the child as he would any other factor. Klink v. Brewster, 986 So. 2d 1060, 2008 Miss. App. LEXIS 382 (Miss. Ct. App. 2008).

Trial court did not err in awarding father custody of parties' child as the mother failed to prove her allegations that the father had viewed pornography on family computers and had engaged in adultery; further, the mother had an unstable employment history, had admitted to committing adultery, and had a history of alcohol use and traffic violations. DeVito v. DeVito, 967 So. 2d 74, 2007 Miss. App. LEXIS 700 (Miss. Ct. App. 2007).

Father alleged that the mother was morally unfit as a parent due to her relationship with a boyfriend and due to alleged drug abuse, but there was no substantial evidence that the mother used illegal drugs, but only that a boyfriend – who apparently was awaiting sentencing for a conviction – did so; also, in an effort to reduce the children's exposure to the mother's boyfriend, the mother was ordered not to have custody of her children in the presence of any male to whom she was not married or related between 10:30 p.m. and 7:00 a.m. on the following day. The chancellor made a reasonable analysis of the evidence, found the evidence raised concerns about the moral fitness of the mother, took steps to reduce the effect of those concerns, and on the balance found that the totality of the evidence supported giving custody to the children's mother. Ethridge v. Ethridge, 926 So. 2d 264, 2006 Miss. App. LEXIS 270 (Miss. Ct. App. 2006).

Court properly awarded child custody to a mother because the child had lived in the mother's home his entire life, he did well in school there, the father was physically limited as to what he could do with the child, and there was nothing to indicate that separation from his sister would be in the child's best interest. Owens v. Owens, 950 So. 2d 202, 2006 Miss. App. LEXIS 750 (Miss. Ct. App. 2006).

In determining the best interest of two minor girls, a chancellor did not err by awarding legal and physical custody thereof to a father where the applicable factors demonstrated that the mother had used drugs and committed adultery; although the father's conduct was questionable as well, it was for the chancellor to weigh the evidence and judge credibility, and the other factors favored neither party. Bellais v. Bellais, 931 So. 2d 665, 2006 Miss. App. LEXIS 436 (Miss. Ct. App. 2006).

Chancellor did not err in finding that a material change in circumstances had occurred when parties' daughter moved to Mississippi as both the mother and father stipulated to the fact that there was a material and substantial change in circumstances. Review of the Albright factors meant that the father was properly granted primary physical custody of children. Harper v. Harper, 926 So. 2d 253, 2006 Miss. App. LEXIS 263 (Miss. Ct. App. 2006).

Chancellor's opinion devoted 29 pages to the Albright factors and gave the husband the benefit of all of the admissions arising from the wife's failure to respond under Miss. R. Civ. P. 36, absent the admission pertaining to the ultimate issue of the child's custody; therefore, the chancellor properly determined the best interests of the child. Gilcrease v. Gilcrease, 918 So. 2d 854, 2005 Miss. App. LEXIS 781 (Miss. Ct. App. 2005).

When considering the Albright factors upon the father's petition to change child custody, the chancellor properly found that the tender years doctrine weighed equally between the parties because the girls had recently lived with their father for two years. Glissen v. Glissen, 910 So. 2d 603, 2005 Miss. App. LEXIS 160 (Miss. Ct. App. 2005).

Where the custody decision was a close call, the appellate court upheld the chancellor's decision to award child custody to the husband based on the following Albright factors: continuity of care; employment; moral fitness; stability of the home environment; and the home, school and community record of the child. Funderburk v. Funderburk, 909 So. 2d 1241, 2005 Miss. App. LEXIS 110 (Miss. Ct. App. 2005).

Chancellor carefully considered the Albright factors and the best interest of the children in finding that the father was entitled to primary physical custody of the children, aged 3 and 14. While both parents had excellent parenting skills, the mother's occasional use of marijuana was troubling, as to her judgment, and the stability of the home environment and employment of each parent favored the father; moreover, even though one child was a child of "tender years," a factor slightly favoring the mother, the children had a strong emotional bond, and it was not in their best interest to be separated. Taylor v. Taylor, 909 So. 2d 1280, 2005 Miss. App. LEXIS 126 (Miss. Ct. App. 2005).

Physical custody of an 18-month-old child was properly awarded to the husband in a divorce case because the trial court examined all of the applicable factors before determining that the father had the best parenting skills, his employment was more flexible, he provided more continuous care, and the sex of the child favored custody by the father; although the tender years doctrine slightly favored the mother, this was not a ground for reversal, and there was no rule that the best interest of the child was served by keeping siblings together. Copeland v. Copeland, 904 So. 2d 1066, 2004 Miss. LEXIS 1490 (Miss. 2004).

Chancellor did not plainly err in her evaluation of the evidence and application of the Albright factors to determine that the best interest of the child would be served by the mother having primary custody; the evidence demonstrated that the mother was a good mother, and the stability of the home environment favored the mother. Bass v. Bass, 879 So. 2d 1122, 2004 Miss. App. LEXIS 775 (Miss. Ct. App. 2004).

Chancery court did not make specific findings of fact concerning child custody; therefore, the appellate court had to remand for consideration of all the necessary factors and on-the-record factual findings. Franklin v. Franklin, 864 So. 2d 970, 2003 Miss. App. LEXIS 1113 (Miss. Ct. App. 2003).

Father was properly awarded custody of parties' two minor boys because the Albright factors were properly considered, as both children were boys, and the compelling interest in keeping siblings together outweighed the "tender years" presumption; the father was involved in extracurricular activities and sports with the boys; and one of the children had a stronger bond with his father than his mother. Steverson v. Steverson, 846 So. 2d 304, 2003 Miss. App. LEXIS 457 (Miss. Ct. App. 2003).

Chancellor did not err by awarding primary care of a minor child to a husband because the evidence showed that the husband had extended family to care for the child, and the child needed the guidance of his father; the parties' religious differences were irrelevant to the custody determination. Messer v. Messer, 850 So. 2d 161, 2003 Miss. App. LEXIS 542 (Miss. Ct. App. 2003).

Chancellor improperly granted custody in favor of a mother where the evidence showed that the mother was unable to provide a stable environment for the child because of her medical condition; the chancellor also erroneous determined that the father was unable to provide daycare or housing and that the mother had provided continuous care for the child before the parties' divorce. Divers v. Divers, 856 So. 2d 370, 2003 Miss. App. LEXIS 194 (Miss. Ct. App. 2003), cert. denied, 2003 Miss. LEXIS 614 (Miss. Nov. 6, 2003).

Custody decision reversed and remanded where chancellor failed to consider each of the factors set out in Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) in both his oral statement and written order. Hamilton v. Hamilton, 755 So. 2d 528, 1999 Miss. App. LEXIS 696 (Miss. Ct. App. 1999).

There is no hard and fast rule that the best interest of siblings will be served by keeping them together. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

A chancellor did not err in awarding permanent primary child custody to the mother, even though she had committed adultery and temporary custody had been awarded to the father, where the chancellor found that the mother had greater willingness and capacity to learn proper parenting skills, the father's psychological profile was potentially detrimental to the children, and "coaching" of the children had occurred while they were in the father's custody. Williams v. Williams, 656 So. 2d 325, 1995 Miss. LEXIS 280 (Miss. 1995).

The doctrine of unclean hands cannot override a chancellor's duty to award custody in the best interests of the child. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

A chancellor did not abuse his discretion in awarding custody of a 14-year-old boy to his mother on the ground that the father was unfit to be a parent, even though the child testified that he preferred to live with his father, where the child's testimony indicated that his relationship with his mother would seriously deteriorate if he were allowed to live with his father, and the father had encouraged the child to ignore and disobey his mother, allowed him to chew tobacco and dip snuff, allowed him to ride a 4-wheeler without adult supervision, allowed him to carry and shoot a .357 magnum pistol without adult supervision, kept his supply of pornographic movies in the child's bedroom, told him he would buy the child a truck if he stayed with him after the divorce, and belittled his wife in the child's presence and encouraged the child to do the same. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

The presumption in favor of awarding custody of a child to a natural parent should prevail over any imperative regarding the separating of siblings. Sellers v. Sellers, 638 So. 2d 481, 1994 Miss. LEXIS 311 (Miss. 1994).

A chancellor erred in awarding custody of a child to her maternal aunt rather than her father where there was no finding that the father was unfit to have custody of the child, and the main foundation for the ruling was the chancellor's concern about separating the child from her half-brother; while the separation of siblings may be an important consideration, it may not be used as a basis to deprive a parent of his or her child in favor of a third party unless the parent has been found to be unfit. Sellers v. Sellers, 638 So. 2d 481, 1994 Miss. LEXIS 311 (Miss. 1994).

A chancellor did not err in awarding custody of a child to his father, even though the mother "may have presented enough evidence at trial to let one conclude that custody should have been awarded to her," where the weight of the evidence in favor of the mother was not so great as to make an award of custody to the father erroneous, the wife stated that the father was a good parent and that he and the child were close, and the only evidence of the father's alleged physical abuse of the child was the mother's uncorroborated testimony. Chamblee

v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

A chancellor did not err in awarding physical custody of 2 minor children to their mother where the chancellor awarded the parents joint legal custody, both parents were found to be fit and proper parents, the mother was the primary caregiver though both parents played active parenting roles, the father had a work schedule based on 12-hour shifts and the only option he had considered for child care while he was at work was his elderly mother who had suffered a stroke, the father did not dispute the mother's ability to care for the children, and the father was given liberal visitation rights. Moak v. Moak, 631 So. 2d 196, 1994 Miss. LEXIS 44 (Miss. 1994).

An award of custody to the father based on the finding that the father was more morally fit than the mother to care for the child was erroneous to the extent that it was based on a finding of adultery by the wife where the evidence of adultery was neither clear nor convincing and did not rise above mere conjecture. McAdory v. McAdory, 608 So. 2d 695, 1992 Miss. LEXIS 600 (Miss. 1992).

A trial court did not abuse its discretion in awarding custody of 2 minor children to their father, though both parents were suitable choices for custody, where the mother had previously "secreted the children" for approximately three weeks, and the father had possession of the parties' house which would give the children stability of the home environment and place them in familiar surroundings. Faries v. Faries, 607 So. 2d 1204, 1992 Miss. LEXIS 599 (Miss. 1992).

There was no abuse of discretion in visitation provisions which granted a father visitation with his 15-year-old son 7 days at Christmas and 2 weeks during the summer, "and such other visitation as could be worked out" between the father and son, where the father had voluntarily moved to another state which made regular visitation more difficult, the father chose to live in a home which was several levels below what he could actually afford and provided little or no testimony of features of the home which might be conducive to visitation, and the son testified that he disliked the father. Caldwell v. Caldwell, 579 So. 2d 543, 1991 Miss. LEXIS 236 (Miss. 1991).

A child custody agreement which provides that the child or children must until majority reside in a particular community, is contrary to the best interests of the children and should not be approved by the court. Such agreements that have been approved are unenforceable. It is presumptuous for anyone, court or otherwise, to declare as an absolute that it is in the best interest of a young child that he or she spend his or her entire minority in a single community. Thus, courts may not require that children be reared in a single community come what may, and divorcing parents may not make such agreements which courts are obligated to enforce. Chancery courts must refuse to approve any child custody agreement presented under § 93-5-2 or otherwise which mandates, without exception, that children be raised in a given community. Such agreements do not make "adequate and sufficient" provisions for the care and maintenance of children. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

A mother was unfit to have custody of her children where she had used marijuana in the children's presence, she sometimes slept until 11:00 a.m. and the children would already be outside, unsupervised, by that time, and there was testimony that the children had not been adequately fed or clothed and that there had been a resulting deleterious effect on their health. White v. Thompson, 569 So. 2d 1181, 1990 Miss. LEXIS 631 (Miss. 1990).

In order to overcome the presumption that best interest of child will be served by child being in custody of his or her natural parent as against third party, there must be a clear showing that the natural parent has (1) abandoned the child; (2) the conduct of the parent is so immoral as to be detrimental to child; or (3) that the parent is unfit mentally or otherwise to have custody. Keely v. Keely, 495 So. 2d 452, 1986 Miss. LEXIS 2652 (Miss. 1986).

Award of custody of children to husband is not impermissibly based solely on wife's adultery where chancellor looks to work schedules, life styles, and other criteria and, while finding that no special circumstances exist to justify granting custody to adulterous mother, considers adultery as but one factor in overall consideration. Carr v. Carr, 480 So. 2d 1120, 1985 Miss. LEXIS 2379 (Miss. 1985).

In determining relative fitness of parents to be awarded custody of child, adultery may be unwholesome influence and impairment to child's best interest or may have no effect; this factor should be considered by trial court along with all others when making original custody determinations; marital fault should not be used as sanction in custody award. Carr v. Carr, 480 So. 2d 1120, 1985 Miss. LEXIS 2379 (Miss. 1985).

Offshore oil workers, truck drivers, and other persons whose professions require them to be away from home for extended periods of time are not to be deprived of custody of children on that basis. Smith v. Todd, 464 So. 2d 1155, 1985 Miss. LEXIS 1924 (Miss. 1985).

That which will promote the best interest of the children is the criterion by which an award of custody should be made, and the problem of what is to the best interest of a child must be solved by a consideration of the relative fitness and ability of each parent to discharge the duties of nurture, maintenance, education, and training. Hodge v. Hodge, 186 So. 2d 748, 1966 Miss. LEXIS 1326 (Miss. 1966).

In awarding the custody of a minor child, the welfare and the best interests of such child are of chief importance and of prime consideration. Cassell v. Cassell, 211 Miss. 841, 52 So. 2d 918, 1951 Miss. LEXIS 416 (Miss. 1951); Neal v. Neal, 238 Miss. 572, 119 So. 2d 273, 1960 Miss. LEXIS 440 (Miss. 1960).

In considering the child's custody the paramount consideration is the child's welfare and a chancery court has a broad discretion in determining the factual issue. Bland v. Stoudemire, 219 Miss. 526, 69 So. 2d 225, 1954 Miss. LEXIS 359 (Miss. 1954).

Child's welfare is paramount consideration. Haynie v. Hudgins, 122 Miss. 838, 85 So. 99, 1920 Miss. LEXIS 481 (Miss. 1920).

Common law right of father to custody of children modified so that now best interest of child is prime consideration. Duncan v. Duncan, 119 Miss. 271, 80 So. 697, 1918 Miss. LEXIS 34 (Miss. 1919).

19. Mother's right to custody.

Upon the parties' divorce, the chancellor properly applied the Albright factors in awarding the wife custody over their daughter; the wife was the better choice with regard to the children's continuity of care, her willingness and capacity to provide primary child care, the employment and employment responsibilities of the parents, and the home, school, and community record of the children. As a part-time truck driver, the husband's schedule was unpredictable and stressful; the wife's adultery did not affect her parental responsibilities. Brock v. Brock, 906 So. 2d 879, 2005 Miss. App. LEXIS 241 (Miss. Ct. App. 2005).

Chancellor did not err by not applying the "tender years" doctrine, because chancellors were required to weigh a number of factors, of which age was only one, and manifest error did not arise simply from failing to give custody of children of tender years to their mother. Steverson v. Steverson, 846 So. 2d 304, 2003 Miss. App. LEXIS 457 (Miss. Ct. App. 2003).

Custody of children may not be awarded solely on basis of tender age of children. Pellegrin v. Pellegrin, 478 So. 2d 306, 1985 Miss. LEXIS 2286 (Miss. 1985).

Where it is clearly to the best interest of a child to remain with the mother, it may be proper to grant custody to the mother even though she may have been found guilty of adultery. Yates v. Yates, 284 So. 2d 46, 1973 Miss. LEXIS 1240 (Miss. 1973).

Where a divorce was granted husband on grounds of his wife's adultery and drunkenness, temporary custody of children 5 and 8 years of age was awarded to the husband on showing that they would be properly cared for. Nix v. Nix, 253 Miss. 565, 176 So. 2d 297, 1965 Miss. LEXIS 1013 (Miss. 1965).

When a divorce has been properly granted because of the adultery of the wife, she is not entitled either to alimony or to the custody of the children. Keyes v. Keyes, 252 Miss. 138, 171 So. 2d 489, 1965 Miss. LEXIS 1084 (Miss. 1965).

A husband acquiescing in an award of custody of a child to the wife, knowing her to be a narcotics addict, cannot be heard to say that the award was obtained by fraud. Rubisoff v. Rubisoff, 242 Miss. 225, 133 So. 2d 534, 1961 Miss. LEXIS 548 (Miss. 1961).

In a habeas corpus proceeding by a mother against the paternal aunt and paternal grandparents seeking custody of two children awarded to the mother by a prior divorce decree, trial court committed reversible error in suppressing affidavits of nonresident witnesses whose attendance could not be procured, and awarding mother custody of the children, without hearing evidence as to changed conditions and circumstances since the divorce decree, pertaining to abandonment, neglect, and alleged moral unfitness of the mother. Neal v. Neal, 238 Miss. 572, 119 So. 2d 273, 1960 Miss. LEXIS 440 (Miss. 1960).

The chancery court has a broad discretion in awarding custody of children, which, however, is to be exercised in the light of the rule that custody of children of tender years should be awarded to the mother. Brown v. Brown, 237 Miss. 53, 112 So. 2d 556, 1959 Miss. LEXIS 448 (Miss. 1959).

Where the wife was entitled to a divorce from the husband on grounds of cruel and inhuman treatment, and there was no proof of any immoral conduct on her part, the wife, as natural mother, was entitled to the custody of two minor children of the marriage as against their natural father, and their paternal grandparents, or either of them. Thames v. Thames, 233 Miss. 24, 100 So. 2d 868, 1958 Miss. LEXIS 352 (Miss. 1958), but see Cheatham v. Cheatham, 537 So. 2d 435, 1988 Miss. LEXIS 627 (Miss. 1988).

Where decree of divorce in favor of husband was sustainable on ground of wife's adultery, award of alimony and custody of the youngest of three children, aged six years, to the wife was wholly reversed and vacated and a decree entered awarding the custody of the children to the father, leaving the privilege of visitation to the children open for the chancellor to determine on remand. Winfield v. Winfield, 203 Miss.

391, 35 So. 2d 443, 1948 Miss. LEXIS 285 (Miss. 1948).

When divorce has been properly granted because of the adultery of the wife, she is not entitled either to alimony or to the custody of the children, save temporarily as to an infant so young as not to permit separation from its mother, and save in exceptional circumstances. Winfield v. Winfield, 203 Miss. 391, 35 So. 2d 443, 1948 Miss. LEXIS 285 (Miss. 1948).

20. Jurisdiction.

Although the chancellor initially granted the mother's motion to terminate the father's parental rights, the Hinds County Chancery Court did not have proper subject matter jurisdiction to do so because the Scott County Chancery Court entered the initial order of child custody; when presented with information regarding the jurisdictional problem, the chancellor immediately corrected the defect by setting aside his previous orders and instructing that any further proceedings regarding the case be brought before the Scott County Chancery Court, pursuant to Miss. Code Ann. § 93-5-23. C.M. v. R.D.H., 947 So. 2d 1023, 2007 Miss. App. LEXIS 29 (Miss. Ct. App. 2007).

In a child custody case where the mother chose to move the child to a new area that "coincidentally" happened to be in another state and under the same roof of a man who had been found by a chancellor to have abused her child, the court-ordered restriction upon removing the child from the trial court's jurisdiction was both valid and enforceable. Allen v. Williams, 914 So. 2d 254, 2005 Miss. App. LEXIS 518 (Miss. Ct. App. 2005).

Chancellor who had proper jurisdiction over divorce action was also authorized, pursuant to Miss. Code Ann. § 93-5-23, to make any appropriate custodial and support arrangements for the minor children. Scally v. Scally, 802 So. 2d 128, 2001 Miss. App. LEXIS 545 (Miss. Ct. App. 2001).

The chancery judge who has in personam jurisdiction over the parties of the marriage may deal not only with divorce but also with care, custody (which includes visitation) and maintenance (support) of the children. Peters v. Peters, 744 So. 2d 803, 1999 Miss. App. LEXIS 147 (Miss. Ct. App. 1999).

The youth court had exclusive jurisdiction to determine custody and visitation rights with respect to an abused child even though the youth court order was in direct conflict with a chancery court order in the parents' divorce proceedings which were being conducted concurrently with the youth court proceedings. D. L. D. v. Wilkinson County, 606 So. 2d 1125, 1992 Miss. LEXIS 543 (Miss. 1992).

Continuing and exclusive nature of chancery court jurisdiction over issues involving child custody precludes Youth Court from having exclusive original jurisdiction over proceedings involving abused child, where allegations of abuse are raised in context of custody proceeding over which chancery court already exercises jurisdiction. Rights of minor child suspected of having been sexually abused by parent, to access to court, were not impaired by chancery court's considering allegations of sexual abuse without referring matter to Youth Court; and even though Youth Court statute provided for exercise of exclusive jurisdiction over child abuse cases, such provision was not applicable to charges raised in case over which chancery court had already assumed and was exercising jurisdiction. Chrissy F. v. Mississippi Dep't of Public Welfare, 780 F. Supp. 1104, 1991 U.S. Dist. LEXIS 17998 (S.D. Miss. 1991), aff'd in part and rev'd in part, 995 F.2d 595, 1993 U.S. App. LEXIS 16843 (5th Cir. Miss. 1993).

Chancery court has exclusive and continuing jurisdiction over custody proceedings, and may issue subsequent modifications to one of its decrees as material change in circumstances may warrant. Chrissy F. v. Mississippi Dep't of Public Welfare, 780 F. Supp. 1104, 1991 U.S. Dist. LEXIS 17998 (S.D. Miss. 1991), aff'd in part and rev'd in part, 995 F.2d 595, 1993 U.S. App. LEXIS 16843 (5th Cir. Miss. 1993).

Although custody of a child may be awarded in a habeas corpus proceeding, support for the child and visitation rights of the parties may not be determined in the habeas corpus court. Thus, Chancery Court did not have continuing jurisdiction over child by virtue of decree previously rendered by it in habeas corpus proceeding. Roach v. Lang, 396 So. 2d 11, 1981 Miss. LEXIS 1976 (Miss. 1981).

Where the chancery court had granted a divorce and had granted custody of the children to the mother, it had continuing jurisdiction to act on a subsequent petition to modify the divorce decree as to custody, even though in the interim the youth court had stepped in to deal with a temporary emergency situation. Morris v. Morris, 245 So. 2d 22, 1971 Miss. LEXIS 1350 (Miss. 1971).

Exclusive jurisdiction of the custody of children as between their parents is vested in the chancery court in which the original divorce decree was entered, and as between the parties the youth court of another county had no authority to change or modify the chancery court's decree awarding custody. Ladner v. Ladner, 206 So. 2d 620, 1968 Miss. LEXIS 1577 (Miss. 1968).

The proper venue for a habeas corpus proceeding by a mother to obtain custody of her children from the father was in the county where the children resided in the custody of the father, rather than in the county where the decree, largely giving custody to the mother, was entered. Logan v. Rankin, 230 Miss. 749, 94 So. 2d 330, 1957 Miss. LEXIS 419 (Miss. 1957).

Where the father invoked the jurisdiction of a Texas court to obtain custody of his children, after the mother, to whom custody had been largely awarded by the Mississippi court, had taken the children to that state, the judgment of the Texas court, awarding exclusive custody of the children to the mother, superseded the earlier decree of the Mississippi court, and was entitled to full faith and credit, and was res adjudicata of the facts and circumstances existing at the time of the rendition of the judgment. Logan v. Rankin, 230 Miss. 749, 94 So. 2d 330, 1957 Miss. LEXIS 419 (Miss. 1957).

The chancery court in granting a divorce is authorized to make such orders touching the care, custody and maintenance of the children of the marriage as may seem equitable and just and where the chancery court makes no order of custody, the county court has jurisdiction to issue writ of habeas corpus and to determine the rightful custody of the minor. Payne v. Payne, 58 So. 2d 377 (Miss. 1952).

No adjudication will be made in divorce action as to custody of minor child of parties when child is beyond jurisdiction of court. Kincaid v. Kincaid, 207 Miss. 692, 43 So. 2d 108, 1949 Miss. LEXIS 380 (Miss. 1949).

Jurisdiction of divorced husband's petition for permanent care and custody of minor child then in custody of such husband, in which proceedings divorced wife was summoned but did not appear, was properly declined by chancery court, since proceeding was merely advisory and not adversary. Bobo v. Christian, 199 Miss. 433, 25 So. 2d 325, 1946 Miss. LEXIS 214 (Miss. 1946).

While the general rule is that in order for a decree or judgment awarding the custody of children to be valid, the child or children must be within the territorial jurisdiction of the court, their removal from the jurisdiction prior to decree after the court has once acquired jurisdiction of such children does not deprive the court of jurisdiction to fix their custody. Cole v. Cole, 194 Miss. 292, 12 So. 2d 425, 1943 Miss. LEXIS 71 (Miss. 1943).

21. Practice and procedure.

Chancery court did not err in failing to appoint a guardian ad litem, sua sponte, to investigate a father's allegations of neglect because the allegations were either not severe enough to require investigation or were adequately investigated by an agent of the court who acted as a guardian ad litem in all but name, the agent, the parties, and the court all seemed to have understood the agent to have been assigned to act as a neutral, investigative agent for the court, and, while the mother's home environment could have had some harmful effects on the child and the father was more attendant to her care, a pediatric endocrinologist found no evidence that the child was abused or neglected. Carter v. Carter, 204 So. 3d 803, 2015 Miss. App. LEXIS 687 (Miss. Ct. App. 2015), aff'd on other grounds, 204 So. 3d 747, 2016 Miss. LEXIS 489 (Miss. 2016).

Chancellor erred in not providing a summary of the guardian ad litem's recommendation and a summary of why the chancellor rejected that recommendation where the chancellor only acknowledged the guardian ad litem's recommendation in awarding custody. Borden v. Borden, 167 So. 3d 238, 2014 Miss. LEXIS 498 (Miss. 2014).

Chancellor made a determination that it was in the best interest of the child that her primary custody be placed with her grandmother, but with the mother continuing to have a role in the child's life. The chancellor specifically noted and gave proper consideration to a guardian ad litem's recommendation, and he stated why he felt the best interest of the child required that that the child's grandmother have primary custody. McCraw v. Buchanan, 10 So. 3d 979, 2009 Miss. App. LEXIS 242 (Miss. Ct. App. 2009).

In a custody proceeding, the chancellor properly considered all of the evidence before it in rendering the custody decision, including findings of the guardian ad litem, because the guardian ad litem made no custody recommendation; the only recommendation that the guardian ad litem made to the court was that there were no grounds for finding any abuse of the child. That was reflected in the chancellor's divorce decree, which stated that there was insufficient proof of child abuse. Collins v. Collins, 20 So. 3d 683, 2008 Miss. App. LEXIS 739 (Miss. Ct. App. 2008), cert. denied, 2009 Miss. LEXIS 542 (Miss. Nov. 5, 2009).

Chancellor did not commit reversible error by not following the recommendation of the child's guardian ad litem because she found that the guardian ad litem considered only the isolated incident in which the father physically harmed the child and not all of the times the child witnessed the abuse of her mother and because the guardian failed to recognize Miss. Code Ann. § 93-5-24(9). J.P. v. S.V.B., 987 So. 2d 975, 2008 Miss. LEXIS 394 (Miss. 2008).

Although the trial court retained jurisdiction over the case in order to review custody before the child was to begin attending school, the trial court's custody determination was a final order that was appealable under Miss. Code Ann. § 93-5-23; like many kinds of domestic relations orders, custody orders were permitted to be modified at any time, but such orders were considered final and appealable. Crider v. Crider, 905 So. 2d 706, 2004 Miss. App. LEXIS 757 (Miss. Ct. App. 2004), rev'd, 904 So. 2d 142, 2005 Miss. LEXIS 222 (Miss. 2005).

A mother's contention on appeal that the appointment of a guardian ad litem in a custody proceeding was improper was erroneous where both parties agreed to the appointment of the guardian ad litem. Foster v. Foster, 788 So. 2d 779, 2000 Miss. App. LEXIS 472 (Miss. Ct. App. 2000).

A child custody order awarding the father custody of the parties' 2 children would be vacated where the mother did not have sufficient time to prepare for 2 adverse witnesses and the custody question was extremely close, so that the mother's lack of an opportunity to prepare for the witnesses could have affected the evidence presented and, necessarily, the chancellor's decision. Schepens v. Schepens, 592 So. 2d 108, 1991 Miss. LEXIS 983 (Miss. 1991).

The court may decree custody of the children even though there is no express prayer therefor. Dickerson v. Dickerson, 245 Miss. 370, 148 So. 2d 510, 1963 Miss. LEXIS 524 (Miss. 1963).

In all cases except where a divorce is granted, or separate maintenance is decreed, the right to the custody of children must be determined on habeas corpus and where the court dismissed the husband's divorce action on the ground that wife's prior divorce was valid, it was not error for the court not to retain the bill to determine the question of custody. Payne v. Payne, 213 Miss. 815, 58 So. 2d 9, 1952 Miss. LEXIS 430 (Miss. 1952).

Custody of children may be awarded notwithstanding prayer for divorce is denied, custody not being dependent on decree of divorce. Davis v. Davis, 194 Miss. 343, 12 So. 2d 435, 1943 Miss. LEXIS 75 (Miss. 1943).

Remarriage of a divorced wife entitled the divorced husband to a reassignment of a policy of insurance on his life, assigned by him to her under the alimony provisions of a divorce decree, requiring such assignment for the evident purpose of protecting her against failure of alimony payments by the death of the husband, since under the divorce decree the divorced wife did not receive absolute ownership of the policy. East v. Collins, 194 Miss. 281, 12 So. 2d 133, 1943 Miss. LEXIS 58 (Miss. 1943).

III. SUPPORT OF CHILDREN.

22. In general.

Chancellor did not err in concluding that there was no showing that the mental and emotional well-being of the child was in danger in the mother's care; the mother removed the conditions in the home that could have had an adverse effect on the child had they been allowed to continue. Ruth v. Burchfield, 23 So. 3d 600, 2009 Miss. App. LEXIS 928 (Miss. Ct. App. 2009).

Trial court erred in ordering a divorced father to reimburse the mother's expenses for attorney fees to defend their child in a murder trial; the supreme court found no provisions within Miss. Code Ann. § 93-5-23 or Miss. Code Ann. § 93-11-65 that could be extended to payment of criminal defense expenses, which in the supreme court's view, did not fit under the general provisions of maintenance, support, or education for a child. Edmonds v. Edmonds, 935 So. 2d 980, 2006 Miss. LEXIS 383 (Miss. 2006).

Trial court's determination that a twenty-year-old child was emancipated for purposes of a divorce action, despite the fact that the child met none of the three legal requirements listed in Miss. Code Ann. § 93-5-23 for emancipation, was harmless error; the child continued to live with his father until after his twenty-first birthday, and the father did not ask for child support in his pleadings or at trial. Ward v. Ward, 825 So. 2d 713, 2002 Miss. App. LEXIS 502 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in determining that the former husband was entitled to a credit for the amount he paid as child support past the time his oldest child turned 21-years-old as the former husband's duty of support terminated by operation of law at the time the older child turned 21-years-old. Houck v. Houck, 812 So. 2d 1139, 2002 Miss. App. LEXIS 111 (Miss. Ct. App. 2002).

When the equitable distribution of property acquired during the marriage is accomplished, the resultant division of assets and liabilities must be factored into the determination of other financial matters such as alimony and child support. Bennett v. Bennett, 650 So. 2d 517, 1995 Miss. LEXIS 86 (Miss. 1995).

A chancellor erred in ordering a father to pay child support without taking into consideration all the relevant factors, including the father's ability to pay and the mother's income. Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

A disabled child's receipt of Supplemental Security Income from the Social Security Administration does not reduce parental support obligations. Hammett v. Woods, 602 So. 2d 825, 1992 Miss. LEXIS 299 (Miss. 1992).

The conveyance of a former wife's interest in her residence to her former husband for a cash payment and mortgage assumption was a "sale" within the meaning of a property settlement agreement which was incorporated into the parties' final divorce decree, which provided that the former husband would continue to pay $350 per month toward the housing expenses of the parties' 2 minor children in the event the parties sold the residence. Thus, the former husband's obligation to provide financially for the housing expenses of his 2 children continued, in spite of his argument that his housing support obligation terminated because the transaction was not a "sale" within the meaning of the agreement in that it was not a sale to a third party. Webster v. Webster, 566 So. 2d 214, 1990 Miss. LEXIS 530 (Miss. 1990).

Social Security benefits received by a mother for the benefit of a minor child under the Social Security Act are considered an alternative source of payment that satisfies child support and should be credited toward that obligation. Moreover, child support obligations are to be off-set, not only to the extent of payments actually received under the Social Security Act, but also for payments that the child was entitled to receive, based on the parent's retirement. Thus, a father's child support obligations would be credited for social security benefits that the minor child was entitled to receive based on the father's retirement, even though social security benefits were elected based on the child's step-father's retirement. Bradley v. Holmes, 561 So. 2d 1034, 1990 Miss. LEXIS 238 (Miss. 1990).

Under § 93-5-23 and § 93-11-65, regular child support is but one type of expense which the court may award for the care and maintenance of children. Regular child support refers to the sums of money which the particular parent is ordered to pay for the child's basic, necessary living expenses, namely food, clothing and shelter. Other sums which a parent may be ordered to pay for the care and maintenance of the child are the expenses of a college or other advanced education. Other items which may properly be awarded pursuant to a valid child care and maintenance order are health related expenses such as reasonable and necessary medical, dental, optical, and psychiatric/psychological expenses. A parent can also be required to absorb insurance expenses such as maintaining medical and hospitalization insurance on the child, and maintaining a life insurance policy on his or her own life with the child named as beneficiary. Additionally, a trial court may require a parent to furnish an automobile and make mortgage payments as part of an award for the care and maintenance of children. The foregoing items are not an exclusive listing, but are merely examples of the real distinction between regular child support and other types of payments for which the parent may become obligated under the terms of a valid child care and maintenance order under §§ 93-5-23 and 93-11-65. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

The object of any child custody and support decree is the accomplishment of that which is in the best interest of the child. Leonard v. Leonard, 486 So. 2d 1240, 1986 Miss. LEXIS 2426 (Miss. 1986).

Duty of parent to support children after divorce is not affected by fact that parent adopted children of other spouse 3 months prior to spouse's separation from parent. Adams v. Adams, 467 So. 2d 211, 1985 Miss. LEXIS 1979 (Miss. 1985).

A trial court may, within the sound discretion of the chancellor, require contribution from the wife toward the support and maintenance of minor children of the marriage. McInnis v. McInnis, 227 So. 2d 116, 1969 Miss. LEXIS 1335 (Miss. 1969).

A father is primarily required by law to support and maintain his children. King v. King, 191 So. 2d 409, 1966 Miss. LEXIS 1213 (Miss. 1966).

After a decree awarding a divorce and custody of children of the marriage, the court may from time to time make decrees in regard to the maintenance of the children. Crum v. Upchurch, 232 Miss. 74, 94 So. 2d 321, 98 So. 2d 117, 1957 Miss. LEXIS 446, 1957 Miss. LEXIS 447 (Miss. 1957).

It is the duty of a father to support his minor child even though it is not in his custody, but that of the mother. Lide v. Lide, 201 Miss. 849, 30 So. 2d 51, 1947 Miss. LEXIS 455 (Miss. 1947).

The obligation of a father to pay child support money under a divorce decree, in the absence of a change in the decree, is not relieved by misconduct of the child's mother which might be violative of the decree. Lide v. Lide, 201 Miss. 849, 30 So. 2d 51, 1947 Miss. LEXIS 455 (Miss. 1947).

In divorce proceeding court had power to enter decree requiring that divorced father pay specified sum monthly to divorced mother for support of the parties' child. Collins v. Collins, 171 Miss. 891, 158 So. 914, 1935 Miss. LEXIS 21 (Miss. 1935).

Duty of father to support children, whose custody awarded to wife, remains and divorced wife may recover such support from him. Lee v. Lee, 135 Miss. 865, 101 So. 345, 1924 Miss. LEXIS 89 (Miss. 1924).

It is parent's duty to support infant child. Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146, 1919 Miss. LEXIS 155 (Miss. 1919).

23. Amount of support.

Appellate court could not find that a chancellor exceeded the authority given to the chancellor by the parties in a divorce by assigning responsibility for the expenses associated with a minor child's car(automobile tag, maintenance and insurance) to the father. Griner v. Griner,—So. 3d —, 2017 Miss. App. LEXIS 388 (Miss. Ct. App. June 27, 2017).

In calculating child support, the trial court abused its discretion in attributing any future rental income to the husband, as it had awarded the rental property to the wife. Collins v. Collins, 112 So. 3d 428, 2013 Miss. LEXIS 285 (Miss. 2013).

In calculating child support, the trial court erred in arbitrarily determining a husband's monthly income to exclusion of the undisputed evidence he provided, due to his failure to comply with Miss. Unif. Ch. Ct. R. 8.05, because the remedy for his violation was to hold him in contempt, not to disregard the credible evidence he provided. Collins v. Collins, 112 So. 3d 428, 2013 Miss. LEXIS 285 (Miss. 2013).

Chancellor properly declined to apply the child support guidelines because the husband had no employment income, due to his incarceration; but as he had other assets, including half the equity in the marital home, the chancellor properly ordered him to pay $ 225 per month in child support, plus support retroactive to the date of his incarceration, secured by a lien against his interest in the marital home. Avery v. Avery, 864 So. 2d 1054, 2004 Miss. App. LEXIS 91 (Miss. Ct. App. 2004).

Circumstances affecting child support include parents' health, income sources, income tax obligations, and earning capacities, child's reasonable needs, obligee's reasonable needs, obligor's necessary living expenses, and other relevant facts and circumstances shown by the evidence. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

A $350 per month award to be paid by a father for the support of his 3 children was manifestly erroneous where the father's adjusted gross income based on his salary, which was his only significant and reliable source of income, was approximately $2,350 per month, the guidelines set forth in § 99-19-101 suggested that he should pay $495 per month in child support, and the chancellor failed to make a specific finding on the record that application of the statutory guidelines would be unjust or inappropriate. Draper v. Draper, 658 So. 2d 866, 1995 Miss. LEXIS 362 (Miss. 1995).

A chancellor did not err in deviating from the child support guidelines set forth in § 43-19-101 when determining the amount of support to be paid by a father where she stated her reasons for departing from the guidelines, including the fact that there was "considerable question as to the actual earnings" of the father. Grogan v. Grogan, 641 So. 2d 734, 1994 Miss. LEXIS 315 (Miss. 1994).

A chancellor did not abuse her discretion in ordering a father to pay $600 per month for the support of 2 children, in spite of the father's argument that $600 per month constituted 27.5 percent of his adjusted gross income which was 7.5 percent greater than the percentage suggested by the statutory guidelines, where the mother's monthly net income was $1,168, her monthly expenses were $2,225, the chancellor was skeptical as to the father's true earnings, and the evidence suggested that the father had some alternative source of support that he had not disclosed. Grogan v. Grogan, 641 So. 2d 734, 1994 Miss. LEXIS 315 (Miss. 1994).

A chancellor did not abuse his discretion in ordering a father to pay $300 in child support for his 14-year-old son, in spite of the father's argument that the amount was excessive because it exceeded 14 percent of his adjusted gross income which was above the statutory guidelines for one child set forth in § 43-19-101, where the record indicated that the father would be able to support himself as well as pay child support in the amount awarded. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

A chancellor erred in awarding child support to be paid by the father in the amount of $1,000 per month where the father earned approximately $8,000 per month, and it appeared that the chancellor had used $4,155 as the figure for the father's. Brennan v. Brennan, 638 So. 2d 1320, 1994 Miss. LEXIS 331 (Miss. 1994).

A child support award to be paid by a mother for the support of one child was not excessive where the mother's income was almost triple that of the father's, and the chancellor followed the guidelines set out in § 43-19-101 and awarded the 14 percent of adjusted gross income suggested by the statute for the support of a single child. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

A child support award would be reversed and remanded where the award was greater than the amount recommended by the guidelines in § 43-19-101, the chancellor did not make a specific finding as to the father's income or make any reference to the statutory child support guidelines, and the final decree did not indicate the basis for the child support award. Dufour v. Dufour, 631 So. 2d 192, 1994 Miss. LEXIS 41 (Miss. 1994).

A chancellor abused his discretion in ordering a father to pay child support in the amount of $520 per month where, pursuant to the guidelines set forth in § 43-19-101, the child support should have been $362 per month, and the father's expenses exceeded his net income by almost $250 a month. Dunn v. Dunn, 609 So. 2d 1277, 1992 Miss. LEXIS 785 (Miss. 1992).

Although a chancellor's award of child support to be paid by a father was not, standing alone, an abuse of discretion, the amount awarded for child support was an abuse of discretion when considered in conjunction with the alimony award and the income of the father. McEachern v. McEachern, 605 So. 2d 809, 1992 Miss. LEXIS 479 (Miss. 1992).

A chancellor's departure from the guidelines set forth in § 43-19-101 in determining an appropriate amount of child support was not error where the chancellor followed the statutory method of rebutting the presumption that 26 percent of the father's adjusted gross income was the appropriate amount of child support, and the record included a written finding, as required by § 43-19-103, that the guidelines were inappropriate in that particular case. McEachern v. McEachern, 605 So. 2d 809, 1992 Miss. LEXIS 479 (Miss. 1992).

It was not error for a trial court to consider a father's overtime pay in measuring his earning capacity to determine an appropriate child support award where the trial court considered overtime in determining both parents' earning capacity, the father had worked overtime consistently for two years and had practically doubled his base salary, and the award was not of such an amount as to create the belief that the trial court gave undue weight to the father's overtime income. Gillespie v. Gillespie, 594 So. 2d 620, 1992 Miss. LEXIS 67 (Miss. 1992).

A provision in a child support decree ordering an automatic $50 per month increase in child support when the child started kindergarten was improper where there was no evidence that kindergarten would cost more than what was previously being spent; if the automatic increase was a modification, it was improper since a modification can result only from substantial and material changes that follow the decree to be modified, and the automatic increase lacked the specificity required for an escalation clause since the specific basis for the calculation of the increase was not provided. Gillespie v. Gillespie, 594 So. 2d 620, 1992 Miss. LEXIS 67 (Miss. 1992).

Section 43-19-101, which sets forth child support award guidelines, is only a guideline and may not determine the specific need or the specific support required; the determination of the amount of support needed must be made by a chancellor who hears all the facts, views the witnesses, and is informed at trial of the circumstances of the parties and particularly the circumstances of the child. Gillespie v. Gillespie, 594 So. 2d 620, 1992 Miss. LEXIS 67 (Miss. 1992).

A chancellor erred in disallowing interest on past due child support payments, and judgment would be entered for interest at the rate of 8 percent per annum on the past due amount of child support. Adams v. Adams, 591 So. 2d 431, 1991 Miss. LEXIS 843 (Miss. 1991).

A child support award of $325 per month was not so high as to constitute reversible error where the mother's adjusted monthly gross income was between $2100 and $2265, the father, who had custody of the child, performed many in-kind services for the child, and the mother had paid no direct support for the child for a minimum of 5 years. Smith v. Smith, 585 So. 2d 750, 1991 Miss. LEXIS 582 (Miss. 1991).

A child support award of $400 per month for one 6-year-old child was excessive where the father, who had custody of the child, only asked for $100 per month in child support, the chancellor recognized that $400 per month was not required at the time for child support, and both parents had approximately the same earnings. The chancellor should have considered the amount of money which reasonably should have been required in child support from each parent, but apparently considered only the guidelines developed by the Governor's Commission on Child Support. Jellenc v. Jellenc, 567 So. 2d 847, 1990 Miss. LEXIS 561 (Miss. 1990).

A child support award ordering a father to pay $400 per month in child support, to maintain medical and hospitalization insurance on the children, to be responsible for ½ of all reasonable and necessary medical bills not covered by insurance, and to pay ½ of the taxes and insurance on the marital home and real property was excessive where the father's gross income was $1,386, his net income was $973.60, he was ordered to pay several debts accumulated during the marriage, and he had to incur separate living expenses for himself as a result of the divorce. Cupit v. Cupit, 559 So. 2d 1035, 1990 Miss. LEXIS 190 (Miss. 1990).

Award of $300 per month child support was not against overwhelming weight of evidence based on facts and circumstances of case. McNally v. McNally, 516 So. 2d 499, 1987 Miss. LEXIS 2956 (Miss. 1987).

Mother, who received full child support during time she had custody of the parties' child, and who did not complain when child moved in with father, and accepted the arrangement for 20 months with $200 a month child support being paid directly to the child by the father, was not entitled to $4,000 back child support with interest, as this would constitute a windfall to her forbidden by equity and good conscience. Alexander v. Alexander, 494 So. 2d 365, 1986 Miss. LEXIS 2644 (Miss. 1986).

24. Education expenses.

Though there was no evidence as what portion of the parties' daughter's educational loans was spent before she turned 21, the chancellor did not err in ordering the father to pay 65 percent of the loans. Wooldridge v. Wooldridge, 856 So. 2d 446, 2003 Miss. App. LEXIS 279 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 52 (Miss. 2004).

The court did not err in ordering the wealthy parents of a college-bound child to pay the costs of her college education without requiring the child to pay some or all of her expenses from her own substantial estate. Saliba v. Saliba, 753 So. 2d 1095, 2000 Miss. LEXIS 35 (Miss. 2000).

The court did not err in ordering the wealthy parents of a college-bound child to pay equal shares of her college expenses, notwithstanding the father's assertion that the wife's wealth was triple that of his own, where both parents had more than ample financial ability to pay for their child's college education. Saliba v. Saliba, 753 So. 2d 1095, 2000 Miss. LEXIS 35 (Miss. 2000).

It was not error for the trial court to order the father of a college-bound child to pay half of her college expenses, including out-of-state tuition, sorority expenses and car insurance in light of the father's wealth and the absence of any hardhip caused by such order. Saliba v. Saliba, 753 So. 2d 1095, 2000 Miss. LEXIS 35 (Miss. 2000).

A father was not entitled to credit against past due child support payments for the sum of $1,301.24, which he had deposited in his daughter's bank account from which she paid her educational expenses at college, where the original divorce decree provided for child support payments to be made in addition to any educational expenses. Adams v. Adams, 591 So. 2d 431, 1991 Miss. LEXIS 843 (Miss. 1991).

A trial court's finding that a daughter was not emancipated despite the fact that she was 22 years old and a fifth-year college student was error; the father's obligation to support his daughter, absent a contract, terminated after her majority. However, the father's 18-year-old daughter was not emancipated where she did not work full time and her earnings were insufficient to support the necessities for her continued education, she was enrolled as a student at Mississippi State University, and her record as a student was acceptable; the father was therefore required to continue to support the daughter at the rate of $300 per month. Duncan v. Duncan, 556 So. 2d 346, 1990 Miss. LEXIS 15 (Miss. 1990).

Where the minor child is worthy of and qualified for a college education and shows an aptitude therefor it is a primary duty of the father, if financially able to do so, to provide funds for the college education of the minor child in the custody of the mother, where the father and mother are divorced and living apart. Pass v. Pass, 238 Miss. 449, 118 So. 2d 769, 1960 Miss. LEXIS 426 (Miss. 1960).

Where a divorced husband agrees to placing of his children in boarding school as provided for in a decree and where also the court expressly adjudicated the children to be wards of the court, the father was under a duty to pay the schools in which the children were placed. Savell v. Savell, 213 Miss. 869, 58 So. 2d 41, 1952 Miss. LEXIS 436 (Miss. 1952).

25. Medical expenses.

Although awards of other sums in addition to the regular child support may be ordered, the payment of health insurance is not mandatory. Baldwin v. Baldwin, 788 So. 2d 800, 2001 Miss. App. LEXIS 71 (Miss. Ct. App. 2001).

Psychological expenses incurred as a result of treatment of a minor child for drug and alcohol abuse under the direction of an accredited medical facility were "medical expenses" to be paid by the child's father in accordance with the divorce decree. Martin v. Martin, 538 So. 2d 765, 1989 Miss. LEXIS 68 (Miss. 1989).

Divorced custodial parent has prerogative to incur substantial expenses for orthodontic care for children and to require supporting noncustodial parent to pay bill, in accordance with agreement of parties, incorporated into divorce decree, requiring noncustodial parent to pay medical and dental expenses of children, so long as care and treatment is reasonably necessary and cost reasonable in amount; amount of bill is not rendered unreasonable merely because noncustodial parent would have selected less expensive treatment. Clements v. Young, 481 So. 2d 263, 1985 Miss. LEXIS 2373 (Miss. 1985).

Bills and prescription receipts evidencing charges made for medical and dental treatment furnished to children provide prima facie showing, in accordance with § 41-9-119, in child support proceeding, that medical and dental expenses represented by bills are reasonable in amount and were necessarily incurred. Clements v. Young, 481 So. 2d 263, 1985 Miss. LEXIS 2373 (Miss. 1985).

In a divorce action the chancery court has the power to impose liability for unusual, unforeseen, emergency obligations such as medical attention for son receiving a serious injury playing football and that of daughter badly injured in automobile wreck. Castleberry v. Castleberry, 214 Miss. 94, 58 So. 2d 67, 1952 Miss. LEXIS 448 (Miss. 1952).

26. Escalation clauses.

A chancellor erred in ordering a father to pay future additional child support in the amount of 10 percent of his adjusted gross income exceeding $50,000 where the chancellor relied solely upon the father's possible future income and did not include other factors such as the mother's separate income, the inflation rate, and the needs and expenses of the children. Morris v. Stacy, 641 So. 2d 1194, 1994 Miss. LEXIS 368 (Miss. 1994).

When employing escalation clauses for child support, the bench and bar are urged to: (a) specify with certainty the specific cost of living or consumer price index which is to be utilized; (b) show the applicable ratio (present CPI is to ascertainable CPI as present award is to future award); (c) calculate the base figure as of the date of judgment; (d) establish frequency of adjustment (nothing less than yearly is suggested); and (e) establish an effective date for each adjustment (e.g. anniversary of date of judgment.) Caution should be exercised in applying a consumer price index that comports with Mississippi's economic picture, as well as the parent's job status. Wing v. Wing, 549 So. 2d 944, 1989 Miss. LEXIS 443 (Miss. 1989).

Escalation clauses should be included in child support decrees since strong public policy calls for provision for increased financial needs of children without additional litigation, incurring attorney's fees, court congestion and delay, and emotional trauma. Wing v. Wing, 549 So. 2d 944, 1989 Miss. LEXIS 443 (Miss. 1989).

27. Termination or nonsupport.

Because the chancellor found that the children were emancipated, as they were 24 and 22 years old at the time of the 2012 order, the chancellor erred in requiring the father to pay child support, college expenses, and life and health insurance for the benefit of the children. Archie v. Archie, 126 So. 3d 937, 2013 Miss. App. LEXIS 684 (Miss. Ct. App. 2013).

Chancery court did not abuse its discretion by declining to require a parent to provide post-majority financial support for the parent's child because Mississippi law did not vest the court with the authority to mandate that parents financially support their offspring post-majority. The duty imposed for a parent to support its child does not extend beyond the child's minority, which terminates when the child reaches twenty-one years of age. Hays v. Alexander, 114 So. 3d 704, 2013 Miss. LEXIS 324 (Miss. 2013).

Where one child was married and another quit school, the children were not necessarily emancipated under Miss. Code Ann. § 93-5-23; it was up to the chancellor to determine such, especially since the father did not seek judicial relief from his obligation, but decided to engage in self-help, and the lump sum payments did not automatically terminate until the emancipation of the youngest child. Strack v. Sticklin, 959 So. 2d 1, 2006 Miss. App. LEXIS 634 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 371 (Miss. 2007).

Father's minor child was incarcerated for life following his conviction for murder; however, the trial court did not abuse its discretion in finding that the child was not emancipated because the father failed to present any authority that would warrant the conclusion that a child was emancipated when incarcerated. Edmonds v. Edmonds, 935 So. 2d 980, 2006 Miss. LEXIS 383 (Miss. 2006).

Chancellor did not err in modifying an original order of a county court that had improperly terminated child support when the child reached 16 years of age, because, Miss. Code Ann. § 93-5-23 (2004) clearly mandated that child support continued until the child attained the age of 21 years of age or was otherwise emancipated and the record showed that the child had not reached the age of 21. And, even if the appellate court held that the mother was estopped from bringing the action due to laches, child support could still be viably pursued by the child under Mississippi law. Owen v. Wilkinson, 915 So. 2d 493, 2005 Miss. App. LEXIS 914 (Miss. Ct. App. 2005).

Trial court properly granted a father summary judgment under Miss. R. Civ. P. 56 in the father's action seeking to terminate his child support obligation on the ground that the children had attained the age of majority; where, absent an agreement to the contrary, the father was not required to provide child support under Miss. Code Ann. §§ 93-5-23 and 93-11-65 after the children reached age 21, the father's obligation had ceased, as the children were at least 21, and there was no written agreement providing for post-emancipation child support payments. Little v. Little, 878 So. 2d 1086, 2004 Miss. App. LEXIS 713 (Miss. Ct. App. 2004).

Based upon the daughter's decision to become pregnant, not complete her education, and not work full-time, as well as the baby's father providing financial support for the daughter's child, the trial court did not err in finding that the daughter was an emancipated adult. Caldwell v. Caldwell, 823 So. 2d 1216, 2002 Miss. App. LEXIS 450 (Miss. Ct. App. 2002).

Although a child possibly met the technical statutory requirements for emancipation, he was unable to support himself on his own, thus defeating the requirement for emancipation. Wesson v. Wesson, 818 So. 2d 1272, 2002 Miss. App. LEXIS 335 (Miss. Ct. App. 2002).

Emancipation occurred when the child of the former husband and the former wife turned 21 and meant that the former husband had no further obligation to provide child support for that child; moreover, the trial court, in its discretion, had the right to grant the former husband a credit for child support he paid on behalf of that child past the time she was emancipated and did not abuse its discretion in granting him such a credit. Houck v. Houck, 2001 Miss. App. LEXIS 517 (Miss. Ct. App. Dec. 11, 2001), op. withdrawn, sub. op., 812 So. 2d

1139, 2002 Miss. App. LEXIS 111 (Miss. Ct. App. 2002).

Chancery court's finding that a daughter who had initially lived with her mother, the father's ex-wife, after the father and the ex-wife were divorced but who, after the death of her mother, lived in various places with various persons, including the father for a short period of time, and worked at various jobs, was not emancipated by her actions after moving out of the father's home because of the father's drinking and therefore awarding the daughter unpaid back child support upon the daughter's suit filed shortly after the daughter turned 21 was warranted. Burt v. Burt, 841 So. 2d 108, 2001 Miss. LEXIS 204 (Miss. 2001).

Evidence supported the determination that the parties' oldest child became emancipated in April, 1997, rather than in August, 1997, where (1) the child had discontinued full-time enrollment in school and had obtained full-time employment by April, 1997, and (2) although she was living in the custodial home, she had established independent living arrangements because her mother had moved to another state. Ligon v. Ligon, 743 So. 2d 404, 1999 Miss. App. LEXIS 269 (Miss. Ct. App. 1999).

Evidence supported the conclusion that the parties' 18 year old son was not emancipated where (1) although he had a full time job, he still lived with his mother as his income was insufficient to allow him to establish an independent residence, and (2) he expressed a desire to go to college and testified that he did not do so only because he could not afford it. Andrews v. Williams, 723 So. 2d 1175, 1998 Miss. App. LEXIS 982 (Miss. Ct. App. 1998).

When the parties' daughter moved into an apartment with her boyfriend, she removed herself from her parents' care and control and became emancipated; therefore, the mother was no longer entitled to receive child support for her, even though the daughter subsequently returned to her mother's home. Rennie v. Rennie, 718 So. 2d 1091, 1998 Miss. LEXIS 336 (Miss. 1998).

A trial court did not err in declining to order a father to pay child support where the mother and the father each had custody of one child, the court's decision was based on the fact that each party would have the responsibility for the child in his or her custody, and the parties' respective incomes were almost the same. Polk v. Polk, 559 So. 2d 1048, 1990 Miss. LEXIS 198 (Miss. 1990).

The fact that one child became emancipated and the other child moved into the father's home did not automatically grant the father the right to receive a credit for child support payments made after that point in time. However, the father was allowed the opportunity to prove before a trial judge that he should receive such a credit. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

The age of majority for purposes of child care and maintenance orders issued pursuant to § 93-5-23 and § 93-11-65 is 21 years. Thus, the courts have no authority under these statutes to require parents to provide for the care and maintenance of their child after the child becomes emancipated, by reaching the age of 21, or otherwise, whichever occurs first. This does not foreclose the enforceability of agreements by the parties providing for the post-emancipation care and maintenance of their children, whether those agreements are separate contracts, or have been incorporated into the divorce decree. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

When retarded son who lived with his mother became an adult, his father was no longer obligated to make payments for his support pursuant to the child support decree entered at the time of the parents' divorce. Watkins v. Watkins, 337 So. 2d 723, 1976 Miss. LEXIS 1590 (Miss. 1976).

28. Practice and procedure.

Mother was not provided notice that she might be required to defend a claim of child support nor was there a suggestion in the record that support payments from the mother were even being contemplated by the court on its own or asked for by the father. Accordingly, the chancery court's imposition of child-support obligations upon the mother was reversed, based on procedurally inadequate notice rather than a review of the merits. Porter v. Porter, 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

Chancery court erred in making an increase in child support retroactive from the date of the parties' divorce judgment under Miss. R. Civ. P. 60(b) in order to rectify a mistake in the husband's statement of his income because a Rule 60(b) claim was time-barred absent a finding of fraud upon the court. Walton v. Snyder, 984 So. 2d 343, 2007 Miss. App. LEXIS 814 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 315 (Miss. 2008).

Limitations period under Miss. Code Ann. § 15-1-43 did not bar a contempt action to recover child support payments 12 years after a divorce decree was entered because the youngest child had until 2008 to bring the action under the savings clause of Miss. Code Ann. § 15-1-59. Strack v. Sticklin, 959 So. 2d 1, 2006 Miss. App. LEXIS 634 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 371 (Miss. 2007).

Upon the parties' divorce, the mother was granted paramount physical custody of the parties, minor child; the chancellor did not err in ordering the father to pay $ 1,030 per month in child support and granting the income tax child dependency exemption to the father until such time as the mother could show an income of over $ 50,000 per year. A chancellor has the authority to require that a custodial parent waive the income tax child dependency exemption in favor of the noncustodial parent. Fitzgerald v. Fitzgerald, 914 So. 2d 193, 2005 Miss. App. LEXIS 240 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 749 (Miss. 2005).

In a child custody and support modification action, the issue was whether the lower court committed reversible error by approving and signing a consent judgment which was not approved or signed by the father or his attorney. Further, no terms were ever announced in open court, recorded by a court reporter, or approved by counsel as required by Miss. Unif. Ch. Ct. R. 3.09 and 5.03,; the appellate court held that given those facts, it was without proof of substantial credible evidence to support the chancellor's order, and the order was vacated and the matter remanded for proper compliance with the aforementioned rules. Samples v. Davis, 904 So. 2d 1061, 2004 Miss. LEXIS 1487 (Miss. 2004).

Where a case was remanded because the chancellor failed to make sufficient findings in support of his division and classification of marital property, the chancellor also had to revisit the issue of child support. Lauro v. Lauro, 847 So. 2d 843, 2003 Miss. LEXIS 272 (Miss. 2003).

The chancery judge who has in personam jurisdiction over the parties of the marriage may deal not only with divorce but also with care, custody (which includes visitation) and maintenance (support) of the children. Peters v. Peters, 744 So. 2d 803, 1999 Miss. App. LEXIS 147 (Miss. Ct. App. 1999).

A chancellor properly refused to have an arrearage of approximately $4300 in child support payments placed in a trust fund that would begin to generate a monthly income for a hearing-impaired child when he reached the arbitrarily-designated age of 36, since past due child support payments become vested as of the date they were due and cannot be modified; furthermore, the chancellor would have abused his discretion by allowing the funds to be placed in a trust that was not established and maintained in accordance with applicable regulations and guidelines governing governmental assistance programs for the disabled. Hammett v. Woods, 602 So. 2d 825, 1992 Miss. LEXIS 299 (Miss. 1992).

A child support agreement, submitted to the court pursuant to § 93-5-2, which ends support for a child before that child reaches the age of 21 or is otherwise emancipated, is unenforceable as to the rights of the child. Lawrence v. Lawrence, 574 So. 2d 1376, 1991 Miss. LEXIS 17 (Miss. 1991).

The guidelines for child support awards set forth in § 43-19-101 must not control a chancellor's award of child support. The national guideline must not dictate the amount of food, the need of clothing, the requirement of education or the standard of living of the children. Rather, this should be done by a chancellor who hears all the facts, views the witnesses, and is informed at trial of the circumstances of the parties and particularly the circumstances of the children. The guidelines may be received and considered in all support matters as relevant, but the guidelines may not determine the specific need or the specific support required; this is to be done by a chancellor at a time real, on a scene certain, and with a knowledge special to the actual circumstances and to the individual child or children. Thurman v. Thurman, 559 So. 2d 1014, 1990 Miss. LEXIS 185 (Miss. 1990).

Trial courts have the authority to allocate income tax dependency exemptions by ordering the custodial parent to sign the required release where the equities of the case favor such action. A trial court's authority to allocate the exemption to the non-custodial parent reduces the amount of income tax to be paid to the federal government, and produces a tax saving to the non-custodial parent which exceeds the moderate increase in the tax liability of the custodial parent. This result will almost always prevail where, as is often the case, the custodial parent's adjusted gross income is less than the adjusted gross income of the non-custodial parent. In such a situation, the after-tax spendable income of the non-custodial parent is increased. This savings in tax liability could easily be channeled into increased child support or other payments thereby rendering the custodial parent's after-tax spendable income, including child support or other payments, the same or better than if he or she had claimed the dependency exemption. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

Award to wife of alimony and child support where such is not sought in pleadings is error, because it deprives husband of due process, although such judgments are not void; therefore, where husband paid alimony and child support for 3 years before complaining about due process violation, decree is final and due process right has been waived. Miller v. Miller, 512 So. 2d 1286, 1987 Miss. LEXIS 2815 (Miss. 1987).

To extent that there is legal duty for parent to support adult incapacitated child, duty runs from parent to child, not from one divorced spouse to other; any action for support of child should therefore be maintained by or on behalf of adult child against parent from whom support is sought, not by suit brought by one parent against other for modification of divorce decree. Taylor v. Taylor, 478 So. 2d 310, 1985 Miss. LEXIS 2288 (Miss. 1985).

The chancery court's as authority under this section to make such orders as are deemed equitable and just may be exercised only after a full and complete hearing after due notice of the purpose of the hearing at which the parties have an opportunity to call witnesses and be heard; thus, in an uncontested divorce proceeding in which no pleading asking for support of the minor children was filed by defendant wife, who had the children with her, it was error for the court arbitrarily to fix a monthly sum that the father should contribute to the children's support, due process requiring that the father be given fair notice by an appropriate pleading that the question of support would be under consideration. Fortenberry v. Fortenberry, 338 So. 2d 806, 1976 Miss. LEXIS 1633 (Miss. 1976).

A petition for modification of a provision for the support of children, which alleges that the custodian mother is employed, contains enough to entitle petitioner to a hearing, though it does not allege the amount of her earnings. Bailey v. Bailey, 246 Miss. 390, 149 So. 2d 478, 1963 Miss. LEXIS 453 (Miss. 1963).

29. Visitation.

There was no error in granting supervised visitation as an ex-husband had drug and alcohol issues, there were questions concerning his moral fitness, and he had little or no contract with the child for some time. McDuffie v. McDuffie, 21 So. 3d 685, 2009 Miss. App. LEXIS 628 (Miss. Ct. App. 2009).

Stepfather's rights under the Due Process Clause of U.S. Const. Amend. XIV were not violated by the chancery court's dismissal of his action seeking to enforce a visitation order against a father because the clause protected the fundamental right of parents to make decisions concerning the care, custody, and control of their children and the stepfather had no visitation rights. Pruitt v. Payne, 14 So. 3d 806, 2009 Miss. App. LEXIS 481 (Miss. Ct. App. 2009).

Record failed to demonstrate that restrictions on visitation were necessary to prevent harm to minor children; although the wife testified that the husband had threatened to disappear with the children 10 years prior to the divorce action, there was no testimony that the husband made any such statements recently, or had ever made any effort to harm the children. Cassell v. Cassell, 970 So. 2d 267, 2007 Miss. App. LEXIS 844 (Miss. Ct. App. 2007).

Final judgment of divorce provided reasonable visitation as specifically dictated in the record and agreed by the parties; however, the record did not indicate any specific visitation schedule or agreement between the parties concerning visitation between the father and his children; therefore, the appellate court remanded on this issue and ordered that the chancellor enter a specific visitation schedule. Lauro v. Lauro, 924 So. 2d 584, 2006 Miss. App. LEXIS 161 (Miss. Ct. App. 2006).

Substantial basis for Chancellor's finding of viable relationship between minor child and his paternal grandparents, supporting grandparents' petition for visitation rights following parents' divorce, was provided by evidence that grandparents gave financial support to parents before parents' separation through use of grandparents' gas credit card and monetary support, and that grandparents regularly visited child both before and after parents' separation. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Substantial basis for Chancellor's finding that granting visitation rights to minor child's paternal grandparents was in child's best interest, supporting grandparents' petition for visitation rights following parents' divorce, was provided by evidence that child would have little exposure to his father, who was stationed away from home as member of United States Navy, but for child's contact with grandparents, who exchanged videotapes with father. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Granting paternal grandparents right to every-other-weekend visitation with their grandchild was not excessive, where primary basis was father's inability to exercise his parental visitation rights due to his being stationed away from home as member of United States Navy, and where the right was to be concurrent with any visitation exercised by father. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Natural grandparents have no common-law right of visitation with their grandchildren; such right must come from legislative enactment. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Natural grandparents' statutory right to visit their grandchildren is not as comprehensive as parents' visitation rights. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

A chancellor abused his discretion in requiring that during a mother's visitation with her minor child the child could not be in the presence of "any male companion not related to her by blood or marriage," since such a sweeping restriction was clearly overbroad; the fact that a parent is having an affair is not enough to create the danger requisite to limit visitation with a child. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

A chancellor abused his discretion in enjoining a father from having his children in the presence of his lover where there was no evidence that visitation in the mere presence of the father's lover would be harmful to the children. Dunn v. Dunn, 609 So. 2d 1277, 1992 Miss. LEXIS 785 (Miss. 1992).

The chancery court has the power to restrict visitation in circumstances which present an appreciable danger of hazard cognizable in law. Thus, a chancellor did not err in modifying a mother's visitation rights without a motion by the father for modification where the mother had proven that she was capable of secreting the children by refusing to deliver the children in defiance of a court order changing custody from the mother to the father, which could certainly be considered a cognizable danger. Newsom v. Newsom, 557 So. 2d 511, 1990 Miss. LEXIS 43 (Miss. 1990).

IV. DECREES.

30. Decree; generally.

A chancellor's finding that a wife was entitled to distribution of marital property and/or lump sum alimony was premature where the husband's principal asset was in bankruptcy, since the value of the husband's estate was not before the court due to the bankruptcy proceedings; the issues of property division and lump sum alimony should have remained in the trial court pending the conclusion of the bankruptcy proceedings. Heigle v. Heigle, 654 So. 2d 895, 1995 Miss. LEXIS 228 (Miss. 1995).

A chancellor did not err in entering a judgment of divorce nunc pro tunc after the death of the husband where the chancellor had fully considered all issues raised by the parties and rendered his opinion prior to the husband's death. White v. Smith, 645 So. 2d 875, 1994 Miss. LEXIS 461 (Miss. 1994).

A chancellor may divide marital assets, real and personal, as well as award periodic and/or lump sum alimony as equity demands; moreover, all property division, lump sum or periodic alimony awards, and mutual obligations for child support should be considered together to determine that they are equitable and fair; to aid appellate review, findings of fact by the chancellor, together with the legal conclusions drawn from those findings, are required. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

Existing law regarding periodic alimony and child support is not altered by the law pertaining to the equitable division of marital assets; upon the dissolution of a marriage, the chancery court has the discretion to award periodic and/or lump sum alimony, divide real and personal property, including the divesting of title, and may consider awarding future interests to be received by each spouse. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

A chancellor erred in determining that a father was not entitled to regular overnight visitation with his minor son, where there was no substantial evidence in the record tending to show that such visitation would be detrimental to the son in any way, since non-custodial parents are presumptively entitled to regular overnight visitation with their children. Wood v. Wood, 579 So. 2d 1271, 1991 Miss. LEXIS 308 (Miss. 1991).

The principle that the litigation of divorce and of alimony are divisible applies to divorce decrees of both Mississippi courts and foreign courts. Weiss v. Weiss, 579 So. 2d 539, 1991 Miss. LEXIS 238 (Miss. 1991).

A husband had sufficient minimum contacts with Mississippi so that requiring him to submit to an adjudication of his rights in a divorce proceeding did not offend "traditional notions of fair play and substantial justice," where the husband was physically present in Mississippi at the time he was personally served, and he was domiciled in Mississippi for years and left the state incident to separation from his spouse and family. Chenier v. Chenier, 573 So. 2d 699, 1990 Miss. LEXIS 840 (Miss. 1990).

When a non-custodial parent has unsupervised visitation rights, the custodial parent has no right to interfere with the non-custodial parent's visitation with his or her children. Thus, a mother's wishes that her children not fly in a private plane was not sufficient to deny the father the right to provide flying lessons or to fly his children in his private airplane during his visitation hours, where there was no evidence that flying would endanger the children's lives or that the children were opposed to flying or taking flying lessons. Mord v. Peters, 571 So. 2d 981, 1990 Miss. LEXIS 716 (Miss. 1990).

A chancellor was not prohibited from awarding lump sum alimony and an equitable division of real property where the property was titled in the name of both parties. Gray v. Gray, 562 So. 2d 79, 1990 Miss. LEXIS 237 (Miss. 1990).

Visitation privileges should be reasonable and appropriate, fostering a positive and harmonious relationship between the children and parent. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

A chancellor did not err in severely restricting a mother's visitation with her children to not more than once per week, for no more than one and ½ hours, in the father's home, where the mother had secreted the children and refused to deliver them in defiance of a court order changing custody from the mother to the father; the safety and welfare of the minor children compelled the chancellor to act in their best interest, protecting them from abduction by the mother. Newsom v. Newsom, 557 So. 2d 511, 1990 Miss. LEXIS 43 (Miss. 1990).

Chancellor erred, where corporation was in no way made party to proceedings, in awarding to ex-wife corporate property, i.e., use of automobile belonging to ex-husband's corporation and allowance of up to $160 per month in purchases of drugs, cosmetics, etc., at ex-husband's pharmacy at 50 percent discount. Skinner v. Skinner, 509 So. 2d 867, 1987 Miss. LEXIS 2549 (Miss. 1987).

Chancery Court is within its authority concerning maintenance of children of marriage in providing that custodial parent shall have exclusive use and possession of marital residence, and issue of whether in interest of child entire 21 acres should be kept intact or 20 should be severed is type of question with respect to which Chancery Court is given some latitude. Regan v. Regan, 507 So. 2d 54, 1987 Miss. LEXIS 2441 (Miss. 1987), overruled, Tramel v. Tramel, 740 So. 2d 286, 1999 Miss. LEXIS 252 (Miss. 1999). But see Tramel v. Tramel, 740 So. 2d 286, 1999 Miss. LEXIS 252 (Miss. 1999).

The object of any child custody and support decree is the accomplishment of that which is in the best interest of the child. Leonard v. Leonard, 486 So. 2d 1240, 1986 Miss. LEXIS 2426 (Miss. 1986).

Divorce decree and property settlement agreement purporting to divest party of title to real property are not valid consent decree, which would be subject to modification, where decree is not signed and consented to in writing by parties. Spearman v. Spearman, 471 So. 2d 1204, 1985 Miss. LEXIS 2084 (Miss. 1985).

Where nothing in the record indicated that it would be detrimental to the welfare of the children for the father to take the children out of the county within the time when he was permitted to visit with them pursuant to a decree of divorce, and there was no showing that the father intended to take the children to visit the woman who was said to have been the cause of the divorce, the decree would be modified by the Supreme Court so as to permit the father to take his children out of the county for the time he was permitted to visit them. Dubois v. Dubois, 275 So. 2d 100, 1973 Miss. LEXIS 1348 (Miss. 1973).

A decree for child support and the use of an automobile, entered against a nonresident husband upon proof of publication only, is void for want of jurisdiction. Brookhaven Pressed Brick & Mfg. Co. v. Davis, 191 So. 2d 840, 1966 Miss. LEXIS 1225 (Miss. 1966).

Where a consent decree expressly directed the husband to make stated monthly payments for the support and maintenance of the children of the parties, provision of a final decree to the effect that in the event of an appeal with supersedeas the earlier decree should remain in full force and effect during the pendency of the appeal was not erroneous. Petersen v. Petersen, 238 Miss. 190, 118 So. 2d 300, 1960 Miss. LEXIS 395 (Miss. 1960).

The chancery court of the proper county may, in a proceeding by a mother having custody of a minor child, award judgment against the father for the child's support and education, notwithstanding the parents are divorced and the divorce decree made no provision for such allowance. Hill v. Briggs, 236 Miss. 43, 109 So. 2d 349, 1959 Miss. LEXIS 292 (Miss. 1959).

Where alimony and absolute divorce decrees bear same date, supreme court will presume that the former was granted first. Schaffer v. Schaffer, 209 Miss. 220, 46 So. 2d 443, 1950 Miss. LEXIS 381 (Miss. 1950).

In action for divorce and alimony, court may award alimony payable in lump sum or in monthly installments and may fix lien for payment thereof against property of husband with right on his part to discharge such lien and retain property, or court may order his property sold under execution after default in payment of alimony under decree fixing alimony in some definite amount in lump sum or in monthly installments. McCraney v. McCraney, 208 Miss. 105, 43 So. 2d 872, 1950 Miss. LEXIS 232 (Miss. 1950).

A wife had a right in an action for divorce to have the amount of an unpaid loan from her to her husband awarded to her in the decree. Oberlin v. Oberlin, 201 Miss. 228, 29 So. 2d 82, 1947 Miss. LEXIS 389 (Miss. 1947).

Court may decree wife alimony, although granting divorce to husband. Winkler v. Winkler, 104 Miss. 1, 61 So. 1, 1913 Miss. LEXIS 3 (Miss. 1913); Yelverton v. Yelverton, 200 Miss. 569, 28 So. 2d 176, 1946 Miss. LEXIS 324 (Miss. 1946).

Chancery court is not authorized to set aside a decree rendered at a former term and render another in lieu thereof, but only to change and modify the terms of a former decree in accordance with the after arising circumstances of the parties. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

Decree denying husband divorce and awarding wife custody of children, attorney's fees, and monthly support and granting lien on husband's lands to secure payment thereof, rendered by a court of competent jurisdiction having jurisdiction of the subject matter and of the parties, was not void but only erroneous because of an error apparent on the face of the decree. Todd v. Todd, 197 Miss. 819, 20 So. 2d 827, 1945 Miss. LEXIS 314 (Miss. 1945).

Chancery decree awarding wife custody of children, monthly support for herself and the children, granting a lien on husband's lands to secure payment thereof, and directing that, upon default, special execution should issue to the sheriff to advertise and sell such land, exceeded the power of the court in directing that the proceeds of the sale in excess of what would be required to satisfy costs and the instalments then due be impounded and retained by the sheriff as a trust fund out of which to provide payment of future instalments, and was subject to correction by injunction or bill of review. Todd v. Todd, 197 Miss. 819, 20 So. 2d 827, 1945 Miss. LEXIS 314 (Miss. 1945).

Where husband conveyed his interest in homestead to wife, and simultaneously entered into agreement with her whereby he agreed to relinquish possession upon becoming intoxicated, provision in divorce decree granted wife on grounds of habitual drunkenness and cruel and inhuman treatment, awarding wife title to the homestead as well as right of possession, together with the accumulated and impounded rent received therefrom since date of conveyance, was proper. Hemphill v. Hemphill, 197 Miss. 783, 20 So. 2d 79, 1944 Miss. LEXIS 328 (Miss. 1944).

Provision in decree awarding divorce to wife, directing sale of certain personalty and division of proceeds upon an arbitrary basis of one-half to each, was unwarranted, where trial court found that the personalty had been purchased partially with funds of the wife and partially with funds of the husband and that each was entitled to a lien thereon for the purchase money paid by the respective parties. Hemphill v. Hemphill, 197 Miss. 783, 20 So. 2d 79, 1944 Miss. LEXIS 328 (Miss. 1944).

New decree within divorce statute is different decree on same subject matter as original decree. Schneider v. Schneider, 155 Miss. 621, 125 So. 91, 1929 Miss. LEXIS 344 (Miss. 1929).

Change in decree is modification of decree in respect to subject-matter which it decided. Schneider v. Schneider, 155 Miss. 621, 125 So. 91, 1929 Miss. LEXIS 344 (Miss. 1929).

Power to modify as to alimony does not justify substitution of decrees. Williams v. Williams, 127 Miss. 627, 90 So. 330, 1921 Miss. LEXIS 266 (Miss. 1921).

31. Effect of decree.

In the case of property jointly owned by the parties but undisturbed in the judgment of divorce, the title remains as before. Thus, where the divorce proceedings failed to reflect that the husband's anticipated military retirement pension was mentioned or affected, the wife's pre-divorce interest, if any, in the husband's pension remained undisturbed. Newman v. Newman, 558 So. 2d 821, 1990 Miss. LEXIS 55 (Miss. 1990).

The principles of res judicata, which command that a final judgment precludes all claims that were or reasonably may have been brought in the original action, apply in divorce actions; the rule that a judgment for alimony, custody or support may be modified only upon a showing of a post-judgment material change of circumstances is a recognition of the force of res judicata in divorce actions. Bowe v. Bowe, 557 So. 2d 793, 1990 Miss. LEXIS 53 (Miss. 1990).

In a habeas corpus proceeding instituted by a mother in a court other than one which had granted her custody of the children in a divorce proceeding, to obtain custody of the children from a paternal aunt and paternal grandparents, who were not parties to the divorce action, the prior decree of custody was not binding upon proof of circumstances and conditions arising since the date of its rendition, showing that the mother was unfit to exercise such right or had forfeited it. Neal v. Neal, 238 Miss. 572, 119 So. 2d 273, 1960 Miss. LEXIS 440 (Miss. 1960).

The mere fact that the custody of a minor daughter was awarded to the mother by court decree does not of itself cause an emancipation of the minor. Pass v. Pass, 238 Miss. 449, 118 So. 2d 769, 1960 Miss. LEXIS 426 (Miss. 1960).

Assumption of a second marriage will not relieve a husband and father from the payment of alimony and support to the first wife and child, according to the provisions of the decree of divorce. Davis v. Davis, 217 Miss. 313, 64 So. 2d 145, 1953 Miss. LEXIS 433 (Miss. 1953).

Where a divorce decree recites that the husband pay to his wife $20 a month until further orders, the husband was mandatorily required by this decree to make payments therein provided for. Dickerson v. Horn, 210 Miss. 655, 50 So. 2d 368, 1951 Miss. LEXIS 304 (Miss. 1951).

Decree for alimony is conclusive, the wife having a vested right to the decreed alimony. Schaffer v. Schaffer, 209 Miss. 220, 46 So. 2d 443, 1950 Miss. LEXIS 381 (Miss. 1950).

A decree for alimony is not a debt in the strict sense of that term, but rather a judgment calling for the performance of a duty made specific by the decree of a court of competent jurisdiction, as regards homestead exemption. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss. 1943).

In view of wife's right to alimony constituting an interest in her husband's real estate, alimony decree fixing payment thereof a specific lien upon the land of the husband as security for the payment of the alimony constitutes such lien an encumbrance running with the land so as to render subject thereto the subsequently acquired homestead right of husband's second wife. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss. 1943).

In view of this section [Code 1942, § 2743] authorizing the court to require sureties for the payment of alimony allowed, and of the fact that a wife's right to alimony constitutes such an interest in her husband's real estate that she is entitled to have a lien fixed on it to enforce her vested right to maintenance out of his property regardless of whether the property was the homestead of the parties, the authority of the court could not be defeated by any subsequent act of the husband in contravention of her rights under a specific lien fixed on his property, and especially when such lien is declared at a time when no homestead rights could be effectually claimed by him therein. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss. 1943).

Divorced husband was not entitled to cancelation of an alimony decree whereby a lien was fixed on his land for payment of the sums due thereunder, or to defeat commissioner's sale of such land to the wife because of default in payment of alimony, by remarrying and claiming homestead exemption. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss. 1943).

Where wife obtains decree for alimony she acquired lien on land superior to deed of trust executed by husband after filing of lis pendens notice. W. H. Gallaspy Sons Co. v. Massey, 99 Miss. 208, 54 So. 805, 1911 Miss. LEXIS 191 (Miss. 1911).

V. MODIFICATION OF DECREE.

32. Alimony; generally.

Chancery court properly denied a husband's motion to reduce or terminate his alimony obligation because the wife's receipt of disability benefits did not constitute a material change in circumstances; the plain language of the parties' divorce agreement reflected that it was anticipated that the wife would receive disability benefits at some point in the future. Morris v. Morris, 8 So. 3d 917, 2009 Miss. App. LEXIS 187 (Miss. Ct. App. 2009).

Ex-husband's obligation to pay alimony was terminated because the ex-wife admitted that the ex-wife and a boyfriend cohabited, and the ex-wife failed to rebut the presumption of mutual support since, inter alia, the boyfriend gave the ex-wife money for groceries and clothes and helped the ex-wife with utilities and projects around the ex-wife's home. Rester v. Rester, 5 So. 3d 1132, 2008 Miss. App. LEXIS 517 (Miss. Ct. App. 2008).

Chancellor found cohabitation between the ex-wife and another man based on financial aspects of the relationship and not the moral aspects of the relationship; also, the wife did not present proof suggesting that there was no mutual support within the relationship, and thus there was evidence to support the chancellor's conclusion that the wife and the other man had arranged their physical living arrangements and financial affairs as a couple evidencing a de facto marriage. Burrus v. Burrus, 962 So. 2d 618, 2006 Miss. App. LEXIS 918 (Miss. Ct. App. 2006), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 482 (Miss. 2007).

Chancery court correctly determined that the ex-husband's obligation to pay alimony terminated upon his ex-wife's cohabitation with her fiancee. Dill v. Dill, 908 So. 2d 198, 2005 Miss. App. LEXIS 521 (Miss. Ct. App. 2005).

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to reduce or eliminate the ex-husband's periodic alimony award to the ex-wife because, inter alia: (1) he was in a much better financial position than her; (2) the decrease in his salary for one year did not reflect a continuing pattern of decline and he was still able to purchase luxury items that year, including an airplane and a recreational vehicle, and to invest in numerous real estate ventures; and (3) based on the husband's monthly disposable income, he could pay his annual periodic alimony obligation to the wife in one month and still have money left over. Dix v. Dix, 941 So. 2d 913, 2006 Miss. App. LEXIS 812 (Miss. Ct. App. 2006).

Where the parties were separated several years and the husband won $ 2,600,000 in a lottery shortly before the divorce but did not disclose this, in the wife's modification action for alimony and an equitable division of property, a remand was required for a determination under the applicable case law of whether the lottery ticket constituted marital property under Hemsley, and if so, for an equitable division pursuant to Ferguson; in light of the husband's failure to disclose the winnings, and in light of Miss. Unif. Ch. Ct. R. 8.05, the chancery court also erred in denying the wife's motion for contempt. Kalman v. Kalman, 905 So. 2d 760, 2004 Miss. App. LEXIS 1101 (Miss. Ct. App. 2004).

This section empowered the chancellor to modify a judgment of divorce by entry of a supplemental judgment based on substantial evidence to support the reformation of the parties' property settlement agreement. Dilling v.

Dilling, 734 So. 2d 327, 1999 Miss. App. LEXIS 58 (Miss. Ct. App. 1999).

Bankruptcy court was collaterally estopped from inquiring into "reasonableness" of debtor's support and alimony obligations as determined by pre-petition state court decision. In re Smith, 114 B.R. 457, 1990 Bankr. LEXIS 1079 (Bankr. S.D. Miss. 1990).

Chancellors have the authority to modify periodic alimony awards upon finding of substantial change in circumstances, regardless of any contrary intent expressed by the parties. McDonald v. McDonald, 683 So. 2d 929, 1996 Miss. LEXIS 633 (Miss. 1996).

Obligor's other financial obligations, decreased income due to opening of solo veterinary practice, and bankruptcy filing did not constitute change in circumstances warranting reduction or termination of alimony obligation imposed in divorce judgment. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

An order modifying a former husband's periodic alimony payments to his former wife due to her sexual "misconduct" with a third party subsequent to the parties' divorce would be reversed and remanded for the court to consider the following factors: (1) whether the third party provided support to the recipient spouse, and (2) whether the recipient spouse contributed to the support of the third party. Ellis v. Ellis, 651 So. 2d 1068, 1995 Miss. LEXIS 123 (Miss. 1995).

In determining the effect of post-divorce cohabitation on a recipient spouse's alimony entitlement, only the financial, not the moral aspects of the cohabitation are to be considered. Hammonds v. Hammonds, 641 So. 2d 1211, 1994 Miss. LEXIS 385 (Miss. 1994).

In a proceeding for modification of a divorce decree, the chancellor abused his discretion in simply reducing the amount of alimony to the same extent that the child support had been reduced, without applying any standard in determining the modification of alimony; furthermore, the chancellor abused his discretion in awarding alimony to the wife in the amount of $150 per month where the alimony award exceeded the husband's monthly net spendable income after paying child support. McEachern v. McEachern, 605 So. 2d 809, 1992 Miss. LEXIS 479 (Miss. 1992).

Even though the former wife had filed no petition for modification, chancellor, by applying equitable principles, could order former husband to make mortgage payments on the marital home, such payments having been the obligation of the former wife under the earlier divorce decree, where the former husband had moved in when a former wife moved out. O'Neill v. O'Neill, 501 So. 2d 1117, 1987 Miss. LEXIS 2286 (Miss. 1987).

Periodic (or "continuing") alimony is subject to change by the court. East v. East, 493 So. 2d 927, 1986 Miss. LEXIS 2564 (Miss. 1986).

Alimony agreements in divorces based upon irreconcilable differences are subject to modification the same as other decrees. Taylor v. Taylor, 392 So. 2d 1145, 1981 Miss. LEXIS 1912 (Miss. 1981).

An agreed decree as to alimony is subject to review because of a material change of circumstances, but careful consideration will always be given to the intent and purpose of the parties at the time the final decree was entered, and such a decree, as to alimony, will not be modified unless the change in circumstances is clear and substantial. McKee v. McKee, 382 So. 2d 287, 1980 Miss. LEXIS 1819 (Miss. 1980).

The trial court erred in reducing the amount of a husband's alimony and child support payments where the modification was not founded on a material or substantial change in the after-arising circumstances of the parties. Although the trial court felt that it had allowed too much alimony and child support in the first instance and although such payments where in fact high, they were not so high as to be unconscionable and oppressive, thereby justifying the court in affording extraordinary relief under its equitable powers. Shaeffer v. Shaeffer, 370 So. 2d 240, 1979 Miss. LEXIS 1971 (Miss. 1979).

The trial court erred in reducing the amount of a husband's alimony and child support payments where the modification was not founded on a material or substantial change in the after-arising circumstances of the parties. Although the trial court felt that it had allowed too much alimony and child support in the first instance and although such payments were in fact high, they were not so high as to be unconscionable and oppressive, thereby justifying the court in affording extraordinary relief under its equitable powers. Shaeffer v. Shaeffer, 370 So. 2d 240, 1979 Miss. LEXIS 1971 (Miss. 1979).

Where there have been material and substantial changes in the circumstances of the parties subsequent to their original divorce decree the court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. Savell v. Savell, 290 So. 2d 621, 1974 Miss. LEXIS 1713 (Miss. 1974).

That a divorce decree requires the deposit in the registry of the court of cash or securities as security for the performance of its provisions for alimony and support of children does not preclude a modification of such provisions. Sanford v. Cowan, 249 Miss. 685, 163 So. 2d 682, 1964 Miss. LEXIS 426 (Miss. 1964).

Where divorced wife was awarded use of the home and the sum of $60 per month as alimony, subsequent decree on husband's application for modification requiring wife to pay taxes, insurance, and repairs on the house which would inure only to the benefit of the husband and substantially reduce the amount awarded to wife, was not justified. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

Alimony decree is never a final judgment, but is always open to change. East v. Collins, 194 Miss. 281, 12 So. 2d 133, 1943 Miss. LEXIS 58 (Miss. 1943).

Where reduction of alimony payments did not begin until after husband filed petition therefor, decree reducing payments was not erroneous on ground that defalcation in payments subjected husband to doctrine of "clean hands," in view of statutory authority of court, on petition of husband, to change alimony decree and from time to time make such new decree as the case may require. Lee v. Lee, 182 Miss. 684, 181 So. 912, 1938 Miss. LEXIS 193 (Miss. 1938).

Court without authority to change alimony unless circumstances changed. Clark v. Clark, 133 Miss. 744, 98 So. 157, 1923 Miss. LEXIS 184 (Miss. 1923).

Authority of chancellor to change alimony not increased by provision in decree. Clark v. Clark, 133 Miss. 744, 98 So. 157, 1923 Miss. LEXIS 184 (Miss. 1923).

33. — Change in spouse's income.

Ex-husband was not entitled to a reduction or elimination of alimony based on an ex-wife making more money because such was not a material change in circumstances as it was contemplated in the parties' settlement agreement. Justus v. Justus, 3 So. 3d 141, 2009 Miss. App. LEXIS 66 (Miss. Ct. App. 2009).

A downward modification of the ex-husband's alimony obligations was warranted because his retirement and loss of income, which was not voluntary, constituted a material and unforeseeable change in circumstances. Clower v. Clower, 988 So. 2d 441, 2008 Miss. App. LEXIS 476 (Miss. Ct. App. 2008).

Miss. R. Civ. P. 60 did not preclude a chancellor from ordering the retroactive modification of alimony since a chancellor had authority to modify based on a father's second petition for such; moreover, the chancellor had the authority to order the modification retroactive to a date within the filing of the petition and the entry of the order. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Appellate court did not have to consider whether a father's motion to reopen under Miss. R. Civ. P. 60 after the denial of his first petition for modification of child support and alimony was timely because the issue was properly before the court after a father filed a second petition for modification based on a loss of income; all the father was required to show was a material change in circumstances, and there was no time limit on modifications. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

A spouse should not be required to deplete his or her separate estate when his or her income has dropped below the level of his or her separate maintenance obligations; thus, a chancellor erred in refusing to reduce a husband's separate maintenance obligation which he could not meet without liquidating his separate estate. Kennedy v. Kennedy, 662 So. 2d 179, 1995 Miss. LEXIS 484 (Miss. 1995).

Fact that a former wife had a high paying job and a husband had voluntarily left his employment was insufficient to show a material change in circumstances justifying a modification of alimony; however, a chancery court did not err by fashioning the wife a remedy from an escalation clause in a property agreement, and the three-year statute of limitations applied since it was a contract matter. D'Avignon v. D'Avignon, 945 So. 2d 401, 2006 Miss. App. LEXIS 549 (Miss. Ct. App. 2006), overruled, Moseley v. Smith, 180 So. 3d 667, 2014 Miss. App. LEXIS 689 (Miss. Ct. App. 2014).

There was not a material change in circumstances warranting modification of a periodic alimony award to a wife, in spite of the husband's argument that the wife went from having no income before the divorce to having an income of almost $80,000, where the majority of her income came from alimony and the husband remained in a much better financial position than the wife. Gambrell v. Gambrell, 644 So. 2d 435, 1994 Miss. LEXIS 494 (Miss. 1994).

A trial court was manifestly in error when it modified/terminated a wife's alimony, even though she began to work as a nurse full-time rather than part-time, she no longer had children at home, and she was not required to contribute to the cost of the children's education and maintenance, where the husband was an affluent professional person, he maintained a high standard of living, he lavishly supported his children including the children of his second wife, and his claimed monthly living expenses of $7,203 exceeded by $1,203 the yearly alimony he paid to the wife who had provided him with 4 children. Austin v. Austin, 557 So. 2d 509, 1990 Miss. LEXIS 24 (Miss. 1990).

In an action to decrease alimony payments, financial reversals of a close corporation of which the husband was the major shareholder did not constitute a sufficient material change in circumstances so as to justify a reduction in alimony where the corporation was recovering and the monthly alimony payments were modest in view of the husband's financial circumstances. Geiger v. Geiger, 530 So. 2d 185, 1988 Miss. LEXIS 414 (Miss. 1988).

Award of $250 per month additional alimony was not against overwhelming weight of evidence despite wife's contention that house payments had risen, home had required substantial repairs, her health had deteriorated, and there had been inflation; court found that wife's income had steadily increased, while husband's income had decreased since 1980. Banks v. Banks, 511 So. 2d 933, 1987 Miss. LEXIS 2694 (Miss. 1987).

In a petition by former husband to reduce $30 weekly payments for the support of former wife and children where the son allegedly had gone into the military service, daughter had almost completed high school and husband's salary was decreased from $68.00 weekly to $46.80, the husband was entitled to reduction in alimony payments. Davis v. Davis, 217 Miss. 313, 64 So. 2d 145, 1953 Miss. LEXIS 433 (Miss. 1953).

Where wife obtaining divorce was allowed the occupancy and use of the home, together with an award of $60 per month alimony, the fact that she augmented her income in a moderate degree by taking in roomers, was not such a change in circumstances as would justify a modification of the previous award. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

The court which granted divorce decree to wife improperly directed that payment of $200 by husband should be in full settlement of alimony for wife and support for nine-month-old child, and three years later, on showing that wife could earn nothing and that child needed medical attention, court properly directed husband, who was remarried, had another child, and was earning about $80 per month, to pay $12 per month for child's support, since a father's duty to support his child is absolute when necessity arises. Walters v. Walters, 180 Miss. 268, 177 So. 507, 1937 Miss. LEXIS 122 (Miss. 1937).

34. Support; generally.

Chancery court did not abuse its discretion by denying the father's motion for modification and termination of child support under this section because the parties' disabled son's 21st birthday was not a material change in circumstances unanticipated by the parties at the time of divorce that would warrant modification of the initial child support order. Ravenstein v. Hawkins, 167 So. 3d 210, 2014 Miss. LEXIS 326 (Miss. 2014).

Clean hands doctrine did not preclude a former husband from seeking a downward modification of child support where he was not in contempt; the husband could have thought he was in compliance by making payments under one of two support orders that were entered. Hunt v. Asanov, 975 So. 2d 899, 2008 Miss. App. LEXIS 117 (Miss. Ct. App. 2008).

Substantial evidence supported an upward adjustment of child support under Miss. Code Ann. § 93-5-23 based on a material change in circumstances because of the child's increased needs and expenses, inflation, and the father's improved financial condition and earning capacity, and the child was attending college and also had transportation costs; further, departure from the 14 percent guideline set forth in Miss. Code Ann. § 43-19-101 was proper because the father consistently earned more than $50,000 per year and the chancellor's findings concerning the child's needs and circumstances supported the departure. Wallace v. Wallace, 965 So. 2d 737, 2007 Miss. App. LEXIS 611 (Miss. Ct. App. 2007).

When an action for contempt was started by a former wife, the child of the parties was well into adulthood, so that the obligation to pay child support had ended, and the husband no longer owed alimony because of the wife's remarriage. And, although the former husband should have sought to have had the divorce decree modified prior to changing his former wife as a beneficiary on his life insurance policy, a finding of contempt was a seemingly harsh result because their child was an adult and to have required him to have complied with the decree would have resulted in the former wife being unjustly enriched. Patterson v. Patterson, 915 So. 2d 496, 2005 Miss. App. LEXIS 919 (Miss. Ct. App. 2005).

Issue presented by the father was not to be decided on principles of contract, but rather upon more traditional considerations of whether, based upon a showing of material change in circumstance, the proposed change was in the best interest of the child. Ballard v. Ballard, 843 So. 2d 76, 2003 Miss. App. LEXIS 51 (Miss. Ct. App. 2003).

Obligor's other financial obligations, decreased income due to opening of solo veterinary practice, and bankruptcy filing did not constitute change in circumstances warranting reduction or termination of child support obligation imposed in divorce judgment. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Support agreements for divorces granted on ground of irreconcilable differences are subject to modification, but only if there has been material change in circumstances with one or more of parties which occurs as result of after-arising circumstances not reasonably anticipated at time of agreement. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Personal bills cannot be used as factor to reduce support payments. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Simply alleging that one is subsisting on borrowed funds does not show with the required particularity one's inability to pay support obligations. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Simply filing for bankruptcy does not rise to level of substantial change in circumstances warranting reduction or termination of support obligations, without finding that filing was made in good faith. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

A chancellor erred in dismissing a father's petition for abatement of child support where the father was in compliance with the court's previous decree at the time he filed for modification, preventing a finding of unclean hands, and he showed a material change in his financial circumstances which arose subsequent to entry of the previous decree; however, the modification could not relate back to the time of filing, and therefore the chancellor's award for child support payments which accrued during litigation of the father's motion would be affirmed. Setser v. Piazza, 644 So. 2d 1211, 1994 Miss. LEXIS 526 (Miss. 1994).

A chancellor did not abuse her discretion in refusing to reduce the amount of child support a father was required to pay, even though the father had stopped working at his private medical practice for a period of time due to a fire which destroyed his office building, where he waited until he was $20,000 in arrears and was brought into court a second time on contempt charges before he sought modification of the child support decree, it appeared that the reason for the modification request was temporary in nature and no longer existed at the time he finally submitted it to the chancellor, and the chancellor determined that he had personal assets from which to satisfy the amount owed. Gambrell v. Gambrell, 644 So. 2d 435, 1994 Miss. LEXIS 494 (Miss. 1994).

There was not a material change in circumstances sufficient to warrant a modification of a father's child support obligation where all of the changes asserted by the father either occurred prior to his signing of the initial child support agreement or were changes which should have been reasonably anticipated by him at the time he signed the agreement. Shipley v. Ferguson, 638 So. 2d 1295, 1994 Miss. LEXIS 337 (Miss. 1994).

In a proceeding to modify child support provisions, the burden of proof is on the petitioner to show a material change of circumstances of one or more of the interested parties-the father, mother, or child-arising subsequent to the original decree. However, the material change which must be proved in support modification proceedings does not have to be a change which "adversely affects the minor child," as is required in custody modification proceedings. Adams v. Adams, 591 So. 2d 431, 1991 Miss. LEXIS 843 (Miss. 1991).

The enactment of the child support award guidelines in § 43-19-101, which provides that child support payments for 2 children should be 20 percent of the parent's adjusted gross income, did not constitute a "material change in circumstances" warranting a modification of a father's child support obligation, even though the father's child support payments for 2 children were more than 20 percent of his adjusted gross income. Gregg v. Montgomery, 587 So. 2d 928, 1991 Miss. LEXIS 712 (Miss. 1991).

A father would be required to continue to pay support for his 15-year-old son, in spite of the father's argument that his son had totally abandoned the father-son relationship and the son's admission that he felt a great deal of hostility toward his father, where the son had sought professional counseling and advice to deal with his feelings toward his father and openly talked of trying to improve the relationship. While it is possible that there could be a situation where a minor child as young as 15 might by his or her actions forfeit support from a non-custodial parent, those actions would have to be clear and extreme. Caldwell v. Caldwell, 579 So. 2d 543, 1991 Miss. LEXIS 236 (Miss. 1991).

The effective date of a modification of child support payments should be the date of the petition to modify or thereafter, within the sound discretion of the trial court. Lawrence v. Lawrence, 574 So. 2d 1376, 1991 Miss. LEXIS 17 (Miss. 1991).

Bankruptcy court was collaterally estopped from inquiring into "reasonableness" of debtor's support and alimony obligations as determined by pre-petition state court decision. In re Smith, 114 B.R. 457, 1990 Bankr. LEXIS 1079 (Bankr. S.D. Miss. 1990).

In child support modification proceedings, the chancellor is accorded substantial discretion and is charged to consider all relevant facts and equities to the end that a decree serving the best interest of the child may be fashioned. However, there may be no modification in a child support decree absent a substantial and material change in the circumstances of one of the interested parties arising subsequent to the entry of the decree sought to be modified. Clark v. Myrick, 523 So. 2d 79, 1988 Miss. LEXIS 85 (Miss. 1988).

The trial court erred in reducing the amount of a husband's alimony and child support payments where the modification was not founded on a material or substantial change in the after-arising circumstances of the parties. Although the trial court felt that it had allowed too much alimony and child support in the first instance and although such payments where in fact high, they were not so high as to be unconscionable and oppressive, thereby justifying the court in affording extraordinary relief under its equitable powers. Shaeffer v. Shaeffer, 370 So. 2d 240, 1979 Miss. LEXIS 1971 (Miss. 1979).

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The trial court is authorized by this statute to reexamine the question of child custody or support at any time on a showing of changed circumstances, regardless of the pendency of an appeal. Smith v. Necaise, 357 So. 2d 931, 1978 Miss. LEXIS 2516 (Miss. 1978).

A chancellor has authority, upon petition of a divorced husband, to reduce the amount to be paid for the support of a child. McIntosh v. Meyer, 243 Miss. 596, 139 So. 2d 368, 1962 Miss. LEXIS 381 (Miss. 1962).

After a decree awarding a divorce and custody of children of the marriage, the court may from time to time make decrees in regard to the maintenance of the children. Crum v. Upchurch, 232 Miss. 74, 94 So. 2d 321, 98 So. 2d 117, 1957 Miss. LEXIS 446, 1957 Miss. LEXIS 447 (Miss. 1957).

In a petition by former husband to reduce weekly payments for support of former wife and two children, the wife's necessity and that of the daughter, if she is so situated, and the husband and father's ability must determine the amount of the award. Davis v. Davis, 217 Miss. 313, 64 So. 2d 145, 1953 Miss. LEXIS 433 (Miss. 1953).

Decree for separate support and maintenance obtained by wife is not subject to modification, except on evidence showing substantial change in circumstances of parties. Malone v. Malone, 159 Miss. 138, 131 So. 870, 1931 Miss. LEXIS 23 (Miss. 1931).

35. —Change in spouse's income.

Chancery court properly denied a former husband's motion to reconsider a judgment that granted him a permanent modification of alimony because, while the decrease in his income from his loss of employment was not anticipated at the time of the divorce and was a material change in circumstances, it did not justify a termination of alimony, his post-divorce personal bills and remarriage could not be used as factors to reduce his support payments, he had not missed any payments on his monthly financial obligations since the divorce, the wife had been substantially dependent upon both her disability payments and the alimony payments from the husband since the divorce to meet her monthly living expenses, and her financial situation had not changed. Easterling v. Easterling, — So. 3d —, 2018 Miss. App. LEXIS 86 (Miss. Ct. App. Feb. 20, 2018)..

Where a father lost his job and made less at a subsequent employer, an agreement entered into regarding alimony and child support due to the granting of a divorce based on irreconcilable differences was modified under Miss. Code Ann. § 93-5-23; the agreement could no longer have been given its intended effect, and a material change in circumstances was shown. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

A chancellor was manifestly in error in not reducing or terminating a separate maintenance award to a wife, even though the husband took "voluntary retirement" at the age of 59, where physical infirmities curtailed the husband's ability to earn a living, and his monthly income was drastically reduced. Kennedy v. Kennedy, 650 So. 2d 1362, 1995 Miss. LEXIS 58 (Miss. 1995).

A trial court did not abuse its discretion in modifying a child support decree based on the father's loss of income due to involuntary termination of employment for alleged intentional wrongful acts where there was no allegation that the father was terminated or caused himself to be terminated to avoid paying child support. Parker v. Parker, 645 So. 2d 1327, 1994 Miss. LEXIS 571 (Miss. 1994).

It was manifest error and an abuse of discretion for a chancellor to find that there had been no material or substantial change in circumstances warranting a modification of a father's child support payments where the father suffered a heart attack approximately one year after the original decree was entered which resulted in a precipitous decline in his income, the father would be required to pay over ½ of his income in child support payments if the original decree were not modified, and the statutory child support guidelines' suggestion and the actual child support ordered constituted a difference of nearly $500.00 a month. McEwen v. McEwen, 631 So. 2d 821, 1994 Miss. LEXIS 77 (Miss. 1994).

An increase in a father's child support obligation from $300 to $750 per month was excessive and unsupported by the evidence in the record, even though the father's income and resources had increased over time, where the mother's income had also steadily increased, the child had not required any extraordinary or unexpected care or treatment, there was no evidence that any of the child's needs had gone unmet, the child's actual expenses averaged approximately $260 per month, and utilization of the child support guidelines set forth in § 43-19-101 produced a monthly figure of approximately $583. Hammett v. Woods, 602 So. 2d 825, 1992 Miss. LEXIS 299 (Miss. 1992).

A former husband failed to show that he was financially unable to comply with the divorce decree so as to avoid paying child support arrearage, where he failed to offer substantial evidence which was "particular and not general" to support his contention, and he had failed to pay medical expenses and school expenses at a time when he held a well paying job, which indicated that financial hardship was not the sole factor in his failure to make payments. Additionally, the husband's argument that he had to pay other bills before making support payments was meritless, since such payments are paramount. Gregg v. Montgomery, 587 So. 2d 928, 1991 Miss. LEXIS 712 (Miss. 1991).

There was no error in a chancellor's decision to leave a father's child support obligation at $250 per month where the father argued that his salary had declined drastically from that earned in previous years but there was an indication that this was a voluntary choice of the father's, the father argued that his monthly support burden should be at least $80 less in accordance with the guidelines of § 43-19-101, and the wife argued that her monthly expenses outstripped her income by approximately $600 each month but she had received an increase in monthly income since the final decree. Caldwell v. Caldwell, 579 So. 2d 543, 1991 Miss. LEXIS 236 (Miss. 1991).

A father did not sustain a material change in circumstances warranting a reduction in child support when he voluntarily left his employment and enrolled in college, where he sought to modify his child support obligation within 6 months of the original divorce decree awarding child support, and his testimony indicated that he anticipated that he would be furthering his education long before the original divorce decree was entered. Tingle v. Tingle, 573 So. 2d 1389, 1990 Miss. LEXIS 838 (Miss. 1990).

A chancery court had the authority to modify an original divorce judgment requiring the husband to pay ½ of his net salary to his former wife in child support payments for one child where, subsequent to the divorce decree making this requirement, the husband's monthly salary almost doubled. In the absence of some extraordinary circumstances, a chancery court could not validly render a decree that, regardless of a parent's future salary, he or she would have to pay ½ of it for child support for one child; requiring a parent to pay ½ of his or her net salary for support of one child, without examining the child's needs, is not the escalation clause recommended to take care of inflation in the cost of living. Brown v. Brown, 566 So. 2d 718, 1990 Miss. LEXIS 450 (Miss. 1990).

There was a material change in circumstances which warranted modification of a child support order requiring the father to pay $400 per month per child for the parties' 2 children who were in the mother's custody, where the oldest child went to live with his father while the matter was pending, and the father had experienced a substantial reduction in his income while the mother had experienced an increase in hers, so that "both parties receive approximately the same amount of money," and therefore the court was within its authority in terminating all child support. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

A denial by the Internal Revenue Service of a non-custodial parent's claim of an income tax dependency exemption which that parent acquired pursuant to court order, constitutes a change in circumstances justifying the parent in seeking relief by way of modification of support obligations. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

A decrease in a father's income from $1,740 per month to $972 per month did not qualify as a material or substantial change in the father's financial situation which would warrant modification of a child support agreement incorporated by a final divorce decree where the father was aware in November of 1986, when he signed the child support agreement, that the severance pay he was receiving would run out in January of 1987 and that after the severance pay ran out he had no confirmed employment. Morris v. Morris, 541 So. 2d 1040, 1989 Miss. LEXIS 199 (Miss. 1989).

Increase in noncustodial parent's salary from between $2 and $3 an hour to $5.89 per hour supported increase in child support payments from $75 to $150 per month. Cox v. Moulds, 490 So. 2d 866, 1986 Miss. LEXIS 2491 (Miss. 1986), limited, Higdon v. Higdon (Miss. Ct. App. 1996).

Modification of child support is required upon showing of rising costs of support of child and inflation, in addition to receipt of cost of living increases in income of parent paying support, in intervening 5 years since original support award. Adams v. Adams, 467 So. 2d 211, 1985 Miss. LEXIS 1979 (Miss. 1985).

That a divorce decree requires the deposit in the registry of the court of cash or securities as security for the performance of its provisions for alimony and support of children does not preclude a modification of such provisions. Sanford v. Cowan, 249 Miss. 685, 163 So. 2d 682, 1964 Miss. LEXIS 426 (Miss. 1964).

The court which granted divorce decree to wife improperly directed that payment of $200 by husband should be in full settlement of alimony for wife and support for nine-month-old child, and three years later, on showing that wife could earn nothing and that child needed medical attention, court properly directed husband, who was remarried, had another child, and was earning about $80 per month, to pay $12 per month for child's support, since a father's duty to support his child is absolute when necessity arises. Walters v. Walters, 180 Miss. 268, 177 So. 507, 1937 Miss. LEXIS 122 (Miss. 1937).

36 — — Res judicata.

Where the material change in circumstances arising from a father's termination from his job occurred after the entry of a final divorce decree, the doctrine of res judicata did not bar a modification decision, even though a prior denial of the father's first petition also concerned an alleged reduction in income. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

37. Custody; generally.

Mississippi Court of Appeals rejects a blanket ban on all modifications based on anticipated adverse material change. Porter v. Porter, 23 So. 3d 470, 2008 Miss. App. LEXIS 643 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 302 (Miss. 2009), aff'd in part and rev'd in part, 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

Even though there was a material change in circumstances, a modification of custody was not warranted where a child suffered no adverse effects; a father contributed to the child's dental problems, a mother's relationships did not constitute a material change in circumstances, and there was no detriment due to the child's taking of one half of a prescription pill. Sudduth v. Mowdy, 991 So. 2d 1241, 2008 Miss. App. LEXIS 594 (Miss. Ct. App. 2008).

Mother was not entitled to a modification of the chancery court's award of custody to the children's father based upon a material change in circumstances because the instances alleged primarily centered on the contention that the father engaged in a pattern of parental alienation and that the ongoing conflict between the couple was detrimental to the children's best interests; any adverse effects felt by the children were not due to a material change in circumstances but to the ongoing volatile relationship between their parents. Gilliland v. Gilliland, 984 So. 2d 364, 2008 Miss. App. LEXIS 353 (Miss. Ct. App. 2008).

In a child custody modification proceeding, the ex-husband was properly awarded custody because (1) the requisite adverse effect was correctly and specifically found prior to the determination that a change in custody would be in the child's best interest, based mainly on the ex-wife's coaching of the child's testimony, (2) a private investigator's DVD was properly admitted, and (3) the effect of separating the child from a half-sister was considered. Pruett v. Prinz, 979 So. 2d 745, 2008 Miss. App. LEXIS 231 (Miss. Ct. App. 2008).

Although the mother experienced material change in circumstances that adversely affected the children, the best interest of children did not require a change in custody and the trial court did not err in denying the father's motion for modification and in refusing to modify the custody arrangement. Quadrini v. Spradley, 964 So. 2d 576, 2007 Miss. App. LEXIS 543 (Miss. Ct. App. 2007).

After the parties' divorce in which the former wife was awarded primary custody of the son, she moved four times, dated several men, and cohabited with a man. The chancellor found that the child's best interests required a change in custody and awarded the former husband primary physical custody. Hill v. Hill, 942 So. 2d 207, 2006 Miss. App. LEXIS 250 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 758 (Miss. 2006).

Trial court properly granted the father's petition for modification of child custody, because the chancellor found a material change in the child's custodial care. The mother denied or prevented the father's visitation on numerous occasions; the child's education was deliberately interrupted by the mother several times to limit his participation in any necessary decisions; the mother involved the child in arguments between her and the father; and the guardian ad litem opined that the child had been substantially impacted by the mother's attitude and approach to care such that the effects would worsen throughout his life. Thornhill v. Van Dan, 918 So. 2d 725, 2005 Miss. App. LEXIS 171 (Miss. Ct. App. 2005).

Chancery court erred in failing to identify the specific material change in circumstance in the custodial home. Without a finding of such a material change or a finding that the actual custodial arrangement was detrimental to the well-being of the children, the appellate court could not affirm the chancery court's modification of custody; the record showed the parties' children, in the father's primary custody, had experienced behavioral problems, but there was no showing that same was due to detrimental conditions in his home or to a poor environment therein. Beasley v. Beasley, 913 So. 2d 358, 2005 Miss. App. LEXIS 271 (Miss. Ct. App. 2005).

Chancellor properly determined that there had been a material change in circumstances that adversely affected the child's well-being based on the following findings: (1) the child had moved at least 10 times in the four years since the child's parents had separated; (2) the child had failed first grade and was doing poorly academically; (3) the child was exposed to pornographic tapes while in the custody of the mother; (4) the mother's new job schedule caused problems as to the child's care; and (5) the mother's frequent relationships with different men was not healthy for the child. Thus, where the record showed that the father's employment was more conducive to parenting responsibilities and that the father would provide the child with a more stable home environment, modification of physical custody was proper. Brown v. White, 875 So. 2d 1116, 2004 Miss. App. LEXIS 597 (Miss. Ct. App. 2004).

Although the mother had improved her lifestyle by quitting the use of illegal drugs, obtaining steady gainful employment, and living comfortably and in stable circumstances with her 10-year-old daughter, the custodial paternal grandparents had provided the child with a stable, secure, and nurturing environment in which the child appeared to be thriving; thus, although there was a material change in the mother's circumstances, the trial court did not err in finding that it was in the best interest of the child to remain with the child's grandparents, and it properly denied the mother's petition seeking to modify the custody arrangement awarding paramount physical custody of the child to the child's grandparents. Callahan v. Davis, 869 So. 2d 434, 2004 Miss. App. LEXIS 256 (Miss. Ct. App. 2004).

Reading Miss. Code Ann. §§ 93-5-23 and 93-11-65 together, Miss. Code Ann. § 93-5-23 concerns divorce actions and a court's ability to make orders touching child custody, whereas, Miss. Code Ann. § 93-11-65 is in addition to the remedies already available in Miss. Code Ann. § 93-5-23. The key to those statutes is that Miss. Code Ann. § 93-5-23 provides for the child's care and custody in a divorce situation and Miss. Code Ann. § 93-11-65 states that it is an alternative, in addition to Miss. Code Ann. § 93-5-23. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

A proper reading of all the three statutes, Miss. Code Ann. §§ 93-5-11, 93-5-23 and 93-11-65, does not provide for a custody matter to proceed under Miss. Code Ann. § 93-11-65 when a divorce is pending. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

When considering a modification of child custody, the proper approach was to first identify the specific change in circumstances, and then analyze and apply the Albright factors in light of that change; the trial court's opinion did not reflect what the prior conditions were or identify any changed circumstances with which to make a comparison; the analysis was incomplete. Thornell v. Thornell, 860 So. 2d 1241, 2003 Miss. App. LEXIS 1067 (Miss. Ct. App. 2003).

Trial court erred in granting a father's motion for modification of child custody pursuant to Miss. Code Ann. § 93-5-23; the trial court placed too much emphasis on the natural parent presumption, and it was in the best interests of the children that they remain with a foster mother who had been granted durable legal custody under Miss. Code Ann. § 43-21-609. Barnett v. Oathout, 2003 Miss. LEXIS 583 (Miss. Oct. 30, 2003), op. withdrawn, sub. op., 883 So. 2d 563, 2004 Miss. LEXIS 1227 (Miss. 2004).

Because the child's best interest was the court's "polestar" consideration in determining child custody, the importance of guardian ad litem appointments in child custody proceedings could not be overemphasized; in a case where a mother sought modification of child custody, and there was an allegation of abuse, it was mandatory that a guardian ad litem be appointed, under Miss. Code Ann. § 93-5-23. Robison v. Lanford, 841 So. 2d 1119, 2003 Miss. LEXIS 151 (Miss. 2003).

Party seeking custody modification must prove that substantial change in circumstances has transpired since issuance of the custody decree, that this change adversely affects child's welfare, and that child's best interests mandate a change of custody. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

Totality of circumstances should be considered in determining whether change in circumstances warrants custody modification. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

Custody may be modified where environment provided by the custodial parent is found to be adverse to the child's best interest and circumstances of the noncustodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Neither nasty exchanges between former spouses when picking up or dropping off child for visitation, nor former wife's implication that former husband had sexually abused child warranted change in custody; although child was subjected to some gross unpleasantries between his parents, record did not remotely suggest that these episodes were characteristic of the overall circumstances in which he lived. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Isolated incident, e.g., an unwarranted striking of a child, does not in and of itself justify a change of custody; rather, it must be the overall circumstances in which a child lives, likely to remain unchanged in the foreseeable future and adversely impacting a child, to warrant change of custody. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Change in circumstances warranting modification of custody is one in overall living conditions in which child is found. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Totality of circumstances must be considered in determining whether to modify child custody. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Change of circumstances in noncustodial parent is not in and of itself sufficient to warrant a modification of custody. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

When environment provided by custodial parent is found to be adverse to child's best interest, and circumstances of noncustodial parent have changed such that he or she is able to provide an environment more suitable than that of custodial parent, Chancellor may modify custody accordingly. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Where a child living in a custodial environment clearly adverse to child's best interest somehow appears to remain unscarred by his or her surroundings, Chancellor is not precluded from removing child for placement in a healthier environment. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Evidence that home of custodial parent is site of dangerous and illegal behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that environment has adversely affected child's welfare. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Once Chancellor determined that mother's home was site of illegal drug use, as well as other behavior adverse to child's welfare, and determined that father's circumstances had improved such that he was able to provide a good home for child, it was within his discretion to transfer custody from mother to father, despite fact that Chancellor could not discern any negative effect on child caused by mother's home environment. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Chancellor is never obliged to ignore a child's best interest in weighing a custody change; in fact, a Chancellor is bound to consider child's best interest above all else. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Test for custody modification need not be applied so rigidly, nor in such a formalistic manner, so as to preclude Chancellor from rendering a decision appropriate to facts of individual case. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

A chancellor erred in failing to grant a father's request for modification of custody of his 18-year old daughter where both parents and the daughter agreed that she should be in the father's custody, she had been living with the father, and the chancellor had reduced the father's child support obligation to reflect this living arrangement. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

A chancellor was not "manifestly in error" in refusing to modify the custody of 2 children from their father to their mother, even though the father's activities in attempting to exclude the mother from the children's lives were very iniquitous and hurtful to the children, where the mother failed to show a material change in circumstances that adversely affected the children. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

A chancellor did not err in his determination that a material change in circumstances adverse to the welfare and best interests of the children warranted a change in custody from the mother to the father where the mother had moved and changed employment several times during the year after the parties' divorce, daycare arrangements were similarly changed, the mother had subjected the children to numerous unwarranted physical and psychological examinations, not for treatment, but for investigation and interrogation as to alleged sexual abuse, and the daughter had exhibited distress and disturbance when being returned to the mother at the end of a visitation period with the father, while the father held a stable position and maintained a stable home, with his parents providing alternative care. Newsom v. Newsom, 557 So. 2d 511, 1990 Miss. LEXIS 43 (Miss. 1990).

Chancellor's modification of custody decree granting father custody of minor children was proper where, although maternal grandmother, in seeking custody of minor children, had met burden of proving that mother was unfit to have custody of children, she had not met this burden with respect to father. Milam v. Milam, 509 So. 2d 864, 1987 Miss. LEXIS 2509 (Miss. 1987).

A change of circumstances in the out of custody parent is not sufficient to authorize modification of custody award. Duran v. Weaver, 495 So. 2d 1355, 1986 Miss. LEXIS 2713 (Miss. 1986).

Even if the original divorce decree in awarding custody of children between their parents could be said to be a joint custody arrangement, the chancellor could modify such decree only upon a finding that there had been a material change of circumstances affecting the children. Rutledge v. Rutledge, 487 So. 2d 218, 1986 Miss. LEXIS 2436 (Miss. 1986).

Fact that custodial parent is receiving aid for dependent children, and social services from federal and state programs, including housing, does not disqualify parent from having custody of children and does not constitute material change adversely affecting children which may be basis for modification of custody decree, either by emergency order or by final decree. Robinson v. Robinson, 481 So. 2d 855, 1986 Miss. LEXIS 2339 (Miss. 1986).

When custodial parent transfers physical custody of child to third party, Chancery Court may transfer legal custody of child to third party. Adams v. Adams, 467 So. 2d 211, 1985 Miss. LEXIS 1979 (Miss. 1985).

Modification of custody decree may not be granted where, to extent that there has been showing of change of circumstance, record shows that custodial parent has provided more stable home environment then since originally being granted custody and greatest change seems to be in noncustodial parent's desire for custody. Smith v. Todd, 464 So. 2d 1155, 1985 Miss. LEXIS 1924 (Miss. 1985).

The trial court is authorized by this statute to reexamine the question of child custody or support at any time on a showing of changed circumstances, regardless of the pendency of an appeal. Smith v. Necaise, 357 So. 2d 931, 1978 Miss. LEXIS 2516 (Miss. 1978).

The provision authorizing the court from time to time to make new decrees applies to a custody as well as to an alimony decree; but this power may be exercised only where there has been a material change of circumstances, even though the award of custody was until a further order of the court. Beard v. Stevens, 239 Miss. 568, 123 So. 2d 860, 1960 Miss. LEXIS 323 (Miss. 1960).

In proceedings for the modification of a decree awarding the care and custody of a minor child, the guiding star in such cases is the best interest of the child, and the chancellor has broad discretion in such matters. Earwood v. Cowart, 232 Miss. 760, 100 So. 2d 601, 1958 Miss. LEXIS 326 (Miss. 1958).

In a hearing upon the father's petition testimony as to the suitability of the mother's second husband as co-custodian of the infant daughter was proper, and although incompetent testimony in regard to the mother relative to an event which transpired prior to the decree giving her custody of the child was admitted, it was not reversible error, where, disregarding this testimony, the chancellor was warranted in awarding custody of the child to the father for ten months of the year. Comfort v. Norton, 232 Miss. 714, 100 So. 2d 342, 1958 Miss. LEXIS 319 (Miss. 1958).

In an action by the mother for a modification of a divorce decree in reference to the custody of the child, where the mother clearly made out a strong prima facie case of a material change in her circumstances and conditions since the divorce decree with reference to the welfare of the child, the trial court should have reexamined the issue of custody. Boswell v. Pope, 213 Miss. 31, 56 So. 2d 1, 1952 Miss. LEXIS 328 (Miss. 1952).

In proceedings by wife to modify decree awarding custody of children to husband, the inquiry is as to what does the best interest of the children require. White v. Brocato, 35 So. 2d 455 (Miss. 1948).

Where petition which was entitled a petition in habeas corpus was in fact a petition for enforcement of custody decree and for contempt for failure to comply therewith, court had power to change decree as circumstances required. Mahaffey v. Mahaffey, 176 Miss. 733, 170 So. 289, 1936 Miss. LEXIS 170 (Miss. 1936).

38. —Choice of child.

Chancery court's transfer of child custody from a mother to a father was upheld because no error could be found in the court's determination that the transfer was favored by: (1) the health, sex, and age of the children; (2) the existing emotional ties; (3) the home, school, and community record of the children; (4) the preference of the child at the age sufficient to express a preference by law; and (5) the stability of the home environment. Connelly v. Lammey, 982 So. 2d 997, 2008 Miss. App. LEXIS 300 (Miss. Ct. App. 2008).

In determining whether there was a substantial and material change in circumstances to warrant a modification of child custody, the lower court would be required to consider the fact that the child had chosen to live with his mother, as well as the fact that the child had passed 12 years of age and could qualify under § 93-11-65 to choose his custodial parent, as factors to be considered on remand along with any other evidence the parties wished to produce. Polk v. Polk, 589 So. 2d 123, 1991 Miss. LEXIS 820 (Miss. 1991).

Reversal of a trial court's denial of a mother's request for modification of a child custody order based on changed circumstances was required because, although a guardian ad litem was properly appointed under Miss. Code Ann. § 93-5-23 based on allegations of abuse, the chancellor rejected the guardian's recommendations but did not state the reasons for doing so in the order, nor did he summarize those recommendations as required; in addition, the chancellor did not explain his reasons for declining to follow the child's preference to live with his mother as required by Miss. Code Ann. § 93-11-65. Floyd v. Floyd, 949 So. 2d 26, 2007 Miss. LEXIS 32 (Miss. 2007).

There was no material change in circumstances due to a mother's remarriage; therefore, a chancery court did not err in refusing to modify a custody order, despite the testimony from one child regarding his preference to live with the father; furthermore, the evidence was not unequivocal that placement with the father would have been in his children's best interests since the mother was best able to provide for their daily needs. Dykes v. McMurry, 938 So. 2d 330, 2006 Miss. App. LEXIS 683 (Miss. Ct. App. 2006).

Although the rules regulating provisions for custody of minor children do not reflect a policy of encouraging separation of siblings, a chancery court did not commit error when it provided that the parties' older child would reside with his father while the younger child would continue to reside with the mother, where the judge conferred with the older child in chambers and found that he wished to live with his father, the child was over 15 years of age, and the court made elaborate provision for assuring that the children were together as much as was reasonably practicable given their residence in separate communities and their attendance at different schools. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

Failure of the chancellor to interview children under 12 years of age where modification of the custody provisions of a divorce decree is sought, is not error. Correll v. Newman, 236 Miss. 545, 111 So. 2d 643, 1959 Miss. LEXIS 348 (Miss. 1959).

39. —Relocation of child.

Where a mother and father agreed to joint physical and legal custody of their daughter but the father moved for a modification of the custody arrangement based upon a change in circumstances after the mother moved 80 miles away, the trial court did not abuse its discretion in granting the father's motion because shuttling the child between the parents' respective homes each week caused instability and because the girl was about to begin attending school, which meant that she could not split every week between her parents' homes. Pearson v. Pearson, 11 So. 3d 178, 2009 Miss. App. LEXIS 308 (Miss. Ct. App. 2009).

In a case where custody was modified to award a father sole physical custody based on a mother's anticipated move to another state, the mother's request for relief under Miss. R. Civ. P. 60(b) when the move did not occur was properly denied; a failure to conduct an analysis under Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983), to re-evaluate the factors after the filing of the Miss. R. Civ. P. 60(b) motion was a harmless error. However, a remand was necessary to determine the mother's visitation rights, which had been changed to reflect the move. Porter v. Porter, 23 So. 3d 470, 2008 Miss. App. LEXIS 643 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 302 (Miss. 2009), aff'd in part and rev'd in part, 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

Modification of a child custody proceeding was not warranted where a child with developmental delays, autism, and possible severe mental retardation was moved to Alaska because the child was not adversely affected by such; moreover, the child needed stability due to the fact that she had always resided with the father, and the mother's experts were unable to say that the services offered to child in Alaska were inadequate since they were not familiar with the extent of those services. Williamson v. Williamson, 964 So. 2d 524, 2007 Miss. App. LEXIS 138 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 513 (Miss. 2007).

Motion for relief under Miss. R. Civ. P. 60(b)(1) in a case involving the modification of child custody was denied because misrepresentations regarding the certifications of the father's wife were not intended to influence the decision, and a chancery court did not rely on them; moreover, there was no misrepresentation regarding a move to Alaska. Williamson v. Williamson, 964 So. 2d 524, 2007 Miss. App. LEXIS 138 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 513 (Miss. 2007).

Trial court erred in changing the primary custody of a minor child because a mother's decision to move adversely impacted a father's ability to exercise visitation rights; the father failed to show that the move posed a clear danger to the child's mental or emotional health. Lambert v. Lambert, 872 So. 2d 679, 2003 Miss. App. LEXIS 999 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032, 2004 Miss. LEXIS 502 (Miss. 2004).

A chancellor was "manifestly in error" when he found a mother in contempt of court for effectively curtailing the father's court-ordered visitation rights with the parties' daughter by moving to Alaska. The mother never ignored an order of the court since there was nothing in the court order that restricted her from moving to another state. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

Divorced custodial parent's planned movement of minor children to foreign nation incident to pursuit of reasonable professional or economic opportunity is not by itself basis for modification of custody decree. Spain v. Holland, 483 So. 2d 318, 1986 Miss. LEXIS 2346 (Miss. 1986).

Where nothing in the record indicated that it would be detrimental to the welfare of the children for the father to take the children out of the county within the time when he was permitted to visit with them pursuant to a decree of divorce, and there was no showing that the father intended to take the children to visit the woman who was said to have been the cause of the divorce, the decree would be modified by the Supreme Court so as to permit the father to take his children out of the county for the time he was permitted to visit them. Dubois v. Dubois, 275 So. 2d 100, 1973 Miss. LEXIS 1348 (Miss. 1973).

Modification of divorce decree changing custody of child from mother to paternal grandparents was erroneous where there was no evidence that mother was an unfit person to have custody; moreover, custody would not be changed since mother had moved to Florida and planned to carry the child out of the jurisdiction of the court, although under such circumstances the court would retain jurisdiction by requiring mother to post a bond to insure the child's return when ordered to the jurisdiction of the court. Rodgers v. Rodgers, 274 So. 2d 671, 1973 Miss. LEXIS 1607 (Miss. 1973).

Circumstances of the wife's remarriage and change of residence to a place 600 miles from her original residence did not constitute such a change in conditions as to warrant modification of the divorce decree which awarded the custody of the child to her. Brocato v. Walker, 220 So. 2d 340, 1969 Miss. LEXIS 1458 (Miss. 1969).

40. —Evidence.

Chancery court properly weighed the Albright factors and modified custody of the parties' children to the mother because the father and the stepmother smoked in the presence of the children, who had allergy problems, and the mother was the primary parent to take the children to the doctor and wand visit their school, while the father only remembered going to the school once; the mother was granted sole legal and physical custody. Tidmore v. Tidmore, 114 So. 3d 753, 2013 Miss. App. LEXIS 259 (Miss. Ct. App. 2013).

Trial court erred in modifying custody based on a material change in circumstances–the mother's inability to set and enforce boundaries for the children–as its finding that the mother imposed little or no discipline on the children was not supported by substantial, credible evidence. A.M.L. v. J.W.L., 98 So. 3d 1001, 2012 Miss. LEXIS 398 (Miss. 2012).

In an action to modify child custody, where guardian ad litem failed to provide the court with an objective record of the evidence or make a recommendation as to whether or not a material change in circumstances had occurred, did not prepare a written report or recommendation; declined to question any witnesses during the trial, and declined to add any statements to the record other than a statement that she would leave it to the court's discretion as to whether or not there had been a material change in circumstances, she failed to comply with her statutory duties, and the case was properly remanded for the chancellor to reconsider based on the totality of the circumstances. Gainey v. Edington, 24 So. 3d 333, 2009 Miss. App. LEXIS 823 (Miss. Ct. App. 2009).

Where a mother and father agreed to joint physical and legal custody of their daughter but the father moved for a modification of the custody arrangement based upon a change in circumstances after the mother moved 80 miles away, the trial court did not err in finding that the Albright mental health factor weighed in favor of the father because testimony from the mother's mother and sister established that the mother went through a stage where she could not take care of herself and the mother testified that she was seeing a psychiatrist and was taking medication for depression, bi-polar disorder, and anxiety. Pearson v. Pearson, 11 So. 3d 178, 2009 Miss. App. LEXIS 308 (Miss. Ct. App. 2009).

Chancery court properly denied a mother's petition for modification of child custody because the chancellor was in the best position to assess the witnesses, did not believe a mother's assertions of sexual abuse, and did believe a father's explanations with regard to the allegations. The father explained that their daughter had a diaper rash requiring him to put Desitin on the affected area and that the daughter was bit while playing as school with other children. Lorenz v. Strait, 987 So. 2d 427, 2008 Miss. LEXIS 359 (Miss. 2008).

Issue of custody was fully and vigorously tried on the merits and both parties presented extensive evidence regarding custody, and the chancellor determined it to be in the best interest of the child to make his custodial situation more conducive to continuous learning; there was no error in the chancellor's grant of full custody to the father. Purviance v. Burgess, 980 So. 2d 308, 2007 Miss. App. LEXIS 787 (Miss. Ct. App. 2007).

Appellate court reversed trial court's award of sole custody to the mother as the stepmother's involvement in the child's life was not a material change in circumstances that warranted a change in custody. Jones v. McQuage, 932 So. 2d 846, 2006 Miss. App. LEXIS 3 (Miss. Ct. App.), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 499 (Miss. 2006).

There was sufficient evidence of changed circumstances to support the chancellor's decision to modify the child custody award and grant the ex-husband primary custody of the children because, inter alia: (1) the ex-wife was cohabitating with the husband's brother, who had four felony convictions for indecency with a 14-year-old minor; (2) the wife had been unable to consistently have the youngest child at school at the appropriate time; (3) the wife would sleep for days at a time, awaking only to eat and returning to bed; (4) the middle child received virtually no discipline from the wife; and (5) the wife's behavior since the divorce was adversely affecting her children. Burrus v. Burrus, 962 So. 2d 618, 2006 Miss. App. LEXIS 918 (Miss. Ct. App. 2006), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 482 (Miss. 2007).

Upon the father's petition to change child custody, the chancellor committed harmless error by restricting his findings of fact to the events that had taken place since the entry of the last custody order; the court was permitted to consider all the events since the first custody order. Glissen v. Glissen, 910 So. 2d 603, 2005 Miss. App. LEXIS 160 (Miss. Ct. App. 2005).

Chancellor abused his discretion in modifying a child custody arrangement without finding the requirement of a substantial and material change in circumstances that adversely affected the child's welfare. Although the trial court referred to the change as an adjustment of the visitation schedule and awarded the wife "primary physical visitation" as opposed to "primary physical custody," the conclusion was inescapable that the court changed the custody of the minor child. Johnson v. Johnson, 913 So. 2d 368, 2005 Miss. App. LEXIS 273 (Miss. Ct. App. 2005).

Evidence of a mother's alcoholism, drug addiction, and psychological problems was sufficient to prove that a material change of circumstances had occurred, that the change was detrimental, and that changing custody from the mother to the father was in the child's best interest. Johnson v. Gray, 859 So. 2d 1006, 2003 Miss. LEXIS 696 (Miss. 2003).

Where a paternal grandmother sought temporary custody of her minor grandchild through an ex parte proceeding based on claims that the child was sexually abused by the attorney of the child's mother, the trial court properly found that the child's molestation was a material change, detrimental to her best interest, and did not err in taking custody from the mother and temporarily granting it to the grandmother. E. J. M. v. A. J. M., 846 So. 2d 289, 2003 Miss. App. LEXIS 397 (Miss. Ct. App. 2003).

Where a paternal grandmother sought temporary custody of her minor grandchild through an ex parte proceeding based on claims that the child had been sexually abused, the trial court properly admitted evidence of the schizophrenic mother's mental state, as it bore on the best interests of the child, and the allegations in the request for custody were of child abuse. E. J. M. v. A. J. M., 846 So. 2d 289, 2003 Miss. App. LEXIS 397 (Miss. Ct. App. 2003).

Award of both children to father was supported by evidence that split custody was not working, that it was in children's best interest to be kept together, that both children viewed their father more favorably than their mother, that children's relationship with stepmother was good, that children's relationship with stepfather was strained, and that instances of excessive physical discipline occurred at mother's home but not at father's home. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

It was harmless error to extend psychotherapist-patient privilege to exclude licensed clinical social worker's testimony, in action to modify custody provisions of divorce decree, regarding mother's interference with and "coaching" of child while he was being examined, where mother freely acknowledged her participation in the examination session. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Trial court did not abuse its discretion by excluding, in custody modification proceeding, arguably repetitive testimony concerning incident in which mother bit another woman on the arm. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

A chancellor erred in changing custody of a 6-year-old girl from her mother to her father based solely on the child's unusual knowledge of sexual conduct allegedly gained from her accidental exposure to sexual relations between her mother and stepfather where the totality of the facts and circumstances failed to support a finding that the child's best interest would be served by a change in custody. Smith v. Jones,

654 So. 2d 480, 1995 Miss. LEXIS 151 (Miss. 1995).

The evidence was sufficient to support a finding that a father had discharged his obligation to support his daughter where the parents modified the custody and child support provisions of their divorce decree by an agreement under which the father took custody of the daughter and the child support payment made by the father to the mother for their three children was proportionately reduced, and the father subsequently made substantial direct payments to the daughter for her support. Although court-ordered child support payments vest in the child as they accrue and may not thereafter be modified or forgiven, this does not mean that equity may not at times suggest ex post facto approval of extra-judicial adjustments in the manner and form in which support payments have been made. Varner v. Varner, 588 So. 2d 428, 1991 Miss. LEXIS 719 (Miss. 1991).

The evidence was not sufficient to support a change in child custody from the mother to the father where the only evidence of the mother's instability was her frequent moves within a short period of time, along with the psychological condition of the children which was questioned at trial. Cooley v. Cooley, 574 So. 2d 694, 1991 Miss. LEXIS 15 (Miss. 1991), overruled, Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

In a father's action seeking a change in child custody from the mother to the father, evidence of the father's treatment of the mother and the child prior to the parties' divorce was manifestly material to the issue of the fitness of the father to have custody of the child, where the divorce decree indicated that the court had found merit to the mother's charges of habitual cruel and inhuman treatment. Herring v. Herring, 571 So. 2d 239, 1990 Miss. LEXIS 703 (Miss. 1990).

The evidence did not reflect a material change in the circumstances of a child and his parents, which adversely affected the child, to the extent that a change of custody from the mother to the father was warranted, where the mother called upon the father for help when she fell upon hard times, the father had custody of the child for 16 months while the mother had liberal visitation, and the mother asked the father to restore custody to her when her situation stabilized, but the father declined; the parties' act, in temporarily modifying the custody decree, was not binding upon the court. Arnold v. Conwill, 562 So. 2d 97, 1990 Miss. LEXIS 227 (Miss. 1990).

A chancellor was not "manifestly wrong" in changing custody of a daughter from the mother to the father where the mother's move to Alaska had an "adverse effect" on the daughter, the parties' original divorce decree provided custody of the parties' son in the father and custody of their daughter in the mother, the daughter visited with her brother every day prior to the move to Alaska, and the mother had a poor relationship with her son. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

There are 2 prerequisites to a modification of child custody. First, the moving party must prove by a preponderance of the evidence that, after the entry of the judgment sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child. Second, if such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody. Phillips v. Phillips, 555 So. 2d 698, 1989 Miss. LEXIS 510 (Miss. 1989).

Case seeking modification of child custody decree which gave joint legal custody of minor children to both parents and physical custody to mother was affirmed, although remanded to Chancery Court for updating custody hearing where record was 2 years old and Chancery Court judgment appealed from was almost entirely lacking in statement of findings of fact or conclusions of law upon which judgment was based. Pace v. Owens, 511 So. 2d 489, 1987 Miss. LEXIS 2672 (Miss. 1987).

Upon making an explicit finding that mother's proposed move from Union County was not a material change of circumstances which would adversely affect the child whose custody had been awarded to her, chancellor committed reversible error in transferring custody of child from mother to father. Rutledge v. Rutledge, 487 So. 2d 218, 1986 Miss. LEXIS 2436 (Miss. 1986).

Trial court did not modify custody based on a father's relocation due to a job transfer, but rather it considered evidence of the mother's conduct and the adverse effect that had on the child, and it did not err by proceeding to analyze the factors under Albright v. Albright, 437 So.2d 1003 (Miss. 1983), after it determined that there was a change in circumstance due to the mother's conduct; moreover, seven of the factors favored the father, and neither party was favored by the child's age since the tender years presumption had been weakened in Mississippi. Giannaris v. Giannaris, 962 So. 2d 574, 2006 Miss. App. LEXIS 668 (Miss. Ct. App. 2006), rev'd, 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

In the absence of evidence of a material change in condition occurring since the entry of the original decree of divorce no change should be made in the original award of custody of the parties' children. Webb v. State, 186 So. 2d 462, 1966 Miss. LEXIS 1311 (Miss. 1966).

In proceedings by wife to modify decree awarding custody of children to husband, admission over wife's objections of evidence that prior to decree of divorce when wife had custody of the children, she neglected them and was leading a life that made it to the best interests of the children that they be given to their father, was proper and necessary in order for the court to determine whether conditions had so changed as to warrant change in custody of the children. White v. Brocato, 35 So. 2d 455 (Miss. 1948).

Evidence of changes in condition of eleven-year-old child and divorced mother held to warrant modification of decree awarding custody of child to father so as to entitle mother, who had remarried, to have child visit her in another state for limited time during summer upon execution by her of bond for child's return. Campbell v. Lovgren, 175 Miss. 4, 166 So. 365, 1936 Miss. LEXIS 19 (Miss. 1936).

41. —Res judicata.

On a petition to modify a divorce decree awarding custody of a child to the wife, where the record did not reflect a change in conditions materially and adversely affecting the child's welfare, but on the contrary tended to show that conditions surrounding the child have been bettered, the decree would not be modified, since the final divorce decree was res judicata, and only subsequent substantial change in conditions materially and adversely affecting the child's welfare would warrant its modification. Brocato v. Walker, 220 So. 2d 340, 1969 Miss. LEXIS 1458 (Miss. 1969).

Agreed provisions of a divorce decree as to visitation rights are not res judicata so as to preclude modifications of a minor nature where original provisions prove impractical and are unsuited to the best interests of the children, and there has been a substantial change of circumstances. Tighe v. Moore, 246 Miss. 649, 151 So. 2d 910, 1963 Miss. LEXIS 491 (Miss.), cert. denied, 375 U.S. 921, 84 S. Ct. 265, 11 L. Ed. 2d 164, 1963 U.S. LEXIS 201 (U.S. 1963).

A former adjudication is res judicata in a subsequent proceeding to modify a former decree of care and custody of a minor child where there has been no substantial change in the facts. Earwood v. Cowart, 232 Miss. 760, 100 So. 2d 601, 1958 Miss. LEXIS 326 (Miss. 1958).

Modification of decree awarding custody of child to ex-wife with visitation and temporary custody to father one day each week, to permit temporary custody of child by father during the vacation month of July, was authorized, notwithstanding that former decree was, as contended by ex-wife, res judicata as to the facts then existing upon which it was based, having in mind the best interests of the child. Evans v. Evans, 195 Miss. 320, 15 So. 2d 698, 1943 Miss. LEXIS 171 (Miss. 1943).

42. —Extra-marital conduct.

Where the ex-wife chose to cohabit with a convicted felon in Texas, the effects of this new relationship constituted a material change in circumstances that adversely affected the children. The chancellor properly granted the ex-husband's motion for a change of child custody. Glissen v. Glissen, 910 So. 2d 603, 2005 Miss. App. LEXIS 160 (Miss. Ct. App. 2005).

An extramarital relationship is not, per se, an adverse circumstance warranting modification of a custody decree. Thus, a chancellor's modification of a joint child custody decree by forbidding the mother to continue conducting her "illicit" relationship with her male friend while her daughter resided with her was sufficient where there was no substantial credible evidence showing an adverse change affecting the child of such proportions that the child's best interest would be served by further modifying the custody decree. Morrow v. Morrow, 591 So. 2d 829, 1991 Miss. LEXIS 868 (Miss. 1991).

A custodial parent's sexual relations with a third person outside of marriage does not, by itself, warrant modification of the child custody order. Phillips v. Phillips, 555 So. 2d 698, 1989 Miss. LEXIS 510 (Miss. 1989).

Mother who, through adultery, loses custody of children but subsequent to divorce rehabilitates herself is entitled to have custody decree modified to provide for visitation with children of at least two full weekends a month during school year, with visitation to terminate Sunday afternoon as opposed to Sunday morning, and five week period during summer vacation. Crowson v. Moseley, 480 So. 2d 1150, 1985 Miss. LEXIS 2417 (Miss. 1985).

Chancery Court may not modify custody decree to remove custody of children from father and grant custody to maternal grandparents on basis of showing that, subsequent to divorce, woman who subsequently married father spent several nights in home prior to marriage and that woman brought with her one 5-year-old son by former marriage; nor may grandparents be awarded visitation rights. Stoker v. Huggins, 471 So. 2d 1228, 1985 Miss. LEXIS 2124 (Miss. 1985).

43. Best interests of child.

Judgment awarding the father primary physical custody of minor child was affirmed because there was substantial evidence for the chancellor's finding that the child had been sexually abused while in the mother's care, which, together with the mother having moved to Alabama without informing the father, constituted a change in circumstances was adverse to the child's best interests. T.K. v. H.K., 24 So. 3d 1055, 2010 Miss. App. LEXIS 7 (Miss. Ct. App. 2010).

Child custody was properly modified based on a change in circumstances arising from allegations that a mother refused to comply with visitation between a father and his 14-year-old daughter because, even though the age and sex of the child favored the mother under the best interest factors in Albright v. Albright, 437 So. 2d 1003, (Miss. 1983), most of the rest of the factors favored the father; he provided the most stable environment, he was the only one employed, he had the better parenting skills, and he was in better health than the mother. An appellate court took note of a threatening letter that the mother had attached to the locker of one of the child's classmates. Davis v. Davis, 17 So. 3d 114, 2009 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

Where the mother had a record of hostility toward the father and interfered with his court ordered visitation, the chancellor did not err by determining that a change in custody from the mother to the father was in the best interest of the child even though the guardian ad litem recommended that the child continue to live with the mother. The mother's allegations of sexual abuse by the father were unsubstantiated. Potter v. Greene, 973 So. 2d 291, 2008 Miss. App. LEXIS 30 (Miss. Ct. App. 2008).

44. Remarriage.

Chancery court erred in terminating a former husband's obligation to pay alimony to his former wife; the chancery court abused its discretion in determining that the wife's sexual relationship with her boyfriend amounted to a marriage. Byars v. Byars, 850 So. 2d 147, 2003 Miss. App. LEXIS 180 (Miss. Ct. App. 2003).

Chancery court abused its discretion in finding that a former wife's lifestyle warranted a change in alimony payments; the wife's lifestyle did not provide her boyfriend with the benefits of marriage without ceremonial endorsement. Byars v. Byars, 850 So. 2d 147, 2003 Miss. App. LEXIS 180 (Miss. Ct. App. 2003).

A chancellor did not err in refusing to modify an antenuptial agreement requiring the husband to "bestow his retirement benefits with a reasonable and comfortable monthly income to his wife so long as she may live," even though the wife had remarried, where the agreement had been specifically enforced in the parties' judgment of divorce, and the parties testified that their respective incomes and economic statuses had not significantly changed since the divorce proceedings. Hollis v. Hollis, 650 So. 2d 1371, 1995 Miss. LEXIS 92 (Miss. 1995).

In a husband's action for reduction of child support and for judgment for any alimony paid to the wife since her remarriage, the court did not err in treating a $225 monthly house payment made by the husband as alimony and a $700 monthly payment as child support where the husband was relieved of the house payment when the wife purchased the house from the husband, the husband continued to make the $700 payment after the wife had remarried, and the husband had not designated any part of the $700 monthly payment as alimony on his federal tax return. Duncan v. Duncan, 556 So. 2d 346, 1990 Miss. LEXIS 15 (Miss. 1990).

Remarriage of mother who had custody of 3-year-old daughter to man of different race is not sufficient reason to justify divesting mother of custody of child. Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421, 1984 U.S. LEXIS 69 (U.S. 1984).

The fact that the father of a six-year-old girl had remarried and was in a position to provide better living conditions for the child than could the mother, who had to work for a living since she received no award of alimony, was not a sufficient change of circumstances to warrant taking custody away from the mother to whom it had been granted in the divorce decree, in the absence of evidence that the mother was unfeeling toward the child, or had neglected or mistreated her. Sistrunk v. Sistrunk, 245 So. 2d 845, 1971 Miss. LEXIS 1386 (Miss. 1971).

Circumstances of the wife's remarriage and change of residence to a place 600 miles from her original residence did not constitute such a change in conditions as to warrant modification of the divorce decree which awarded the custody of the child to her. Brocato v. Walker, 220 So. 2d 340, 1969 Miss. LEXIS 1458 (Miss. 1969).

Modification of an original decree awarding custody of children to their father so as to give custody to their mother was proper where the father was subsequently permanently hospitalized and the mother was then shown to be a fit person and remarried to a man who had no other children and was willing and able to provide them a suitable home. Conrad v. Fountain, 202 Miss. 237, 30 So. 2d 803, 1947 Miss. LEXIS 265 (Miss. 1947).

Remarriage of a divorced wife entitled the divorced husband to a reassignment of a policy of insurance on his life, assigned by him to her under the alimony provisions of a divorce decree, requiring such assignment for the evident purpose of protecting her against failure of alimony payments by the death of the husband, since under the divorce decree the divorced wife did not receive absolute ownership of the policy.

East v. Collins, 194 Miss. 281, 12 So. 2d 133, 1943 Miss. LEXIS 58 (Miss. 1943).

Remarriage of the divorced wife relieved her former husband of all duties to support and maintain her thereafter, and the divorced wife was not entitled after the date of her remarriage to the monthly payments for her support or to mortgage instalment payments against the former home. East v. Collins, 194 Miss. 281, 12 So. 2d 133, 1943 Miss. LEXIS 58 (Miss. 1943).

Evidence of changes in condition of eleven-year-old child and divorced mother held to warrant modification of decree awarding custody of child to father so as to entitle mother, who had remarried, to have child visit her in another state for limited time during summer upon execution by her of bond for child's return. Campbell v. Lovgren, 175 Miss. 4, 166 So. 365, 1936 Miss. LEXIS 19 (Miss. 1936).

45. Education.

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to offset the ex-husband's child support obligation by his payments for his oldest child's college education because, inter alia: (1) although the child lived at college, he frequently came home on the weekend and for holidays; (2) the child received financial support from both parents as the ex-wife gave him money to pay for his car insurance; (3) the wife used a portion of the child's support payment to provide for the child when he came home for visits and to maintain the household for the rest of the family; and (4) the child support agreement contained no provision for reducing child support payments to the wife once the children left home. Dix v. Dix, 941 So. 2d 913, 2006 Miss. App. LEXIS 812 (Miss. Ct. App. 2006).

A finding that a son was emancipated and that his father had no further duty to support him would be reversed, and the father would be required to abide by the terms of a court order requiring him to pay for his son's college expenses, even though the son worked full-time, where the father had ignored the court order to pay his son's college expenses, in effect forcing his son to abandon his schooling and become a full-time worker. Caldwell v. Caldwell, 579 So. 2d 543, 1991 Miss. LEXIS 236 (Miss. 1991).

In determining whether there had been a substantial change in circumstances necessary to modify child support, the trial court should have considered an increase in expenses as a result of the children's attendance at college; this was not something that should have been anticipated at the time of the entry of the original decree since few parents can anticipate with certainty, 5 years ahead of time, that their children will attend college. Lawrence v. Lawrence, 574 So. 2d 1376, 1991 Miss. LEXIS 17 (Miss. 1991).

Where, since rendition of a divorce decree, giving custody of minor daughter to the wife and directing the husband to make monthly payments for support of the child, the daughter had become a senior in high school, prepared for graduation and for college, and showed a special aptitude for the latter, there had been such a material and substantial change in the circumstances of the parties as to justify modification of the decree so as to require the father to provide funds for the college education of the daughter. Pass v. Pass, 238 Miss. 449, 118 So. 2d 769, 1960 Miss. LEXIS 426 (Miss. 1960).

46. Visitation.

Chancery court did not abuse its discretion in granting visitation to a father because the father was awarded two weekends per month, six weeks in the summer, and holidays every other year, and "liberal visitation," at a minimum, meant two weekends a month and five weeks during the summer. Tidmore v. Tidmore, 114 So. 3d 753, 2013 Miss. App. LEXIS 259 (Miss. Ct. App. 2013).

Chancellor's decision to grant the mother's motion requesting modification of the visitation provision to require the father to pay the entire cost of his optional visitation was supported by substantial evidence, because the mother was unemployed and could not afford the cost of transporting her son. Balius v. Gaines, 95 So. 3d 730, 2012 Miss. App. LEXIS 488 (Miss. Ct. App. 2012).

Chancery court did not err by refusing to order the husband to undergo a mental evaluation under Miss. R. Civ. P. 35(a) before awarding him unsupervised visitation; although the wife cited various incidents, the record did not support her contention that the husband had harmed their minor child in the past or that he would have presented an immediate danger to her health and safety in the future. LeBlanc v. Andrews, 931 So. 2d 683, 2006 Miss. App. LEXIS 462 (Miss. Ct. App. 2006).

Where evidence that the very young child had been sexually abused by his father during times of visitation included testimony from the mother, relatives, teachers, and a child therapist, the child had never named another person as his abuser, and during four years of hearings and examinations, no one else had been implicated as sexually abusing the child, the appellate court could not find that the chancellor's decision to terminate visitation, at least for an interim period, was based on insufficient credible evidence. R.L.N. v. C.P.N., 931 So. 2d 620, 2005 Miss. App. LEXIS 992 (Miss. Ct. App. 2005).

Incarcerated father admitted to barely knowing the child, and the only testimony heard by the chancellor was from the child's parents, the maternal grandfather and the paternal grandmother, and none of that testimony concerned the child's best interest. There was no testimony by anyone else, professional or otherwise, regarding what, if any, impact the exposure to the prison environment might have on an impressionable young child, and therefore, the father failed to meet the burden of showing that visitation was in the best interest of the child. Christian v. Wheat, 876 So. 2d 341, 2004 Miss. LEXIS 775 (Miss. 2004).

Mother argued that the chancellor abused his discretion in setting up the revised visitation schedule since it did not provide for more frequent weekend visitation periods, a longer period during the summer, and extended weekend visitation during Mardi Gras; however, the visitation arrangements for the mother ordered by the chancellor appeared to fall within the range of discretion afforded the chancellor in fashioning a schedule that was in the best interest of the child, and the chancellor did not abuse his discretion in failing to expand the visitation further in the areas complained of by the mother in her appellate brief. Callahan v. Davis, 869 So. 2d 434, 2004 Miss. App. LEXIS 256 (Miss. Ct. App. 2004).

Decision of a chancellor, who found that a father's alleged sexual abuse of his four-year-old son had not been proven and refused to restrict the father's visitation, was supported by substantial evidence and was based on the credibility of the witnesses; it was therefore not overturned on appeal. Bratcher v. Surrette, 848 So. 2d 893, 2003 Miss. App. LEXIS 569 (Miss. Ct. App. 2003).

A chancellor erred in amending a visitation order to restrict a father's visitation with his 2 daughters to daytime hours on the basis that he taught his children Christian principles while living with a woman to whom he was not married where there was not substantial evidence in the record supporting the chancellor's finding that the children were confused by the father's alleged hypocrisy; moreover, even if the children were confused or did not like their father's living arrangements, that is not the type of harm that rises to the level necessary to overcome the presumption that a non-custodial parent is entitled to overnight visitation. Harrington v. Harrington, 648 So. 2d 543, 1994 Miss. LEXIS 632 (Miss. 1994).

A chancellor erred in suspending all visitation rights of a father, even though there was ample evidence that the child had been sexually abused, where there was not substantial credible evidence that the father was the abuser; however, the evidence warranted restriction of visitation, since there was conflicting evidence as to the identity of the abuser. Doe v. Doe, 644 So. 2d 1199, 1994 Miss. LEXIS 528 (Miss. 1994).

In cases where the terms of visitation are at issue, the change in circumstances rule has no application because the court is not being asked to change the permanent custody of the child. All that need be shown is that there is a prior decree providing for visitation rights that is or is not working and that is or is not in the best interest of the child. On visitation issues, as with other issues concerning children, the chancery court enjoys a large amount of discretion in making its determination of what is in the best interest of the child. Clark v. Myrick, 523 So. 2d 79, 1988 Miss. LEXIS 85 (Miss. 1988).

Petition by noncustodial parent who has been granted reasonable visitation rights to be granted specific visitation rights after parties have been unable to agree upon reasonable visitation is properly viewed as petition to clarify, not modify, divorce decree and should be granted. Brown v. Gillespie, 465 So. 2d 1046, 1985 Miss. LEXIS 1971 (Miss. 1985).

The chancellor did not abuse his discretion in refusing to modify a child custody decree, pursuant to § 93-5-23, to require that professional psychological care and treatment be required, even though the child was experiencing emotional problems, perhaps resulting from the divorce and subsequent custody fight, in view of the finding that the child's emotional problems could best be dealt with by keeping him in the custody of his mother and that his mother was a fit and suitable person to have the care and custody of the child; nor was there abuse of discretion in the chancellor's modification of the original decree awarding the father two day visitation privileges, even though a substantial distance separated the parties. Cheek v. Ricker, 431 So. 2d 1139, 1983 Miss. LEXIS 2685 (Miss. 1983).

A mother's petition which sought modification of her visitation rights and claimed that the father continuously refused to permit the mother to visit the child at any and all reasonable times, and that the father arbitrarily defined reasonable rights of visitation as he saw fit, sufficiently charged that there had been material and substantial changes in circumstances, and a decree modifying the mother's visitation rights by designating specific and exact times and intervals between changes in custody and visitation of the mother and father was justified and did not have the effect of splitting custody. Hatten v. Pearson, 221 So. 2d 87, 1969 Miss. LEXIS 1487 (Miss. 1969).

Agreed provisions of a divorce decree as to visitation rights are not res judicata so as to preclude modifications of a minor nature where original provisions prove impractical and are unsuited to the best interests of the children, and there has been a substantial change of circumstances. Tighe v. Moore, 246 Miss. 649, 151 So. 2d 910, 1963 Miss. LEXIS 491 (Miss.), cert. denied, 375 U.S. 921, 84 S. Ct. 265, 11 L. Ed. 2d 164, 1963 U.S. LEXIS 201 (U.S. 1963).

The modification of a former decree awarding the care and custody of a minor daughter to the mother, to provide that the father should have care and custody of the child during the summer months with the mother exercising such rights during the school months, and granting certain visitation rights to each of the parents, was not an abuse of the chancellor's discretion. Earwood v. Cowart, 232 Miss. 760, 100 So. 2d 601, 1958 Miss. LEXIS 326 (Miss. 1958).

47. Lump sum payments.

Lump-sum alimony is fixed obligation and is not modifiable. McDonald v. McDonald, 683 So. 2d 929, 1996 Miss. LEXIS 633 (Miss. 1996).

Lump-sum alimony award could not be modified under rule allowing relief from judgment for "any other reason justifying relief from the judgment"; modification was inconsistent with substantive law. McDonald v. McDonald, 683 So. 2d 929, 1996 Miss. LEXIS 633 (Miss. 1996).

Former husband's decision to pursue medical residency was not such "substantial change in circumstances" as might justify modification of payment schedule for lump-sum alimony, if such modifications are permissible, where former husband considered pursuing residency for years before he entered property settlement agreement. McDonald v. McDonald, 683 So. 2d 929, 1996 Miss. LEXIS 633 (Miss. 1996).

Even though the chancellor erred in holding that alimony awarded in the original decree was lump sum, rather than periodic, he was not manifestly wrong in denying former husband's request for modification of payments where, in an attempt to end continuing litigation between the former spouses, the chancellor arrived at an equitable solution. Bonderer v. Robinson, 502 So. 2d 314, 1986 Miss. LEXIS 2711 (Miss. 1986).

Agreement between divorcing husband and wife, which was incorporated into their divorce decree pursuant to Mississippi Code § 93-5-2, which obligated husband to pay $5,000 per month to wife, and further provided that payments to the wife would not terminate upon husband's death or wife's remarriage, and that wife could never ask that payments to her be increased, was, notwithstanding the use of the term "alimony" therein, in fact a property settlement or lump sum alimony, payable in fixed, unalterable installments, which could not be modified on ground of husband's subsequent deteriorated financial condition. East v. East, 493 So. 2d 927, 1986 Miss. LEXIS 2564 (Miss. 1986).

Alimony awarded in a lump sum, or in gross, constitutes a fixed liability of the husband and his estate and cannot be modified. East v. East, 493 So. 2d 927, 1986 Miss. LEXIS 2564 (Miss. 1986).

Where alimony awarded wife is in lump sum presently payable, court cannot modify award after term. Guess v. Smith, 100 Miss. 457, 56 So. 166, 1911 Miss. LEXIS 5 (Miss. 1911).

48. Payments in arrears.

A chancellor erred in determining that the matter of a child support arrearage was previously settled by a court-approved modification of child support, which effectively amounted to a forgiveness of vested but unpaid child support obligations, since this is contrary to the well-established rule that "a court cannot relieve the civil liability for support payments that have already accrued." Tanner v. Roland, 598 So. 2d 783, 1992 Miss. LEXIS 222 (Miss. 1992).

A former husband failed to show that he was financially unable to comply with the divorce decree so as to avoid paying child support arrearage, where he failed to offer substantial evidence which was "particular and not general" to support his contention, and he had failed to pay medical expenses and school expenses at a time when he held a well paying job, which indicated that financial hardship was not the sole factor in his failure to make payments. Additionally, the husband's argument that he had to pay other bills before making support payments was meritless, since such payments are paramount. Gregg v. Montgomery, 587 So. 2d 928, 1991 Miss. LEXIS 712 (Miss. 1991).

A chancellor's reduction of past due child support payments was manifest error since child support payments become vested and cannot be modified once they become past due. Thurman v. Thurman, 559 So. 2d 1014, 1990 Miss. LEXIS 185 (Miss. 1990).

49. Jurisdiction.

Husband's foreign divorce decree did not terminate the Mississippi chancery court's jurisdiction over the matter, nor were the parties required to file a separate pleading for alimony or division of property once the parties consented to the chancellor's authority to rule on such matters. Chapel v. Chapel, 876 So. 2d 290, 2004 Miss. LEXIS 759 (Miss. 2004).

A custody agreement which called for a change in custody of the children from the mother to the father on relocation by the mother was void and contrary to public policy. The court cannot surrender or subordinate its jurisdiction and authority as to the circumstances and conditions which will cause a change in custody. McManus v. Howard, 569 So. 2d 1213, 1990 Miss. LEXIS 669 (Miss. 1990).

Where parties incomes were not sufficient to meet expenses at time of trial, Chancery Court should have retained jurisdiction over question of alimony and if at later date husband's dental practice became successful financially, court would have authority to award such alimony as may at that time be fair and equitable; in cases where facts do not justify present award of alimony, Chancery Court generally ought to retain jurisdiction over question of alimony, and need not award nominal alimony in order to allow for modification in event that earning power of one spouse increases. McNally v. McNally, 516 So. 2d 499, 1987 Miss. LEXIS 2956 (Miss. 1987).

The amount of child support to be paid by a non-resident defendant was properly increased where the trial court had continuing jurisdiction over the matter of child support and where notice by publication in accordance with statutory requirements was reasonable. Campbell v. Campbell, 357 So. 2d 129, 1978 Miss. LEXIS 2492 (Miss. 1978).

Modification of divorce decree changing custody of child from mother to paternal grandparents was erroneous where there was no evidence that mother was an unfit person to have custody; moreover, custody would not be changed since mother had moved to Florida and planned to carry the child out of the jurisdiction of the court, although under such circumstances the court would retain jurisdiction by requiring mother to post a bond to insure the child's return when ordered to the jurisdiction of the court. Rodgers v. Rodgers, 274 So. 2d 671, 1973 Miss. LEXIS 1607 (Miss. 1973).

The rule being well established that a chancery court which grants the custody of children in a divorce proceeding has, as between the same parties, continuing exclusive jurisdiction to modify the decree upon subsequent changed circumstances, the chancery court in the county in which the children and divorced parents resided was without jurisdiction to modify the decree of custody entered by the chancery court of another county, notwithstanding the statute providing that an action to determine the legal custody of a child may be brought in the county where the child is actually residing, in the county of residence of a party who has actual custody, or in the county of the residence of the defendant. Reynolds v. Riddell, 253 So. 2d 834, 1971 Miss. LEXIS 1231 (Miss. 1971).

Even if the court granting divorce to the mother and awarding to her the custody of the parties' minor child had continuing jurisdiction over the matter, the chancellor properly dismissed the father's proceeding for modification of the custody decree, and for custody of the child, where the mother was decoyed into the state for service of process by trick, device and fraud on the part of the husband. McClellan v. Rowell, 232 Miss. 561, 99 So. 2d 653, 1958 Miss. LEXIS 303 (Miss. 1958).

Foreign divorce decree directing payments in instalments for support of minor child may not be modified by Mississippi courts as to future instalments under the full faith and credit clause, where jurisdiction to amend such future instalments was retained by the court granting the divorce. Hatrak v. Hatrak, 206 Miss. 239, 39 So. 2d 779, 1949 Miss. LEXIS 258 (Miss. 1949).

A decree expressly awarding a given sum as present alimony, payable in monthly installments, and reserving the matter of future alimony for further consideration was not the allowance of a commuted and lump sum intended to be permanent, so that court had full jurisdiction to award further alimony if changed conditions so required. Cazenave v. Cazenave, 201 Miss. 211, 28 So. 2d 856, 1947 Miss. LEXIS 387 (Miss. 1947).

Where under the alimony provisions of a divorce decree, the divorced husband was required to assign to the divorced wife a policy of insurance on his life not as a division of property, but for the evident purpose of protecting her against failure on his part to make alimony payments, the chancery court, under this section [Code 1942, § 2743], as well as under the decree expressly retaining jurisdiction of the terms of the alimony, retained jurisdiction to adjudicate the future title to and rights under the policy as affected by changed conditions. East v. Collins, 194 Miss. 281, 12 So. 2d 133, 1943 Miss. LEXIS 58 (Miss. 1943).

50. Practice and procedure.

As the Mississippi Rules of Civil Procedure apply only to the extent that the divorce statutes do not, strict reliance on the Mississippi Rules of Appellate Procedure and Mississippi Rules of Civil Procedure is misplaced. Mississippi divorce statutes do not place a time limit on modification. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

A party's own request does not create notice that should she fail in her claims for child support, she would become subject to having a child support obligation placed on her solely by virtue of her own petition. Massey v. Huggins, 799 So. 2d 902, 2001 Miss. App. LEXIS 446 (Miss. Ct. App. 2001).

The amount of periodic alimony awarded in a divorce decree based on irreconcilable differences was subject to modification, even though an agreement incorporated into the decree provided that the alimony provisions "shall not be modified without consent and agreement of the parties," since periodic alimony agreements incorporated into a divorce decree based on irreconcilable differences are subject to modification where a material change in circumstances arises. Ellis v. Ellis, 651 So. 2d 1068, 1995 Miss. LEXIS 123 (Miss. 1995).

A letter written by a former wife evidencing an attempt to waive alimony, which was provided to her former husband to enable him to obtain a loan, would not bar the wife's claim of recovery for unpaid alimony, even though the letter was written subsequent to the entry of the parties' divorce decree, since the letter could not deprive the court of its exclusive power to modify the decree to meet a change in the circumstances and conditions of the parties as described by statute; in order for the wife to relieve the husband of alimony payments, it would be necessary for her to file a motion to modify with the court. Gregg v. Montgomery, 587 So. 2d 928, 1991 Miss. LEXIS 712 (Miss. 1991).

An obligation owed by one spouse to the other becomes fixed and vested when due and unpaid. This obligation will not be discharged or amended in an agreement between the parties unless it is explicitly pled before an informed court. To amend a prior decree, even a temporary one, the parties should recite the change and present it to the court. Thus, a final decree of divorce did not relieve a husband from paying an arrearage of temporary alimony which accrued before the entry of that final decree. Lewis v. Lewis, 586 So. 2d 740, 1991 Miss. LEXIS 500 (Miss. 1991).

A chancery court's order reducing a father's child support obligation, predicated on its finding that there was a material change in circumstances, could not relate back to the date that the father first filed and sought a reduction in child support; such a rule provides sharp incentives for one who would have his or her support obligation reduced to bring the matter to trial as expeditiously as possible. Accordingly, the father's reduction in child support obligations became effective on the date of the court judgment. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

To extent that there is legal duty for parent to support adult incapacitated child, duty runs from parent to child, not from one divorced spouse to other; any action for support of child should therefore be maintained by or on behalf of adult child against parent from whom support is sought, not by suit brought by one parent against other for modification of divorce decree. Taylor v. Taylor, 478 So. 2d 310, 1985 Miss. LEXIS 2288 (Miss. 1985).

Statistical data regarding increase in consumer price index, proffered through expert opinion testimony by party seeking additional property settlement and child support, is admissible but not conclusive. Craft v. Craft, 478 So. 2d 258, 1985 Miss. LEXIS 2258 (Miss. 1985).

Property settlement and child support agreement entered into by parties to divorce who are adversaries, represented by counsel, and dealing with one another at arms' length will not be invalidated as having been induced by fraud where party seeking invalidation fails to meet burden of proving fraud by clear and convincing evidence. Craft v. Craft, 478 So. 2d 258, 1985 Miss. LEXIS 2258 (Miss. 1985).

County judge presented with petition for writ of habeas corpus by noncustodial parent followed by proof that custodial parent has become frequent drug user and is substantially emotionally unstable may refuse to enforce prior Chancery Court decree, and may enter judgment dismissing petition and temporarily vesting custody of child with noncustodial parent pending further action by Chancery Court on any petition for modification that may be pending or may be brought by either or both parties. Wade v. Lee, 471 So. 2d 1213, 1985 Miss. LEXIS 2130 (Miss. 1985).

Child support payments required to be made to person designated by decree fixing payment may not be suspended when physical custody of child is transferred to third party due to estranged relations between child and custodial parent; however, court may transfer support payment from custodial parent to person who has physical custody and may require both parents to pay support to third party. Adams v. Adams, 467 So. 2d 211, 1985 Miss. LEXIS 1979 (Miss. 1985).

A court may modify a decree for the support of children to require a divorced wife periodically to account for child support payments only if circumstances so require, and a petition which alleged that a divorced wife was using payments for her own obligations was insufficient, under § 93-5-23, to allege changed circumstances that were not anticipated at the time of entry of the original decree so as to justify modification. Trunzler v. Trunzler, 431 So. 2d 1115, 1983 Miss. LEXIS 2676 (Miss. 1983).

A decree increasing the amount of the allowance a divorced father was required to pay for the support and maintenance of his children must be reversed when it was entered without prior notice to the father and was unsupported by proper pleadings. Webb v. State, 186 So. 2d 462, 1966 Miss. LEXIS 1311 (Miss. 1966).

A petition for modification of a provision for the support of children, which alleges that the custodian mother is employed, contains enough to entitle petitioner to a hearing, though it does not allege the amount of her earnings. Bailey v. Bailey, 246 Miss. 390, 149 So. 2d 478, 1963 Miss. LEXIS 453 (Miss. 1963).

One unable to comply with an alimony decree should with reasonable promptness make the fact known to the court by proper petition for modification or suspension. Rainwater v. Rainwater, 236 Miss. 412, 110 So. 2d 608, 1959 Miss. LEXIS 334 (Miss. 1959).

A letter, relied on as process in husband's action for modification of the provisions of a divorce decree, largely awarding custody of the children to the wife, served both upon the wife's attorney of record at the time of the former decree and an attorney subsequently employed by the wife, which did not advise wife's attorneys what modifications would be sought but merely notified that the husband would insist upon the wife obeying the terms of the former decree, did not constitute legal process upon the wife, who could not be found by the sheriff, and a judgment awarding complete custody of the children to the father was void. Logan v. Rankin, 230 Miss. 749, 94 So. 2d 330, 1957 Miss. LEXIS 419 (Miss. 1957).

When a decree of custody is to be made or modified in substantial or major aspects, a proper notice and opportunity to be heard must be given to the adverse party. Gordon v. Gordon, 196 Miss. 476, 17 So. 2d 191, 1944 Miss. LEXIS 217 (Miss. 1944).

Decree in vacation awarding permanent custody of child to mother, modifying original decree dividing custody of child equally between parents, without notice to father, was void. Gordon v. Gordon, 196 Miss. 476, 17 So. 2d 191, 1944 Miss. LEXIS 217 (Miss. 1944).

Original decree of divorce and alimony in wife's favor, providing that changes might be made therein with reference to alimony and property rights and custody of the children on five days' notice to either party, did not authorize hearing in vacation and decree modifying original decree, in the absence of specific provision in such decree for modification proceedings in vacation. Lanham v. Lanham, 194 Miss. 872, 14 So. 2d 215, 1943 Miss. LEXIS 113 (Miss. 1943).

Original decree of divorce and alimony in wife's favor, providing that changes might be made therein with reference to alimony and property rights and custody of children on five days' notice to either party, did not authorize hearing in vacation and decree modifying original decree, in absence of specific provision in such decree for modification proceedings in vacation. Lanham v. Lanham, 194 Miss. 872, 14 So. 2d 215, 1943 Miss. LEXIS 113 (Miss. 1943).

Petition to modify alimony may be filed in original case or as independent petition, but it must be in court rendering decree. Guess v. Smith, 100 Miss. 457, 56 So. 166, 1911 Miss. LEXIS 5 (Miss. 1911).

51. Retirement, pension.

Modification and reduction of a payor spouse's monthly alimony obligation was appropriate because the spouse's unanticipated, health-based retirement was an after-arising, material change in circumstances. However, remand was necessary because it was not apparent that the chancellor considered the spouse's ability to pay the decreased award, as the unchallenged figures representing each party's income and expenses showed that the spouse suffered a monthly deficit after paying alimony. Peterson v. Peterson, 129 So. 3d 255, 2013 Miss. App. LEXIS 777 (Miss. Ct. App. 2013).

A former wife who had voluntarily entered into an agreement, incorporated into the divorce decree, releasing her former husband from a claim for alimony was not entitled to a modification of the decree to grant her one-half of former husband's military retirement pay as alimony, in absence of a showing of a material change of circumstance, notwithstanding the enactment of 10 USCS § 1408 subsequent to the divorce decree. Colvin v. Colvin, 487 So. 2d 840, 1986 Miss. LEXIS 2447 (Miss. 1986).

Naval retirement pay, including increases, is subject to award of permanent alimony, pursuant to 10 USCS § 1408; however, decree requiring former spouse to be maintained as irrevocable beneficiary of Military Survivors' Benefit Plan is prohibited by 10 USCS § 1450. Powers v. Powers, 465 So. 2d 1036, 1985 Miss. LEXIS 1947 (Miss. 1985).

VI. ENFORCEMENT OF DECREE.

52. Enforcement by court.

Provision in marital property settlement agreement under which husband was subject to 10 percent penalty for late child support and alimony payments was enforceable, notwithstanding husband's contention that it was penalty provision, where it was approved by divorce court and was therefore court order, especially in light of wife's reliance on support payments. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Supreme Court views divorce decrees as quasi-contracts. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

The evidence was sufficient to show that a fraudulent conveyance had been made by a former husband to prevent his former wife from collecting amounts owed to her pursuant to the parties' divorce decree where the husband deeded 2 parcels of land to his mother and sister after the divorce was granted, there was no monetary consideration given, and the husband drafted the documents himself without informing his sister or mother until after the fact. Morreale v. Morreale, 646 So. 2d 1264, 1994 Miss. LEXIS 198 (Miss.), modified, in part, 646 So. 2d 1264, 1994 Miss. LEXIS 634 (Miss. 1994).

The 25 percent restriction on wage garnishment set forth in § 85-3-4(2)(a) applied to the garnishment of a father's wages in satisfaction of a judgment for past due child support, even though the 25 percent restriction does not apply in cases where the judgment is for the support of another person, where the mother no longer had custody of the children because custody had been placed in the father. Sorrell v. Borner, 593 So. 2d 986, 1991 Miss. LEXIS 593 (Miss. 1991).

A chancellor erred in removing a former wife from the former marital home, pursuant to a separation and property settlement agreement incorporated into the divorce decree which provided that the wife's exclusive use and possession of the marital residence would terminate upon a third person taking up a "permanent residency therein," since the chancellor was "manifestly in error" in finding a third person to be a permanent resident where the third party did not keep any clothes or toiletries at the residence, and he stayed overnight on occasion but maintained a room elsewhere. Phillips v. Phillips, 555 So. 2d 698, 1989 Miss. LEXIS 510 (Miss. 1989).

Blood tests will not be ordered in order that father against whom proceeding has been filed for enforcement of child support may obtain proof that he is not actually father of children where question of paternity is raised only when contempt action is filed and increase in child support sought. Brabham v. Brabham, 483 So. 2d 341, 1986 Miss. LEXIS 2367 (Miss. 1986).

In proceeding to enforce past due child support, court must assess interest at legal rate on each past due payment from date that payment became due; sums paid by supporting spouse at time spouse is in arrears is applied first to interest obligations, then to extinguish principal amount of oldest outstanding support payment, then next oldest unpaid payment, and so forth. Brand v. Brand, 482 So. 2d 236, 1986 Miss. LEXIS 2347 (Miss. 1986).

Testimony by former wife that former husband is in arrears for child support in sum of $5,030 is sufficient basis upon which to fix amount of arrears, notwithstanding that wife's testimony is originally vague and indefinite where there is no other direct evidence as to amount due. Brown v. Gillespie, 465 So. 2d 1046, 1985 Miss. LEXIS 1971 (Miss. 1985).

Under § 93-5-23, the chancery court may enforce support obligations by a contempt proceeding and may modify the order of support on proper proof, and, if the order is not terminated by the court, liability may continue to accrue and contempt may lie for non-payment. Hailey v. Holden, 457 So. 2d 947, 1984 Miss. LEXIS 1950 (Miss. 1984).

Where a consent decree entered on November 10, 1958, unconditionally directed husband to pay to the wife for the support of the children the sum of $150 per month until the further order of the court, and it was shown when the case came on for final hearing at the March, 1959 term, that the husband was delinquent in the monthly payment in an amount totaling $450, the trial court committed no error in requiring the husband to pay the arrearage. Petersen v. Petersen, 238 Miss. 190, 118 So. 2d 300, 1960 Miss. LEXIS 395 (Miss. 1960).

53. —Forced sale or lien.

Although the trial court erred in awarding to the wife, under the doctrine of equitable distribution, nonmarital property obtained by the husband as a gift from his mother, the court could impose an equitable lien upon such property to secure payment of alimony or child support. Baldwin v. Baldwin, 788 So. 2d 800, 2001 Miss. App. LEXIS 71 (Miss. Ct. App. 2001).

A chancery court did not err in ordering a sale of a husband's future interest in 2 parcels of land with the proceeds from the sale to be kept in the registry of the court where the husband had fraudulently conveyed his interest in the land to his mother and sister, he had never voluntarily paid the wife any amount owed to her pursuant to previous court orders, and he had a history of manipulating his parents for money and then "frittering the money away." Morreale v. Morreale, 646 So. 2d 1264, 1994 Miss. LEXIS 198 (Miss.), modified, in part, 646 So. 2d 1264, 1994 Miss. LEXIS 634 (Miss. 1994).

A chancellor did not err in imposing a lien on marital property in the wife's favor to secure the lump sum alimony awarded to her even though the pleadings did not reflect that the wife had requested a lien, as there is no pleadings impediment to the imposition of an equitable lien. Bishop v. State, 607 So. 2d 122, 1992 Miss. LEXIS 649 (Miss. 1992).

The payment of a lump sum alimony award may be secured by placing an equitable lien upon the property of the debtor spouse. Jones v. Jones, 532 So. 2d 574, 1988 Miss. LEXIS 488 (Miss. 1988).

A lien to secure payment of alimony or child support should not be given or declared unless specifically requested in the complaint so that the responding spouse has an opportunity to make a defense. Holleman v. Holleman, 527 So. 2d 90, 1988 Miss. LEXIS 270 (Miss. 1988).

The fixing of a lien upon real and personal property belonging to a former husband who had failed to pay alimony and child support as required by a divorce decree did not deny the husband his constitutional right to due process where the lien had been imposed after a full hearing and where such lien had been necessary to ensure that the husband pay to the wife the support owing to her under the agreement embodied in the decree. Morgan v. Morgan, 397 So. 2d 894, 1981 Miss. LEXIS 2002 (Miss. 1981).

Writ of execution directing sale of husband's land to pay delinquent monthly support instalments to wife, in so far as it directed sale of the land to make money necessary to pay instalments not due, and that the excess over the instalments due should be impounded and retained by the sheriff as a trust fund out of which to provide payment of future instalments, was not sanctioned by law, although in accordance with the decree awarding wife custody of the children and monthly support for them and herself, and was subject to injunction or bill of review for error apparent. Todd v. Todd, 197 Miss. 819, 20 So. 2d 827, 1945 Miss. LEXIS 314 (Miss. 1945).

The court under its inherent power of equity may enforce payment of an alimony award by making it a lien on husband's land in lieu of requiring surety for the payment of the sum so allowed as provided hereunder. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss. 1943).

Alimony may be fixed as a lien on the homestead where there are no children, and such lien becomes an encumbrance running with the land. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss. 1943).

54. —Contempt; generally.

In wife's action for delinquent spousal support and child support, since the wife was successful on her motion for contempt, it followed that she was eligible for an award of attorney fees; however, since there were two contempt hearings following the hearing in which the husband's hands were cleansed, and since the amount of attorney fees was not allocated on a per hearing basis, the appellate court reversed and remanded for further consideration the amount of the award of attorney fees. Cook v. Whiddon, 866 So. 2d 494, 2004 Miss. App. LEXIS 130 (Miss. Ct. App. 2004).

There was no error in the chancellor finding the ex-husband in contempt because (1) the husband did not make alimony payments and a judgment was entered against him to pay the wife past due alimony, but he only paid half of the amount; (2) the husband only paid three months of the wife's insurance premiums; and (3) the evidence indicated that the husband simply chose not to pay the court-ordered alimony and insurance premiums; thus, in a petition for contempt and enforcement, the chancellor did not err in awarding the wife unpaid alimony, unpaid insurance premiums, and attorney fees. McCardle v. McCardle, 862 So. 2d 1290, 2004 Miss. App. LEXIS 22 (Miss. Ct. App. 2004).

Trial court did not err in modifying a custody order in favor of a father since the mother's decision to move to Arizona rendered joint custody virtually impossible; however, the mother was improperly found in contempt as the prior order did not prohibit the move. Elliott v. Elliott, 877 So. 2d 450, 2003 Miss. App. LEXIS 997 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 873 (Miss. 2004).

Contempt matters are committed to substantial discretion of trial court. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

The burden was on the father to make out a clear case of inability to pay child support to prevent a finding of contempt, even though he sought a modification of his child support obligations prior to the mother's counterclaim for contempt, where he did not follow this course of action promptly, he paid the full amount of child support only one month during the first year following the divorce, and he "adjusted" his support payments without the consent of any court when one of his children moved in with him. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

A chancellor did not err in finding a father in contempt of court for failure to pay child support where he did not file for a reduction of support promptly, when he finally sought such a reduction the mother counterclaimed with an action for contempt, and he failed to carry his burden of proving a clear case of inability to pay. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

A chancellor erred in finding a father in willful contempt for failure to make child support payments and jailing him after allowing only one week to purge himself of such contempt, since the father should have been given a more reasonable, limited amount of time to make the payment where he had been unemployed for approximately 6 months due to a fire that destroyed his office building and had reopened his medical practice and was again earning income at the time of the hearing. Gambrell v. Gambrell, 644 So. 2d 435, 1994 Miss. LEXIS 494 (Miss. 1994).

An award of attorney's fees in a contempt proceeding against the husband in a divorce action was improper where the only evidence presented regarding attorney's fees was an affidavit, with attached attorney time sheets, setting out the hours worked, the hourly rates, and costs, for a total fee of $4,450, and the husband was not present when the evidence was presented and was not given the opportunity to examine witnesses and to question the reasonableness of the award. Griffin v. Griffin, 579 So. 2d 1266, 1991 Miss. LEXIS 322 (Miss. 1991).

A chancellor was "manifestly in error" when he found a mother in contempt of court for effectively curtailing the father's court-ordered visitation rights with the parties' daughter by moving to Alaska. The mother never ignored an order of the court since there was nothing in the court order that restricted her from moving to another state. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

A former husband was properly held in contempt of court for failure to pay his former wife monies due for insurance premiums under the parties' original divorce decree, which provided that the former wife was to purchase insurance on behalf of the parties' children and that the former husband was to reimburse the former wife for the premium allocated to the parties' son, in spite of the former husband's arguments that he had obtained health insurance on the children's behalf and should be absolved of any responsibility to reimburse the former wife for any insurance she obtained; the divorce judgment required the former husband to reimburse the former wife for the son's premiums, which the former husband failed to do. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

Noncustodial parent who fails to pay, in accordance with divorce decree, medical, dental and drug expenses incurred on behalf of children by noncustodial parent and who offers no proof of lack of present financial ability to pay will be held in contempt of court. Clements v. Young, 481 So. 2d 263, 1985 Miss. LEXIS 2373 (Miss. 1985).

In contempt proceedings for enforcement of child support, court may allow counsel for defendant to give oral dictation of answer into record on morning of hearing and require that answer be reduced to writing for appeal purposes; further, when party seeking contempt citation moves for judgment on pleadings, alleged contemnor will be permitted to amend response to assert verbally affirmative defense of inability to pay. Peeples v. Yarbrough, 475 So. 2d 1154, 1985 Miss. LEXIS 2241 (Miss. 1985).

In contempt proceedings for enforcement of child support, court properly makes finding of no contempt upon showing that spouse who has defaulted on payment has been unable to make payment due to difficulty in finding employment but has been making timely payments for current child support and for partial payment of past support since becoming employed; court may not condition judgment for past due child support by restricting right of former spouse to levy on judgment by filing for garnishment. Peeples v. Yarbrough, 475 So. 2d 1154, 1985 Miss. LEXIS 2241 (Miss. 1985).

Statute of limitations, applicable to contempt action brought by divorced parent to enforce past due child support, is savings clause in favor of persons under disabilities (§ 15-1-59), not 7 year statute of limitations (§ 15-1-43), so long as child is minor. Wilson v. Wilson, 464 So. 2d 496, 1985 Miss. LEXIS 1914 (Miss. 1985).

In proceedings for contempt in failing to comply with alimony decree, it is not necessary to order payment of overdue installments. Rainwater v. Rainwater, 236 Miss. 412, 110 So. 2d 608, 1959 Miss. LEXIS 334 (Miss. 1959).

One failing to obtain modification or suspension of an alimony decree prior to contempt proceedings against him has the burden of purging himself of contempt by showing compliance or inability to comply. Rainwater v. Rainwater, 236 Miss. 412, 110 So. 2d 608, 1959 Miss. LEXIS 334 (Miss. 1959).

Judgment reciting chancellor was fully advised of all matters involved, and found defendant was in contempt for failure to pay alimony pendente lite, sufficiently found adversely to defendant on issue of his ability to comply with decree. Hamblin v. Hamblin, 107 Miss. 113, 65 So. 113, 1914 Miss. LEXIS 59 (Miss. 1914).

55. — —Prima facie evidence.

A former husband was not in willful contempt for failure to pay child support even though the evidence sufficiently made out a prima facie case for delinquent support where the former wife waited 18 years before taking any action for contempt or for collection of the child support. Guthrie v. Guthrie, 537 So. 2d 886, 1989 Miss. LEXIS 22 (Miss. 1989).

Failure to comply with an alimony decree is prima facie evidence of contempt. Rainwater v. Rainwater, 236 Miss. 412, 110 So. 2d 608, 1959 Miss. LEXIS 334 (Miss. 1959).

A prima facie case of contempt of court was made out where a husband, shown to have substantial property and to be actively engaged in business at the time of the original decree awarding separate maintenance of the wife and children, had made no payments at all for ten months, even though the husband testified at the contempt hearing that he had paid out a large sum for medical attention for the children. Vogel v. Vogel, 200 Miss. 576, 28 So. 2d 217, 1946 Miss. LEXIS 326 (Miss. 1946).

In contempt proceeding against divorced husband for failure to comply with decree requiring that he pay specified monthly sum to divorced wife for support of the parties' child, introduction of decree requiring such payment made out prima facie case of contempt and imposed on divorced husband burden of proving his inability to make payments directed. Collins v. Collins, 171 Miss. 891, 158 So. 914, 1935 Miss. LEXIS 21 (Miss. 1935).

56. — —Confinement.

Substantial credible evidence supported chancellor's finding husband in willful contempt of divorce judgment and ordering his incarceration based upon his failure to pay child support, alimony and other sums due. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

In contempt proceedings against a husband for failure to pay child support as directed in a decree of divorce, in the absence of a showing that the husband was able, at the time of the hearing, to purge himself of contempt for his failure to pay, an adjudication of contempt with an order that the husband be confined until the amount due was paid within 120 days, was unjustified, where it was shown that the husband had been injured in an automobile accident and confined to a hospital for over 6 months and had been able to secure only temporary employment, and had been living on loans, donations, and credit, and had no money and no property at the time of the hearing. Mullen v. Mullen, 246 So. 2d 923, 1971 Miss. LEXIS 1433 (Miss. 1971).

Court's power to commit divorced husband to jail until he complies with decree requiring him to make monthly payments for support of child depends on divorced father's present ability to comply with the decree, and, in determining such ability, amount of past earnings and how they have been expended is not controlling. Collins v. Collins, 171 Miss. 891, 158 So. 914, 1935 Miss. LEXIS 21 (Miss. 1935).

Where divorced husband was in bad health and without money or property and had no means of obtaining any except by his personal efforts in the practice of his profession, except $28.37, payable monthly, as veteran's compensation, commitment of husband to jail until he paid past-due installments allowed for support of child in divorce proceeding held error. Collins v. Collins, 171 Miss. 891, 158 So. 914, 1935 Miss. LEXIS 21 (Miss. 1935).

Where husband wilfully and deliberately ignores orders of court to pay installments of alimony he may be sentenced to confinement until the alimony is paid. Millis v. State, 106 Miss. 131, 63 So. 344, 1913 Miss. LEXIS 115 (Miss. 1913).

57. — —Defenses.

Father was properly found in contempt for failing to pay child support and failing to maintain insurance on his children where he did not show that he was unable to pay, only two payments totaling $550 were made to the mother, and an agreement between the parents did not mean that the father no longer had the obligation to provide support. Strack v. Sticklin, 959 So. 2d 1, 2006 Miss. App. LEXIS 634 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 371 (Miss. 2007).

Defendant may avoid judgment of contempt by establishing that he is without present ability to discharge his obligations. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Contemnor who raises inability to pay as defense has burden to show it with particularity, not just in general terms. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

A chancery court did not err in failing to find a former husband in contempt for not removing his former wife's name from a note and deed of trust held by a bank, as required by the parties' divorce decree, where the husband had requested that the wife's name be removed from the note and deed of trust, but the bank had denied his request; the bank's refusal to release the wife from the note and deed of trust created an honest inability to comply with the dictates of the decree, and such an inability is a recognized defense to a charge of contempt. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

It was proper for a chancellor to find a father not in contempt for failure to pay the full amount of child support required where the father filed for a modification of child support before the children's mother filed the motion for contempt concerning the arrearage in child support payments. Thurman v. Thurman, 559 So. 2d 1014, 1990 Miss. LEXIS 185 (Miss. 1990).

In an action against a husband for contempt for failing to abide by the terms of a divorce decree, the husband was deprived of due process where, after the husband was held in contempt, the chancellor did not allow him to present evidence in support of his motion for a new trial in order to prove that he had abided by the terms of the divorce decree, and the chancellor then dispensed with the husband's motion for a new trial by denying it without hearing the additional evidence. Weeks v. Weeks, 556 So. 2d 348, 1990 Miss. LEXIS 12 (Miss. 1990).

A father was not in contempt for failure to pay child support under an automatic adjustment clause of a property settlement agreement where the agreement was uncertain in that a genuine dispute existed over the amount owed, over the commencement year of the escalation clause, and over which consumer price index was to be utilized. Wing v. Wing, 549 So. 2d 944, 1989 Miss. LEXIS 443 (Miss. 1989).

A former husband was not in willful contempt for failure to pay child support even though the evidence sufficiently made out a prima facie case for delinquent support where the former wife waited 18 years before taking any action for contempt or for collection of the child support. Guthrie v. Guthrie, 537 So. 2d 886, 1989 Miss. LEXIS 22 (Miss. 1989).

Chancellor will not abuse his discretion in refusing to award attorneys fees to divorced wife who has sufficient funds or separate estate with which to pay her own attorney fees. Dillon v. Dillon, 498 So. 2d 328, 1986 Miss. LEXIS 2749 (Miss. 1986).

Custodial parent who fully abides by visitation provisions of decree or number of years, during which time noncustodial parent does not take advantage of all visitations, and who unilaterally discontinues allowing overnight visitation pending hearing of petition to modify decree to eliminate overnight visitation is not in contempt of court. Cook v. State, 483 So. 2d 371, 1986 Miss. LEXIS 2393 (Miss. 1986).

Chancellor may find former spouse who has not paid child support as ordered to not be in contempt of court, based upon observations of spouse's demeanor on witness stand, notwithstanding absence of testimony about spouse's financial ability or reason for failing to make payments. Brown v. Gillespie, 465 So. 2d 1046, 1985 Miss. LEXIS 1971 (Miss. 1985).

In contempt proceedings against a husband for failure to pay child support as directed in a decree of divorce, in the absence of a showing that the husband was able, at the time of the hearing, to purge himself of contempt for his failure to pay, an adjudication of contempt with an order that the husband be confined until the amount due was paid within 120 days, was unjustified, where it was shown that the husband had been injured in an automobile accident and confined to a hospital for over 6 months and had been able to secure only temporary employment, and had been living on loans, donations, and credit, and had no money and no property at the time of the hearing. Mullen v. Mullen, 246 So. 2d 923, 1971 Miss. LEXIS 1433 (Miss. 1971).

One manifestly unable to pay accrued installments of alimony may, in the court's discretion, be allowed to purge himself of contempt by giving bond for the payment of future installments. Rainwater v. Rainwater, 236 Miss. 412, 110 So. 2d 608, 1959 Miss. LEXIS 334 (Miss. 1959).

58. Enforcement by suit to recover.

The fact that a child has been emancipated does not pretermit recovery of vested but unpaid child support. Either the child or the former custodial parent may bring an action against the defaulting parent, though the latter receives any recovery in his or her continuing fiduciary capacity subject to all of the duties and strictures thereof. If by reason of the supporting parent's default, the custodial parent is forced to dip into his or her own resources beyond what would otherwise be expected of him or her, he or she may recover and retain amounts so proved, subject to equitable adjustment should the child's prior needs so suggest. Varner v. Varner, 588 So. 2d 428, 1991 Miss. LEXIS 719 (Miss. 1991).

A trial court properly dismissed a former wife's fraudulent conveyance claim against her former husband, based upon the former husband's conveyance of 15.2 acres of farm property to his father for inadequate consideration, where the husband had tendered the amount of the child support judgment owed to the former wife. However, since the matter was to be remanded for a determination of an additional amount of child support owed by the former husband, the judgments would be vacated to the extent necessary to provide the lower court with the opportunity to consider the need for security with regard to the child support arrearage or any of the father's further obligations to and for the benefit of his children. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

In former wife's suit for judgment on an indebtedness created when, as part of a divorce agreement, she conveyed her interest in the parties' home and acreage to the former husband, the action of the chancellor who, because of the husband's financial condition, impressed a lien on former husband's land to secure the balance due on the indebtedness did not deprive the former husband of any constitutional rights, notwithstanding his claim that he had no notice that a lien might be so placed. Alexander v. Alexander, 494 So. 2d 365, 1986 Miss. LEXIS 2644 (Miss. 1986).

The court may impress a lien upon property to secure payment of support awards, or may order the surrender of the possession of a family home to the wife and children as an incident to their support, in which case credit reasonably may be allowed by the court on the sum which otherwise might be necessary, commensurate with the value of the lodging provided. Buckalew v. Stewart, 229 So. 2d 559, 1969 Miss. LEXIS 1248 (Miss. 1969).

In an action for unpaid alimony, the court may adjust the equities by deducting the money expended by the husband on a child after taking it from the wife's custody. Rubisoff v. Rubisoff, 242 Miss. 225, 133 So. 2d 534, 1961 Miss. LEXIS 548 (Miss. 1961).

A wife is not chargeable with laches in bringing suit for unpaid installments of alimony for which she was continually asking. Rubisoff v. Rubisoff, 242 Miss. 225, 133 So. 2d 534, 1961 Miss. LEXIS 548 (Miss. 1961).

Wife is entitled to recover from her husband's estate defaulted alimony payments and interest extending for a period of seven years prior to husband's death, but Code 1942, § 733, bars recovery for alimony in default for more than seven years before husband's death. Schaffer v. Schaffer, 209 Miss. 220, 46 So. 2d 443, 1950 Miss. LEXIS 381 (Miss. 1950).

Defaulted instalments of alimony can be recovered against the husband's personal representative and claim therefor may be probated as a decree. Schaffer v. Schaffer, 209 Miss. 220, 46 So. 2d 443, 1950 Miss. LEXIS 381 (Miss. 1950).

Recovery of past due instalments for support of minor child under Indiana divorce decree is permitted in courts of this state under the full faith and credit clause where the foreign court has no authority to modify decree as to past due instalments, notwithstanding the foreign court reserved jurisdiction to modify the decree as to future instalments. Hatrak v. Hatrak, 206 Miss. 239, 39 So. 2d 779, 1949 Miss. LEXIS 258 (Miss. 1949).

Indiana law requires divorced wife to show, before recovering a judgment for past due unpaid support money ordered paid by husband for support of minor child, the amount spent out of her own funds and that such expenditure was necessary and caused by failure of the father to pay support money in accordance with the decree, and proof complying with Indiana law will support decree in suit brought in this state for the recovery of such unpaid instalments. Hatrak v. Hatrak, 206 Miss. 239, 39 So. 2d 779, 1949 Miss. LEXIS 258 (Miss. 1949).

Suit by divorced wife against husband to recover moneys expended for maintenance of son was one of equitable cognizance. Schneider v. Schneider, 155 Miss. 621, 125 So. 91, 1929 Miss. LEXIS 344 (Miss. 1929).

VII. OTHER MATTERS.

59. Collusion, effect of.

Settlement constituting part of collusive agreement for divorce held void. Gurley v. Gorman, 137 Miss. 210, 102 So. 65, 1924 Miss. LEXIS 202 (Miss. 1924).

60. Bonds, requirement of and action on.

The question of the excessiveness of a bond and life insurance policy required by the chancery court of a husband to assure payment of an award of alimony made for the support and maintenance of his mentally incompetent wife, cannot be raised for the first time on appeal, under the provisions of this section [Code 1942, § 2743]. Klumb v. Klumb, 194 So. 2d 221, 1967 Miss. LEXIS 1402 (Miss. 1967).

Where a husband, who had on two occasions left the state during the pendency of his wife's action for divorce, child custody and alimony and maintenance, was required to execute a ne exeat bond, the chancellor, after awarding alimony, could continue the bond in full force, if in his opinion such action was necessary to insure a good faith compliance with the terms of the decree. Blount v. Blount, 231 Miss. 398, 95 So. 2d 545, 96 So. 2d 232, 97 So. 2d 240, 1957 Miss. LEXIS 525, 1957 Miss. LEXIS 526, 1957 Miss. LEXIS 527 (Miss. 1957).

The chancery court has inherent power, where, in its judgment, it is deemed necessary for the enforcement of its orders, to remand a defendant to the custody of the sheriff until he has executed the bond for the payment of alimony required of him by decree of the court. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss, 1943).

Chancery court has jurisdiction of suit against sureties on bond to pay alimony. Cadenhead v. Estes, 134 Miss. 569, 99 So. 361, 1924 Miss. LEXIS 299 (Miss. 1924).

Court may decree alimony for support of wife and require bond to enforce performance, and may commit husband to jail unless bond given. Rhinehart v. Rhinehart, 126 Miss. 488, 89 So. 152, 1921 Miss. LEXIS 57 (Miss. 1921).

Husband not in contempt for failure to obtain sureties, where he is unable to do so. Ramsay v. Ramsay, 125 Miss. 185, 87 So. 491, 1921 Miss. LEXIS 113 (Miss. 1921).

Chancery court may require bond to secure payment of alimony. Edmonson v. Ramsey, 122 Miss. 450, 84 So. 455, 1920 Miss. LEXIS 446 (Miss. 1920).

Chancery court may remand defendant to custody of sheriff until bond for alimony is executed. Edmonson v. Ramsey, 122 Miss. 450, 84 So. 455, 1920 Miss. LEXIS 446 (Miss. 1920).

61. Life insurance policy, furnishing of.

Ex-wife waived all rights to alimony and the ex-husband agreed to maintain in force the same life insurance coverage that was in effect at the time of the parties' divorce; furthermore, the ex-husband agreed that beneficiaries of such insurance policies would not be changed without the ex-wife's consent, and there was nothing in the separation agreement that suggested the life insurance provision of the agreement was a form of support or maintenance; therefore, contempt for failing to maintain the policy was proper. Martin v. Ealy, 859 So. 2d 1034, 2003 Miss. App. LEXIS 1072 (Miss. Ct. App. 2003).

Although awards of other sums in addition to the regular child support may be ordered, the keeping of a life insurance policy is not mandatory. Baldwin v. Baldwin, 788 So. 2d 800, 2001 Miss. App. LEXIS 71 (Miss. Ct. App. 2001).

Former wife who under the terms of the original decree has a $70,000 interest in whole life policies, but had no interest in the cash surrender value of those policies, did not have her position altered by a subsequent modified judgment which allowed former husband to replace the whole life policies with term policies which provided wife with $70,000 worth of insurance. Alexander v. Alexander, 494 So. 2d 365, 1986 Miss. LEXIS 2644 (Miss. 1986).

The trial court in a divorce action erred in failing to require the husband to post a bond pursuant to § 93-5-23 to secure payment of child support and alimony, where the husband's own testimony revealed that he planned to leave the state at the conclusion of the proceedings, where his travels had made and would make it difficult for the wife to locate him and for any court to exercise jurisdiction over him, where there was a judgment for arrearage in child support that remained unpaid at the time of trial, and where the husband owned no real property in the state on which a lien could be imposed as security. Bush v. Bush, 451 So. 2d 779, 1984 Miss. LEXIS 1785 (Miss. 1984).

A chancellor has authority and right in a divorce action to require the posting by a husband of a performance bond and the furnishing of a policy of insurance on his life to assure performance of provisions of a decree requiring him to support his mentally incompetent wife for the term of her natural life. Klumb v. Klumb, 194 So. 2d 221, 1967 Miss. LEXIS 1402 (Miss. 1967).

The question of the excessiveness of a bond and life insurance policy required by the chancery court of a husband to assure payment of an award of alimony made for the support and maintenance of his mentally incompetent wife, cannot be raised for the first time on appeal, under the provisions of this section [Code 1942, § 2743). Klumb v. Klumb, 194 So. 2d 221, 1967 Miss. LEXIS 1402 (Miss. 1967).

62. Review.

Finding of fact regarding custody will not be set aside or disturbed unless it is manifestly wrong or is not supported by substantial credible evidence; this is so regardless of whether finding is express or implied and regardless of whether finding relates to evidentiary or ultimate fact. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

In matters concerning child custody, reviewing court will not reverse Chancery Court's factual findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence in the record supporting these findings of fact. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Chancellor's findings regarding child custody will not be disturbed when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Admission of evidence is within the discretion of the chancellor, who should not be held in error for excluding repetitive and probably irrelevant evidence. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Motion to strike portions of former husband's brief would be denied, where motion appeared to be just another in the series of actions and incidents the parties had used to harass each other at their child's expense. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Alimony award will not be disturbed on appeal unless it is found to be against overwhelming weight of the evidence or manifestly in error. Parsons v. Parsons, 678 So. 2d 701, 1996 Miss. LEXIS 410 (Miss. 1996).

That Supreme Court will not reverse chancellor's finding where it is supported by substantial credible evidence holds true for contempt matters. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Determination of punishment for contempt falls within discretion of chancellor, and Supreme Court will not reverse on appeal absent manifest error or application of erroneous legal standard. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

A trial court in a divorce action erred by failing to provide findings of fact and conclusions of law when requested to do so by one of the parties, and therefore the case would be reversed and remanded for the limited purpose of providing findings of fact and conclusions of law as required under Rule 52, Miss. R. Civ. P. Lowery v. Lowery, 657 So. 2d 817, 1995 Miss. LEXIS 332 (Miss. 1995).

The Supreme Court's remand of a child support case to the chancery court "for such further proceedings and judgments as may be required and as may be consistent with this opinion" did not restrict the chancery court to consideration of the issues litigated in the original proceeding. Harrell v. Duncan, 593 So. 2d 1, 1991 Miss. LEXIS 979 (Miss. 1991).

The standards for review of periodic alimony are much the same as those used in reviewing lump sum alimony; the chancellor should consider the reasonable needs of the wife and the right of the husband to lead as normal a life as possible with a decent standard of living. Gray v. Gray, 562 So. 2d 79, 1990 Miss. LEXIS 237 (Miss. 1990).

Since there is no statute setting up any special procedure for appeal from a divorce action or relief from a divorce judgment, Rule 60, Miss. R. Civ. P. was controlling where the husband had filed a Motion for Relief from Final Judgment under Rule 60(b)(3), alleging that the wife had found new employment which more than doubled her salary. The chancellor had the authority to alter the final judgment if Rule 60(b)(3) was otherwise applicable, even though the husband had already filed bond for supersedeas, where the record had not yet been transmitted to the Supreme Court when the Rule 60(b)(3) Motion for Relief was filed. Gray v. Gray, 562 So. 2d 79, 1990 Miss. LEXIS 237 (Miss. 1990).

Chancery Court's decision on alimony will not be disturbed on appeal unless it is against overwhelming weight of evidence or manifestly in error; in case claiming inadequacy or outright denial of alimony, appellate court will interfere where decision is seem oppressive, unjust, or grossly inadequate, such that it evidences abuse of discretion. McNally v. McNally, 516 So. 2d 499, 1987 Miss. LEXIS 2956 (Miss. 1987).

Award to wife of alimony and child support where such is not sought in pleadings is error, because it deprives husband of due process, although such judgments are not void; therefore, where husband paid alimony and child support for 3 years before complaining about due process violation, decree is final and due process right has been waived. Miller v. Miller, 512 So. 2d 1286, 1987 Miss. LEXIS 2815 (Miss. 1987).

That part of a decree granting a divorce is severable from other parts of the decree involving alimony, attorney's fees, and insurance protection, and although a party is estopped from appealing from a final decree of divorce, he has not thereby lost the right to appeal from the other provisions of the decree. Klumb v. Klumb, 190 So. 2d 454, 1966 Miss. LEXIS 1393 (Miss. 1966).

Appeal from court's refusal to modify divorce decree directing that parties' minor children be placed in certain boarding school for scholastic year and then be returned to mother's father for 6 weeks, then transferred to custody of father for 6 weeks, was dismissed as moot on mother's motion where the scholastic term and the two successive 6 weeks period had expired. Savell v. Savell, 206 Miss. 55, 39 So. 2d 532, 1949 Miss. LEXIS 241 (Miss. 1949).

Noncompliance with order to pay solicitors' fees and alimony pendente lite is ground for dismissal of appeal. Creel v. Creel, 29 So. 2d 838 (Miss. 1947).

Matter of awarding alimony, both temporary and permanent, is largely within discretion of trial court, and is not subject to revision and correction on appeal unless it is erroneous on its face, or unjust to either party, or oppressive. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

Supreme court has power to affirm, reverse, or modify divorce decree appealed from, or it may reverse in part and affirm in part, or remand for a new hearing, and where all the facts necessary to enable it to do justice are contained in the record, it may make such order with respect to alimony or allowances as the trial court should have made. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

Chancellor's decision on the facts modifying alimony decree will not be set aside unless it is against the overwhelming weight of the evidence. Lee v. Lee, 182 Miss. 684, 181 So. 912, 1938 Miss. LEXIS 193 (Miss. 1938); De Marco v. De Marco, 199 Miss. 165, 24 So. 2d 358, 1946 Miss. LEXIS 184 (Miss. 1946).

Supreme court must assume that chancellor had ample evidence to support decree allowing alimony from decree itself. Crawford v. Crawford, 158 Miss. 382, 130 So. 688, 1930 Miss. LEXIS 75 (Miss. 1930).

63. Property division.

Chancellor acted within her discretion in choosing the date of the divorce, rather than the date of a temporary support order, to mark the point of demarcation between marital and separate property. To the extent that Pittman v. Pittman, 791 So. 2d 857 (Miss. Ct. App. 2001), could be read to create a rule that a temporary support order always and necessarily indicated the point of demarcation, the Mississippi Supreme Court overruled it. Collins v. Collins, 112 So. 3d 428, 2013 Miss. LEXIS 285 (Miss. 2013).

Chancellor's division of the marital assets were supported by substantial credible evidence; there was not sufficient testimony, other than the husband's assertions, that the wife did not contribute to the marital assets. Beddingfield v. Beddingfield, 11 So. 3d 780, 2009 Miss. App. LEXIS 348 (Miss. Ct. App. 2009).

Husband acquiesced to the appraised value of $ 599,000-$ 600,000 of the marital home, and there was no expert testimony that the initial appraisal was faulty; the delay between the completion of the appraisal and the division of marital assets was not unreasonable, and the chancellor did not err in finding that the husband bound himself to that figure. Smith v. Smith, 25 So. 3d 369, 2009 Miss. App. LEXIS 283 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 17 (Miss. 2010).

Chancellor did not err in its classification and equitable division of the parties' assets as the chancellor properly made findings based on the Ferguson factors, and as the wife had minimal financial ability other than her lump-sum distribution of marital assets, he properly awarded her attorney's fees. Stewart v. Stewart, 2 So. 3d 770, 2009 Miss. App. LEXIS 69 (Miss. Ct. App. 2009).

In a divorce case, a chancellor properly determined that a business given to a former husband by his father was separate property; the evidence presented by the former wife was insufficient to show that the business and personal expenses were so interwoven as to have caused the stock of the company to have transmuted into marital property, even though some personal funds were used to pay business debts. Moreover, property given to the husband by his brothers was also found to be an inter vivos gift not subject to division as a marital asset. Dorsey v. Dorsey, 972 So. 2d 48, 2008 Miss. App. LEXIS 18 (Miss. Ct. App. 2008).

Chancellor did not err in determining that the property settlement agreement was ambiguous with respect to the husband's duty to pay the wife upon sale of less than the complete property; the wife was to be paid upon each partial sale and the chancellor did not err in finding that the agreement was unambiguous with regard to the division of proceeds. Crisler v. Crisler, 963 So. 2d 1248, 2007 Miss. App. LEXIS 549 (Miss. Ct. App. 2007).

Where a divorce action was filed ten years earlier and temporary support was ordered, it was properly not considered the line of demarcation for the equitable division of marital assets because the case was subsequently dismissed as being stale under Miss. R. Civ. P. 41; the dismissal relieved the husband of his support obligations. Marshall v. Marshall, 979 So. 2d 699, 2007 Miss. App. LEXIS 411 (Miss. Ct. App. 2007).

Where the parties stipulated regarding the value of a residence, a chancellor did not err by taking into consideration the cost of repairs because that was not part of the stipulation; moreover, the distribution as a whole was not inequitable. Marshall v. Marshall, 979 So. 2d 699, 2007 Miss. App. LEXIS 411 (Miss. Ct. App. 2007).

In a divorce case, a chancery court did not err by finding that mineral interests given to a former wife by her former husband were separate property of the wife since they were the separate property of the husband at the time of the gift; moreover, the husband intended them to be the wife's separate property since he titled them in her name alone. LaRue v. LaRue, 969 So. 2d 99, 2007 Miss. App. LEXIS 338 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

In a divorce case, a chancery court did not err by finding that a wife's interest in her husband's property was marital due to commingling where the husband had his children redeed the property to him after a mistake in a gift to them; however, the chancery court properly relied on the factors in Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), when awarding the wife the entire interest thereof because it was a way to provide for the maintenance of the two elderly parties. LaRue v. LaRue, 969 So. 2d 99, 2007 Miss. App. LEXIS 338 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

In a divorce case, a chancery court did not err by ordering a former husband to pay all of the marital debts where a chancellor considered each party's economic and domestic contributions, the disposal of marital assets, the market value of each party's separate and marital assets, and each party's mineral interest and Social Security income; the award was fair and equitable. LaRue v. LaRue, 969 So. 2d 99, 2007 Miss. App. LEXIS 338 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

In a divorce case, a chancery court did not err by dividing a marital residence between the parties and allowing the wife to reside there for life due to the wife's age, limited income, and inability to work for health reasons. LaRue v. LaRue, 969 So. 2d 99, 2007 Miss. App. LEXIS 338 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

In a divorce case, a chancery court did not err by refusing to find that a former wife dissipated the marital assets by gambling where it was disputed as to who spent the $100,000 at issue; the wife testified that she wrote checks for her husband to use gambling on a regular basis. LaRue v. LaRue, 969 So. 2d 99, 2007 Miss. App. LEXIS 338 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

Chancellor did not abuse his discretion in distributing the marital property where the chancellor properly considered the Ferguson factors; the father was the sole wage earning with an annual salary of $200,000, the wife did not work, and the chancellor found substantial marital debt. Lauro v. Lauro, 924 So. 2d 584, 2006 Miss. App. LEXIS 161 (Miss. Ct. App. 2006).

In a divorce case, a former wife was properly awarded ten percent of a former husband's retirement account and 50 percent of the equity in the marital home where the evidence showed that the husband made almost all of the financial contributions to the marriage, and where the wife only worked part-time sporadically, the husband did most of the household duties, and the wife diverted funds from the husband's account to rent an apartment while she was seeing another man; it was fair to give the wife fewer assets since she was not given any of the marital debt. Brabham v. Brabham, 950 So. 2d 1098, 2007 Miss. App. LEXIS 128 (Miss. Ct. App. 2007).

Chancellor's division of marital assets was supported by credible evidence and he properly awarded the store to the wife, given that she had less marketability for her skills and the husband had more equity in property than the wife; the husband was not entitled to additional alimony other than the wife's support for three months. Graham v. Graham, 948 So. 2d 451, 2006 Miss. App. LEXIS 915 (Miss. Ct. App. 2006).

Trial court did not err in dividing the marital assets of the parties where there would be four people in the wife's household as opposed to only one in the husband's, where the husband earned more than $50,000 per year, while the wife earned only $18,000; the trial court also found that the husband's adultery had to be considered since it was the admitted cause of the break down of the marriage. Seymour v. Seymour, 960 So. 2d 513, 2006 Miss. App. LEXIS 805 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 382 (Miss. 2007).

Body shop was properly characterized as marital property; however, the body shop held no assets as all was leased from the prior operator. Thus, the chancellor did not err in finding that the body shop would be addressed as alimony, but not in the division of property. Fogarty v. Fogarty, 922 So. 2d 836, 2006 Miss. App. LEXIS 139 (Miss. Ct. App. 2006).

Property distribution was equitable where the chancellor conducted an appropriate analysis of the factors and delineated the two factors that she found relevant; the wife was entitled to one-half the equity in the home, and the husband was entitled to one-half of the wife's retirement accounts, and the chancellor chose to have the respective obligations completely offset each other; there was no evidence that the credit card debt was not marital debt. Shoffner v. Shoffner, 909 So. 2d 1245, 2005 Miss. App. LEXIS 109 (Miss. Ct. App. 2005).

Court properly divided marital properly where the wife made a substantial income, her house was free of any mortgages, the husband was disabled and had little income, and he had child support payments for his other children. Jones v. Jones, 904 So. 2d 1143, 2004 Miss. App. LEXIS 993 (Miss. Ct. App. 2004).

In a divorce case, a court properly characterized the wife's real property as her separate property where the land had always been titled in the wife's maiden name, it was debt free at the time of the marriage, the wife purchased the land from her great-grandmother's estate, and she had a great emotional attachment to the property. Jones v. Jones, 904 So. 2d 1143, 2004 Miss. App. LEXIS 993 (Miss. Ct. App. 2004).

Chancellor, in his findings of fact and conclusions of law, equitably disposed of all of the parties' property in accordance with the Ferguson factors and applicable case law; therefore, the appellate court was not at liberty to disturb that decision. Ericson v. Tullos, 876 So. 2d 1038, 2004 Miss. App. LEXIS 595 (Miss. Ct. App. 2004).

In a divorce trial, where court was adjourned and the husband did not appear at the next scheduled hearing, the chancellor committed reversible error in concluding a decision on property division, alimony, and child support could be rendered fairly without allowing the wife an opportunity to cross-examine the husband; cross-examination of the husband was necessary for the chancellor's complete deliberation on the marriage and assets without a one-sided slant on the facts and circumstances. Barnes v. Barnes, 874 So. 2d 477, 2004 Miss. App. LEXIS 490 (Miss. Ct. App. 2004).

Chancellor did not abuse his discretion in ordering that the wife could occupy the marital home for six months, during which time the husband would pay all utilities, and that thereafter the wife would be assessed rent against her interest until the home was sold and the proceeds of sale divided between the parties. Ferro v. Ferro, 871 So. 2d 753, 2004 Miss. App. LEXIS 90 (Miss. Ct. App. 2004).

Where the chancellor rejected both parties' opinions as to the value of the husband's gun shop, valued it a $50,000, and awarded the wife one-third of this amount, the chancellor's recitation of facts after the discussion of the Ferguson factors was sufficient, and he did not abuse his discretion. Ferro v. Ferro, 871 So. 2d 753, 2004 Miss. App. LEXIS 90 (Miss. Ct. App. 2004).

Chancellor properly ordered a husband to reimburse his wife for his criminal defense and counseling fees paid during the marriage as part of the distribution of assets since the fees for the husband's misconduct were paid from marital funds. Avery v. Avery, 864 So. 2d 1054, 2004 Miss. App. LEXIS 91 (Miss. Ct. App. 2004).

Chancellor made distribution of the marital property in accordance with case law where the wife would become eligible for some of the husband's retirement benefits, and the husband's personal injury settlement proceeds were outside of the marital estate and could not be subject to equitable distribution. Tynes v. Tynes, 860 So. 2d 325, 2003 Miss. App. LEXIS 1065 (Miss. Ct. App. 2003).

Chancellor erred in ordering the sale of the marital home where the husband had dropped his complaint for divorce; once the couple had reunited, the separation agreement including settlement of property rights became null and void, and the husband's withdrawn petition did not constitute a request to order partition of the martial property. Myers v. Myers, 881 So. 2d 220, 2003 Miss. App. LEXIS 1165 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 881 So. 2d 180, 2004 Miss. LEXIS 711 (Miss. 2004).

Where a former wife's net income slightly exceeded her former husband's, and the chancellor awarded her over $300,000, or 51.7 percent, of the marital property, the division of property, though not equal, was equitable, and the chancellor did not err in failing to award her alimony. McLaurin v. McLaurin, 853 So. 2d 1279, 2003 Miss. App. LEXIS 787 (Miss. Ct. App. 2003).

Where the chancellor erred by failing to make sufficient findings in support of the division of the marital property to meet the Ferguson standard and failed to make specific findings as to how the marital property was classified, the case was remanded for such findings. Lauro v. Lauro, 847 So. 2d 843, 2003 Miss. LEXIS 272 (Miss. 2003).

Chancellor erred by failing to include a husband's inherited property as a martial asset during the distribution of property because it had been co-mingled with the parties' marital property; however, a reversal was not necessary because an equitable result had been reached. Messer v. Messer, 850 So. 2d 161, 2003 Miss. App. LEXIS 542 (Miss. Ct. App. 2003).

Chancellor did not err by equally dividing an unfinished marital home because the wife's monetary contribution was offset by the fact that the property had been inherited by the husband. Messer v. Messer, 850 So. 2d 161, 2003 Miss. App. LEXIS 542 (Miss. Ct. App. 2003).

Chancellor did not err in classifying a condominium as a marital asset because the evidence showed that numerous payments were made from the parties' joint account, and significant improvements were made by the husband; moreover, the wife was given all of the equity in the property when an award of complete ownership and possession was entered. Messer v. Messer, 850 So. 2d 161, 2003 Miss. App. LEXIS 542 (Miss. Ct. App. 2003).

Chancellor did not err in valuing a condominium because the evidence established that neither party introduced any evidence to support valuation; moreover, the decision to accept an appraiser's valuation of a mobile home did not amount to manifest error. Messer v. Messer, 850 So. 2d 161, 2003 Miss. App. LEXIS 542 (Miss. Ct. App. 2003).

Chancellor did not err by failing to divide ownership in 110 acres of land because the evidence showed that the parties purchased the land as an investment for their child's education; moreover, the parties could have instituted a partition proceeding to divide the land if an agreement could not have been reached concerning the disposition of the land. Messer v. Messer, 850 So. 2d 161, 2003 Miss. App. LEXIS 542 (Miss. Ct. App. 2003).

Where a former wife admitted to having numerous affairs during her marriage, and the former husband was granted a divorce on grounds of adultery, the chancellor erred in awarding the wife half of the marital assets, as the strain and conflict created in the marriage by the wife's affairs could not be ignored without violating principles of equity. Singley v. Singley, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

Goodwill should not be used in determining the fair market value of a business subject to equitable division in divorce cases. Singley v. Singley, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

Although the chancellor correctly determined that a husband's inheritance was commingled and became a part of the marital estate, she apparently failed to realize that she could adjust the Ferguson distribution because of the factors surrounding the source and application of the inheritance; while the wife might have been entitled to some interest in the commingled funds, she was not necessarily entitled to half. Singley v. Singley, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

Funds inherited by a wife were converted to marital property when she placed them in an account which the couple used to purchase cattle and to pay other family expenses; however, the amount paid by the husband to the wife after he sold the cattle to his father regained its nonmarital status and would not be subject to equitable distribution. Heigle v. Heigle, 654 So. 2d 895, 1995 Miss. LEXIS 228 (Miss. 1995).

Where a husband and wife had been divorced in a community property state, a resulting or constructive trust was available to protect the community property interest of the wife in real property acquired in Mississippi solely in the husband's name; thus, the wife was entitled to an undivided ½ interest in Mississippi oil and gas properties, which were acquired with community funds and held in the husband's name, based on the theory of resulting or constructive trust. Palmer v. Palmer, 654 So. 2d 1, 1995 Miss. LEXIS 81 (Miss. 1995).

The totality of a chancellor's awards of alimony and property to a wife was excessive where the wife was awarded periodic alimony which exceeded the husband's net income as well as his gross income, she was granted greater than 50 percent of the marital property, and she was awarded substantial lump sum alimony. Brooks v. Brooks, 652 So. 2d 1113, 1995 Miss. LEXIS 152 (Miss. 1995).

A chancellor erred in not giving a husband any credit for his investment in the parties' Mercedes automobile. Pittman v. Pittman, 652 So. 2d 1105, 1995 Miss. LEXIS 142 (Miss. 1995).

The equitable division of marital assets between divorcing parties does not require an automatic 50-50 split or a vested right in the other spouse's pension plan, but rather requires "fundamental fairness" in the division of marital assets; thus, equitable distribution was effected, even though the chancellor did not give the wife an interest in the husband's pension plan, where she was instead awarded monies which reflected her contribution to the marital assets. Savelle v. Savelle, 650 So. 2d 476, 1995 Miss. LEXIS 64 (Miss. 1995).

A wife's waiver of her right to alimony did not compromise her claim for division of her husband's military pension, since a military pension constitutes personal property, and a claim for equitable division of property is separate and distinct from a claim for alimony. Pierce v. Pierce, 648 So. 2d 523, 1994 Miss. LEXIS 499 (Miss. 1994), cert. denied, 515 U.S. 1160, 115 S. Ct. 2613, 132 L. Ed. 2d 856, 1995 U.S. LEXIS 4319 (U.S. 1995).

When property is found to be jointly accumulated, the chancellor should make specific findings in support of the proportionate share awarded to the parties because a spouse is not automatically entitled to an equal division of jointly-accumulated property. Pierce v. Pierce, 648 So. 2d 523, 1994 Miss. LEXIS 499 (Miss. 1994), cert. denied, 515 U.S. 1160, 115 S. Ct. 2613, 132 L. Ed. 2d 856, 1995 U.S. LEXIS 4319 (U.S. 1995).

A chancellor's findings were sufficient to support an award to a wife of a 50 percent interest in her husband's military pension where the chancellor found that the parties were married for more than 20 years while the husband was on active duty as a member of the United States Navy, and the husband earned and became eligible for retirement pay from the military service while the wife "followed him faithfully throughout the years of their marriage up to the time of their last separation." Pierce v. Pierce, 648 So. 2d 523, 1994 Miss. LEXIS 499 (Miss. 1994), cert. denied, 515 U.S. 1160, 115 S. Ct. 2613, 132 L. Ed. 2d 856, 1995 U.S. LEXIS 4319 (U.S. 1995).

A chancellor did not err in dismissing a complaint in which a woman sought "equitable division of partnership assets" accumulated during 13 years of cohabitation with her companion where the parties never entered into a ceremonial marriage, the woman was not an innocent partner to a void marriage, and she was not destitute but was well-compensated during and after the relationship; the legislature has not extended the rights enjoyed by married people to those who choose merely to cohabit, and cohabitation remains a "crime against public morals and decency" under § 97-29-1. Davis v. Davis, 643 So. 2d 931, 1994 Miss. LEXIS 487 (Miss. 1994).

A chancellor erred in holding that a wife's adulterous conduct precluded her from being entitled to any form of equitable distribution of property upon divorce where her affairs occurred during periods in which the parties were separated, and the chancellor did not make a finding as to the effect, if any, the affairs had on the deterioration of the marriage. Carrow v. Carrow, 642 So. 2d 901, 1994 Miss. LEXIS 438 (Miss. 1994).

A chancellor erred in failing to grant a wife an equitable distribution of marital assets where the wife paid most of the family's household expenses and did a great deal of domestic work in the home during the course of the marriage, thereby allowing the husband to utilize more of his money for the purchase of investments. Carrow v. Carrow, 642 So. 2d 901, 1994 Miss. LEXIS 438 (Miss. 1994).

Profit sharing plans acquired during the course of the marriage are marital assets subject to adjudication by the chancery court granting a divorce, depending upon the facts and circumstances of each particular case. Parker v. Parker, 641 So. 2d 1133, 1994 Miss. LEXIS 375 (Miss. 1994).

When an interest in a profit sharing plan has been awarded in a divorce proceeding pursuant to Mississippi law, the parties may seek qualification of the interest in the pension plan under federal law if the state court order is properly drawn under the Employee Retirement Income Security Act (ERISA), as amended by the Retirement Equity Act (REA); if the order is properly drawn and approved by the pension plan administrator, it becomes "qualified" under federal law and vests an interest in the alternate payee. Parker v. Parker, 641 So. 2d 1133, 1994 Miss. LEXIS 375 (Miss. 1994).

The alternate payee's interest in a pension plan vests only after (1) a chancellor has determined that an equitable division of the marital assets requires awarding some portion of one spouse's pension or profit sharing plan to the other spouse, and (2) a Qualified Domestic Relations Order (QDRO) is entered and accepted as qualified; in other words, if apportionment of one spouse's pension or profit sharing plan is not equitable based on the facts and circumstances presented, no right in such a plan in favor of the other spouse can ever vest. Parker v. Parker, 641 So. 2d 1133, 1994 Miss. LEXIS 375 (Miss. 1994).

A wife was entitled to a percentage of her husband's profit sharing plan where the wife made material contributions as a homemaker and a wage earner, and her earned income was enjoyed by both parties rather than invested only in her name. Parker v. Parker, 641 So. 2d 1133, 1994 Miss. LEXIS 375 (Miss. 1994).

A chancellor erred in awarding a wife an interest in her husband's pension benefits in the absence of findings that the wife contributed to the accumulation of the funds in the pension plan. Crowe v. Crowe, 641 So. 2d 1100, 1994 Miss. LEXIS 378 (Miss. 1994).

The chancery court has the authority to equitably divide marital assets upon divorce. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

No right to property vests by virtue of the marriage relationship alone prior to entry of a judgment or decree granting equitable or other distribution pursuant to dissolution of the marriage; thus, the rights of alienation and the laws of descent and distribution are not affected by the recognition of marital assets. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

The following guidelines should be considered when making an equitable division of marital property: (1) substantial contribution to the accumulation of the property; (2) the degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise; (3) the market value and the emotional value of the assets subject to distribution; (4) the value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse; (5) tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution; (6) the extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties; (7) the needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and (8) any other factor which in equity should be considered. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

When evaluating the division of marital assets upon divorce, chancery courts should support their decisions with findings of fact and conclusions of law for purposes of appellate review. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

A division of marital property should be based upon a determination of the fair market value of the assets, and these valuations should be the initial step before determining division; thus, expert testimony may be essential to establish valuation sufficient to equitably divide the property, particularly when the assets are diverse. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

Although contributions of domestic services are not made directly to a retirement fund, they are nonetheless valid material contributions which indirectly contribute to any number of marital assets, thereby making such assets jointly acquired; when one spouse has contributed directly to a retirement fund by virtue of his or her labor, while the other spouse has contributed indirectly by virtue of domestic services and/or earned income which both parties have enjoyed rather than invested, it is equitable to allow both parties to reap the benefits of the one existing retirement plan. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

In dividing marital assets upon divorce, homemaker contributions are not to be measured by a mechanical formula, but on the contribution to the economic and emotional well-being of the family unit. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

Marital partners can be equal contributors whether or not they both are at work in the marketplace; thus, for the purpose of divorce, marital property would be defined as any and all property acquired or accumulated during the course of the marriage. Hemsley v. Hemsley, 639 So. 2d 909, 1994 Miss. LEXIS 351 (Miss. 1994).

Assets acquired or accumulated during the course of the marriage are marital assets subject to an equitable distribution by the chancellor. Hemsley v. Hemsley, 639 So. 2d 909, 1994 Miss. LEXIS 351 (Miss. 1994).

In determining an equitable distribution of marital property upon divorce, it is assumed that the contributions and efforts of the marital partners, whether economic, domestic or otherwise, are of equal value; in arriving at an equitable distribution, the chancellor should follow the guidelines set out. Hemsley v. Hemsley, 639 So. 2d 909, 1994 Miss. LEXIS 351 (Miss. 1994).

A chancellor did not err in awarding a wife 50 percent of the husband's military retirement benefits and civil service retirement benefits where the wife contributed her share to the marriage by caring for the children and the house. Hemsley v. Hemsley, 639 So. 2d 909, 1994 Miss. LEXIS 351 (Miss. 1994).

A chancellor failed to equitably divide a $400,000 marital estate where he awarded all but $20,500 to the husband, the parties were married for 11 years, the entire marital estate was accumulated during the course of the marriage, the wife did the majority of the housework and cared for the parties' son during the first 8 or 9 years of the marriage, she contributed her own salary to the marital assets, and she participated in activities she thought would build the husband's dental practice. Davis v. Davis, 638 So. 2d 1288, 1994 Miss. LEXIS 336 (Miss. 1994).

A chancellor did not err in awarding a husband permanent possession, custody and control of the former marital residence and 10 acres of other land where the husband was awarded custody of the parties' child, and the wife retained the ownership interest in the property that she had prior to the divorce. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

A primary consideration in providing for a proper division of property at divorce is the economic contributions made to the marriage by each party, whether it be in terms of actual money earned or in terms of service without compensation. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

A chancellor abused his discretion in awarding to a husband every item of marital property that the parties contested where both parties had donated large amounts of money and noncompensated time to the marriage. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

A chancellor did not abuse his discretion in awarding a wife an equitable lien in the husband's ½ interest in the parties' marital home arising out of all the improvements, work and money she had spent on the house where the wife had purchased with her own money the land on which the home was located, the wife worked hard remodeling and renovating the home, and she made the majority of the improvements and contributions to the homestead. Lindsey v. Lindsey, 612 So. 2d 376, 1992 Miss. LEXIS 840 (Miss. 1992).

A wife was entitled to her ½ share of all three of the parties' real properties that were part of the marital estate, including the marital residence, even though the wife voluntarily left the residence and failed to assert any semblance of a claim during the 6-year period when she was living with another man, since the mere passage of time should not have deprived the wife of her ½ interest in the properties that she had helped purchase and maintain and which the parties had used as a marital home, and there was no compelling reason not to partition all three marital properties aside from sheer punishment of the wife. Lenoir v. Lenoir, 611 So. 2d 200, 1992 Miss. LEXIS 791 (Miss. 1992).

In a divorce proceeding, an equitable lien was necessary to protect the wife's mother's interest in the parties' residence, where the mother had loaned the husband and wife $51,500 to enable them to retire the mortgage against their home, since unjust enrichment would result if the husband and wife were permitted to divorce and partition the debt-free family residence. Dudley v. Light, 586 So. 2d 155, 1991 Miss. LEXIS 586 (Miss. 1991).

A chancellor did not err in ordering a husband to pay his wife an income of $7,333.33 per month from the corporate owner of 5 commercially successful restaurants, of which the wife owned 49.8 percent of the shares while the husband owned the remaining shares, where the amount was based on current financial information and would be subject to change depending upon the economic welfare of the corporation. Just as the chancery court has the authority to require a husband to pay his wife periodic and lump sum alimony from his property and estate, it clearly has the authority to require a divorced husband to pay his wife whatever is due her in his management of her property. Retzer v. Retzer, 578 So. 2d 580, 1990 Miss. LEXIS 858 (Miss. 1990).

The former wife of a retired Naval officer could not belatedly seek an equitable division of her former husband's military retirement pension, even though their 1982 divorce decree expressly reserved the wife's "rights as may now or hereafter be vested by law" in the husband's military retirement. The Federal Uniformed Services Former Spouses Protection Act did not vest any rights in anyone, but merely removed a federal bar and allowed the states to treat the military retirement pensions of their domiciliaries as personal property subject to state property laws, and state law did not vest or revest in the wife any rights in the husband's military pension. Brown v. Brown, 574 So. 2d 688, 1990 Miss. LEXIS 809 (Miss. 1990).

In an action to determine a former wife's entitlement to a share of her former husband's military retirement pension, a finding that the former husband at all times remained a Mississippi domiciliary during his active duty tenure with the Army was absolutely requisite to the judgment entered by the lower court denying the former wife's claim to a share of the pension on the basis of Mississippi law, since the matter of whether the spouse of a service person has a vested right in the military retirement pension is governed by the law of the state (or states, pro rata) of domicile during the term of active deduty service, the term during which the pension is earned. Since the lower court made no finding on the matter of the former husband's domicile, the matter would be remanded for findings regarding the former husband's state of domicile for the legally operative period of time. Southern v. Glenn, 568 So. 2d 281, 1990 Miss. LEXIS 584 (Miss. 1990).

A court did not err in rejecting a husband's claim that he owned a 100 percent equitable interest in a 112-acre tract of land, less the 5 acres on which the parties' home was located, even though the husband acquired the land by gift from his aunt and the husband conveyed an interest in the property to the wife only because it was necessary in order to obtain a loan to build their house; deeds between husband and wife are common, even without consideration, and are necessary vehicles in family business and relationships. Powers v. Powers, 568 So. 2d 255, 1990 Miss. LEXIS 278 (Miss. 1990).

A wife was entitled to receive an undivided ½ interest in a marital home where the property was jointly accumulated and the wife was jointly and severally liable on the note and deed of trust pertaining to that property, in spite of the husband's argument that the chancellor erred in awarding the ½ interest because the wife's financial contributions in obtaining the property did not amount to a ½ interest. Brendel v. Brendel, 566 So. 2d 1269, 1990 Miss. LEXIS 539 (Miss. 1990).

A chancellor was not manifestly wrong in awarding to a husband the right to operate the parties' chicken farm, which was their most valuable asset and was an asset that could quickly depreciate and deteriorate in value, until its disposition under the terms of the divorce decree, where the parties' experience in operating the farm was approximately equal. Additionally, the chancellor was not manifestly wrong in awarding the husband use of the parties' home until its disposition under the terms of the decree since the house was a necessary part of the operation of the chicken farm which was properly awarded to the husband. Martin v. Martin, 566 So. 2d 704, 1990 Miss. LEXIS 466 (Miss. 1990).

An award to a wife of "a lien on ⅓ of Defendant's gross Federal Civil Service Retirement. Benefits as provided by Federal Law with a lien hereby being imposed thereon" was unclear and would be remanded for clarification, since it was not possible to discern, for example, whether the chancellor meant to impose a lien on ⅓ of the husband's retirement benefits as security in the event he failed to meet his financial responsibilities as delineated in the divorce decree, or whether the chancellor meant to award the wife ⅓ of the husband's retirement benefits. The chancellor should delineate in the divorce decree the specific terms, e.g., method of payment, which concern a former spouse's civil service retirement benefits. Boykin v. Boykin, 565 So. 2d 1109, 1990 Miss. LEXIS 290 (Miss. 1990).

It was within the trial court's discretion to deny the wife's request to remain in the marital home, and to order that the house be sold and the proceeds divided, in spite of the wife's argument that the denial of her use of the marital home was not in the best interest of the child in her custody, where the husband had custody of the parties' other child who also had an interest in the family home. Polk v. Polk, 559 So. 2d 1048, 1990 Miss. LEXIS 198 (Miss. 1990).

A wife was entitled to proceed in Chancery Court against her husband for partition of jointly held property as an incident to her action for divorce. Johnson v. Johnson, 550 So. 2d 416, 1989 Miss. LEXIS 454 (Miss. 1989).

The Chancery Court seeks equity in a property division by reference to the economic contribution made by each spouse to the acquisition and maintenance of the property, and in doing so has no authority to disregard a spouse's economic contributions just because they were not monetary in form. Johnson v. Johnson, 550 So. 2d 416, 1989 Miss. LEXIS 454 (Miss. 1989).

In an action by an ex-wife to recover the fair rental value of land owned jointly by the parties but farmed exclusively by the ex-husband after the divorce, the trial court properly directed a verdict for the ex-husband where the separation agreement provided that he was to use the real property rent free for agricultural purposes and where the property settlement had not been subject to the approval of the chancery court, thereby remaining purely contractual in nature and not subject to judicial modification. Stone v. Stone, 385 So. 2d 610, 1980 Miss. LEXIS 2013 (Miss. 1980).

Court's power to award alimony does not extend to requiring husband to join wife in conveyance of jointly owned timber so that wife may receive the entire proceeds. Jones v. Jones, 234 Miss. 461, 106 So. 2d 134, 1958 Miss. LEXIS 518 (Miss. 1958).

64. Attorney fees; generally.

After finding a father's claims of abuse and neglect by the mother were unsubstantiated, a chancellor never made a finding that the mother lacked the ability to pay attorney's fees incurred litigating other matters in the child support dispute. Remand was therefore necessary because the chancellor abused the chancellor's discretion by failing to separate the attorney's fees the mother incurred defending against the father's allegations of abuse and neglect from those fees incurred litigating other matters. Campbell v. Campbell, — So. 3d —, 2018 Miss. App. LEXIS 306 (Miss. Ct. App. Jan. 19, 2018).

Although a chancery court properly awarded attorney's fees to a father for defending against the mother's baseless abuse allegations, Miss. Code Ann. § 93-5-23, and for the mother's contemptuous conduct, the court erred in awarding the full amount of the attorney's bill because at least part of the fees awarded were for custody modification proceedings, for which attorney's fees were not normally awarded. Tidmore v. Tidmore, 114 So. 3d 753, 2013 Miss. App. LEXIS 259 (Miss. Ct. App. 2013).

Miss. Code Ann. § 93-5-23 provided that attorney's fees are only appropriate where the child abuse allegations were without foundation, but in finding an award of attorney's fees not warranted, the chancellor explained that the wife's concerns were well-founded, because on the witness stand, the husband admitted to the underlying behavior investigated by the guardian ad litem. In short, the chancellor found ample foundation in the following: the husband's admissions on the stand; his continuing practice of bathing his daughter even after the guardian ad litem's first report; and his continuing to help the daughter bathe even after the court instructed both parents that the children were of sufficient age to bathe themselves. Jones v. Jones, 43 So. 3d 465, 2009 Miss. App. LEXIS 946 (Miss. Ct. App. 2009), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Award of attorney's fees for he wife was made in the chancellor's ruling in the same paragraph and right after his discussion of the wife's poor health and the disproportionate incomes of the parties. It was clear that those two factors were the deciding points in favor of the attorney's fees award, and there was no error as to the chancellor's ruling. White v. White, 913 So. 2d 323, 2005 Miss. App. LEXIS 250 (Miss. Ct. App. 2005).

Award of attorney fees to the husband in a divorce action was improper where the chancellor never made a finding that the wife had fabricated the sexual abuse charges involving their older son and had in some manner convinced the child to make the statements that he did; an award of some amount of fees incurred by the husband allocable to enforcing the visitation order might be supportable but a finding of contempt must first have been made. Gregory v. Gregory, 881 So. 2d 840, 2003 Miss. App. LEXIS 1082 (Miss. Ct. App. 2003), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1333 (Miss. 2004).

Award of attorney's fees to the wife was in error where the chancellor made no finding that the wife was unable to pay her own attorney; the wife was allocated over $300,000 in the divorce, and the fact that she did not have the money actually in the bank did not alter the value of her assets and thus her ability to pay. Franklin v. Franklin, 864 So. 2d 970, 2003 Miss. App. LEXIS 1113 (Miss. Ct. App. 2003).

Where a case was remanded because the chancellor failed to make sufficient findings in support of his division and classification of marital property, the chancellor also had to revisit his award of attorney's fees to the wife. Lauro v. Lauro, 847 So. 2d 843, 2003 Miss. LEXIS 272 (Miss. 2003).

Award of attorney fees in divorce cases is left to chancellor's discretion, assuming he or she follows appropriate standards. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

Attorney fee in divorce proceeding should be fair and should only compensate for services actually rendered after it has been determined that the legal work charged for was reasonably required and necessary; chancellor's attorney fee award is reviewed for manifest error. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

In divorce cases, award of attorney fees is left to discretion of chancellor. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

Attorney fees are not awarded in cases for modification of child support following divorce judgment unless party requesting fees is financially unable to pay them. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

When court denies spouse's postdivorce petition for contempt, no award of attorney fees is warranted. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

When considering award of attorney fees in divorce proceeding, lower court must take into account sum sufficient to secure competent attorney; relative financial ability of parties; skill and standing of attorney employed; nature of case and novelty and difficulty of questions at issue; degree of responsibility involved in management of cause; time and labor required; usual and customary charge in community; and preclusion of other employment by attorney due to acceptance of case. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

If improper conduct of a party's attorney unnecessarily increased the amount of attorney's fees, the amount awarded should be decreased by the amount of any unnecessary fees, but any other consideration of the attorney's improper behavior in the determination of attorney's fees e.g., to sanction the client by awarding nominal attorney's fees would be improper. Creekmore v. Creekmore, 651 So. 2d 513, 1995 Miss. LEXIS 110 (Miss. 1995).

It was error for a chancellor to award attorney's fees to a wife based only on the wife's statement as to the amount she owed her attorney, without supporting evidence such as a timesheet showing the number of attorney hours spent. Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

A $5,000 award of attorney's fees to a wife in a divorce action was an abuse of discretion where the record did not reflect whether the wife was unable to pay her own attorney's fees. Benson v. Benson, 608 So. 2d 709, 1992 Miss. LEXIS 687 (Miss. 1992).

The standards for an award of attorney's fees on a motion to modify a divorce decree are much the same as in an original action; the chancery court is vested with considerable discretion and the court's findings on the issue will not be disturbed unless manifestly wrong. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

Chancellor, who made a thorough and complete division of the property between the parties, was not manifestly wrong in not awarding attorneys fees to husband. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Decree ordering payment of counsel fees must direct that fees be paid to spouse for spouse's use and benefit to be applied to attorney fees and may not direct payment directly to attorney for spouse. Massey v. Massey, 475 So. 2d 802, 1985 Miss. LEXIS 2213 (Miss. 1985).

Testimony of wife that she lacks money to pay legal fee of approximately $6,500 owed to her attorney and that husband has told her that he probably makes $100,000 or more a year, combined with evidence that wife has annual income of approximately $15,000 and has $6,000 cash in safety deposit box and that husband has submitted state income tax returns to effect that he has made less than $20,000 per year does not meet standards for accurate assessment of attorney fees. Bumgarner v. Bumgarner, 475 So. 2d 455, 1985 Miss. LEXIS 2217 (Miss. 1985).

In an action for divorce the matter of fixing attorney's fees for services rendered in the trial court is appropriately entrusted to the sound discretion of the chancellor. Klumb v. Klumb, 194 So. 2d 221, 1967 Miss. LEXIS 1402 (Miss. 1967).

Under agreed decree between husband and wife in divorce proceeding providing for sale of land and that "after paying all court cost and attorney's fee, the proceeds to be equally divided between the complainant and defendant, giving to each a one-half interest," trial court is without authority to change agreement and to refuse to allow one-half of fee for appellant's attorney to be paid out of appellee's part, and court's refusal to allow attorney's fee to be paid out of whole proceeds of sale is reversible error. Sutton v. Sutton, 208 Miss. 886, 45 So. 2d 736, 1950 Miss. LEXIS 311 (Miss. 1950).

Where decree of divorce granted to a husband was reversed and the cause remanded for no other purpose than to permit chancellor to fix an allowance to the wife to cover attorney's fees earned in the defense of the case, the chancellor could not deny any allowance on the theory that since the final decree of the divorce issue in the main case the wife had become able to pay the fees herself, since the question involved is whether the wife was able to pay while the proceedings for the divorce were in progress. Wilson v. Wilson, 202 Miss. 545, 32 So. 2d 688, 1947 Miss. LEXIS 314 (Miss. 1947).

Where, pursuant to an agreement, divorce case was remanded for determination whether wife should be allowed counsel fees, supreme court, acting upon analogy of Code 1942, § 1972, authorized chancery court to include in its decree an additional amount of 50 per cent for counsel services rendered in supreme court provided that that court finds that the wife is entitled to an allowance for counsel fees. Wilson v. Wilson, 198 Miss. 334, 22 So. 2d 161, 1945 Miss. LEXIS 202 (Miss.), modified, 198 Miss. 334, 23 So. 2d 303, 1945 Miss. LEXIS 203 (Miss. 1945).

Supreme court will ordinarily allow for services of counsel in supreme court 50 per cent of the amount allowed by the trial court for services of counsel therein. Wilson v. Wilson, 198 Miss. 334, 22 So. 2d 161, 1945 Miss. LEXIS 202 (Miss.), modified, 198 Miss. 334, 23 So. 2d 303, 1945 Miss. LEXIS 203 (Miss. 1945).

The court is without authority, in the absence of statutory justification, to allow divorced wife counsel fees with which to contest former husband's petition to modify divorce decree in reference to custody of the children of the parties, where by the divorce decree awarding wife alimony in gross sum husband was freed of his primary moral and legal obligation to contribute to wife's support, and an allowance under such circumstances constitutes reversible error. Robinson v. Robinson, 112 Miss. 224, 72 So. 923, 1916 Miss. LEXIS 93 (Miss. 1916).

On appeal by a husband from a decree in a suit for divorce, directing him to pay alimony pendente lite and counsel fees to the wife, the supreme court will, on proper application, award the wife a reasonable solicitor's fee for resisting the appeal. Hall v. Hall, 77 Miss. 741, 27 So. 636, 1900 Miss. LEXIS 22 (Miss. 1900).

The compensation for fees allowable to a wife in a divorce suit is such as will secure the services of competent counsel, not what may be considered just as between her and particular counsel. Parker v. Parker, 71 Miss. 164, 14 So. 459, 1893 Miss. LEXIS 179 (Miss. 1893).

An allowance pendente lite should not be on the basis of compensation for the services of counsel in conducting the suit to an end. Allowance should be made for her litigation from time to time, as the cause progresses, and the allowances of counsel fees for the wife should be made to her, and not to her counsel direct. Parker v. Parker, 71 Miss. 164, 14 So. 459, 1893 Miss. LEXIS 179 (Miss. 1893).

65. —Fees granted—to party unable to pay.

Chancellor did not abuse his discretion in awarding the wife half of her attorney's fees where the husband had a substantial income and the wife had no income; the chancellor found that the wife had the ability to contribute toward the costs of her representation and held that the husband should only be obligated to pay one-half of the wife's legal expenses. Smith v. Smith, 25 So. 3d 369, 2009 Miss. App. LEXIS 283 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 17 (Miss. 2010).

In a divorce case, a chancery court did not err by awarding a former wife $7,000 in attorney fees due to an inability to pay, it was not error to refuse to force the elderly wife to sell her mineral interests to pay her fees since this was her source of monthly income, and moreover she would have been unable to pay for a home equity loan; however, the wife cited no authority for her entitlement to attorney fees for defending an appeal of the case. LaRue v. LaRue, 969 So. 2d 99, 2007 Miss. App. LEXIS 338 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

Chancellor did not abuse his discretion in awarding the mother attorney's fees where the mother was not employed and she provided direct testimony that she would be unable to pay the fees; the chancellor found that the father's actions had caused the mother to incur increased fees. Lauro v. Lauro, 924 So. 2d 584, 2006 Miss. App. LEXIS 161 (Miss. Ct. App. 2006).

A chancellor did not abuse his discretion by awarding a wife $3,300 out of $7,784 in attorney's fees where her business had a negative net worth of $90,593, she had filed for Chapter 13 bankruptcy, her total monthly income was $1,085, and she owed $11,726 in personal debt. Hubbard v. Hubbard, 656 So. 2d 124, 1995 Miss. LEXIS 283 (Miss. 1995).

A chancellor did not abuse his discretion in awarding $1,435 in attorney's fees to a wife, in spite of the husband's argument that there was insufficient evidence of the wife's inability to pay her attorney, where the chancellor had testimony and exhibits showing the wife's monthly income and expenses as well as her cash on hand. Crowe v. Crowe, 641 So. 2d 1100, 1994 Miss. LEXIS 378 (Miss. 1994).

A chancellor did not abuse his discretion in awarding attorney's fees to a wife in the amount of $5000 where the attorney testified that he had been paid only $1,000 by his client, he requested $9,100 in fees for services performed prior to and during the 2-day trial, and the wife had no cash funds from which the fee could be paid. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

A chancellor did not err in ordering a husband to pay ½ of the wife's $5,641 in attorney's fees, even though the wife had a savings account balance in the amount of $9,100 and an annual income in excess of $20,000, where the wife testified that she was going to have to invade her savings to repay a $1,200 loan to her father, and her take-home pay and alimony would barely cover her monthly expenses. Hemsley v. Hemsley, 639 So. 2d 909, 1994 Miss. LEXIS 351 (Miss. 1994).

A chancellor did not err in awarding attorney's fees to a mother who sought a modification of the father's child support obligations where the father's earnings were more than triple those of the mother, the father's investments and other resources were far greater than those of the mother, and the mother was able to pay only $500 of the $1000 retainer required by her attorney. Hammett v. Woods, 602 So. 2d 825, 1992 Miss. LEXIS 299 (Miss. 1992).

An award of attorney's fees to a wife in the amount of $2,000 was not manifestly wrong where the wife was unable to pay her full attorney's fees and had paid only $500, and the husband stated that he was paying his attorney $2,500 which he thought to be reasonable. Powers v. Powers, 568 So. 2d 255, 1990 Miss. LEXIS 278 (Miss. 1990).

Although trial court allowed wife $500 for her defense of husband's original bill seeking divorce, she should have also been allowed her reasonable counsel fees in connection with prosecuting her cross bill against her husband, where it appeared that the husband was earning a net annual income which was many times in excess of what the wife was earning, and the wife was not able to work full time during the last year of their living together. Porter v. Ainsworth, 285 So. 2d 752, 1973 Miss. LEXIS 1294 (Miss. 1973).

Although cross actions for divorce resulted in a decree for the husband on grounds of his wife's adultery and drunkenness, she should not be denied a remedy merely because of lack of funds when her attempt was in good faith, and where the husband was financially able to pay the same a reasonable attorney's fee was allowed the wife for services performed in her behalf both at the trial and on appeal. Nix v. Nix, 253 Miss. 565, 176 So. 2d 297, 1965 Miss. LEXIS 1013 (Miss. 1965).

Where the evidence showed that wife's one-half interest in certain stock was being withheld from her by the husband and was not available to her for the purpose of providing counsel fees, and that her salary was insufficient to support her and to provide such fees, whereas the husband had financial ability to do so, the chancellor was warranted in awarding counsel fees to the wife. Petersen v. Petersen, 238 Miss. 190, 118 So. 2d 300, 1960 Miss. LEXIS 395 (Miss. 1960).

The statute providing that court granting divorce decree may, on petition, change decree and make such new decrees as case may require, contemplates that children should be supported by father, if necessary, and necessarily implies that court may impose on father obligation to pay expenses incident to presentation of petition for support, including attorney's fee, so that a divorced mother, who was unable to support child and prepare petition, was entitled to allowance of attorney's fee for filing and presenting petition. Walters v. Walters, 180 Miss. 268, 177 So. 507, 1937 Miss. LEXIS 122 (Miss. 1937).

66. — —Miscellaneous.

The chancellor was within his discretion to award reasonable attorney fees to the husband for defending against sexual abuse allegations by the wife, notwithstanding the wife's argument that custody was not at issue because the parties had stipulated to the custody of their child as custody had been at issue for almost three years prior to the stipulation, and the wife had alleged that the husband was guilty of abuse and neglect of the child. Rogers v. Morin, 791 So. 2d 815, 2001 Miss. LEXIS 132 (Miss. 2001).

Award of $2,000 in attorney fees award to wife who requested $2,270.79, following her successful motion for contempt against husband for failure to pay child support and alimony, was reasonable. Varner v. Varner, 666 So. 2d 493, 1995 Miss. LEXIS 599 (Miss. 1995).

A chancellor did not err in awarding attorney's fees to a wife, even though she did not establish her inability to pay the fees, where the fees were awarded for an ancillary suit to have the husband's conveyance of the marital home to his sister and niece set aside; the chancellor did not "reward" the wife by his decision, but reimbursed her the extra legal costs incurred as a result of the husband's actions. Pittman v. Pittman, 652 So. 2d 1105, 1995 Miss. LEXIS 142 (Miss. 1995).

An award to a wife of only $2,500 in attorney's fees was an abuse of discretion where her attorney's fees and expenses totalled $8,393.75, she testified that she was unable to pay the fees and that the services listed on her attorney's itemization were actually rendered, her attorney testified that the work was reasonably required and necessary, the husband had the ability to pay the fees, and the award was based on the chancellor's finding that the case could have been concluded in much less time so that the total amount of attorney's fees was "grossly excessive" but he found that both parties' attorneys were equally at fault in causing a portion of the excessive time; the issue would be reversed and remanded to allow the wife's attorney to present evidence of the only McKee factor not satisfied the preclusion of other employment as a result of the divorce case. Creekmore v. Creekmore, 651 So. 2d 513, 1995 Miss. LEXIS 110 (Miss. 1995).

A chancellor abused his discretion by making an award of attorneys fees to a wife where he made no finding of the wife's inability to pay, determining only that the fees were reasonable in light of the fact "that the litigation has been protracted and difficult." Bennett v. Bennett, 650 So. 2d 517, 1995 Miss. LEXIS 86 (Miss. 1995).

A chancellor abused his discretion in not awarding a wife attorney's fees where the husband had been found in willful contempt for failing to pay child support and other obligations, and the husband had inflicted substantial injury on his wife and children by evading and ignoring many prior judgments ordering him to provide support. Morreale v. Morreale, 646 So. 2d 1264, 1994 Miss. LEXIS 198 (Miss.), modified, in part, 646 So. 2d 1264, 1994 Miss. LEXIS 634 (Miss. 1994).

A chancellor did not abuse her discretion in ordering a husband to pay his wife $15,000 as a partial attorney's fee, where the wife's attorney's fees totalled $18,957, the husband's attorney stipulated that the amount was reasonable, the wife testified that she was unable to pay the fees, and much of the fees resulted from the husband's actions in failing to obey the court's orders and refusing to provide requested discovery. Grogan v. Grogan, 641 So. 2d 734, 1994 Miss. LEXIS 315 (Miss. 1994).

In a proceeding for modification of a father's child support obligation, the chancellor erred in refusing to award attorney's fees to the mother, since the father had no basis on which to bring a claim that he was entitled to a reduction of his monthly child support obligation where all of the changes asserted by the father either occurred prior to his signing of the initial child support agreement or were changes which should have been reasonably anticipated by him at the time he signed the agreement. Shipley v. Ferguson, 638 So. 2d 1295, 1994 Miss. LEXIS 337 (Miss. 1994).

A former wife was entitled to reasonable attorney's fees for having to defend her former husband's unsuccessful suit to modify child support, even though the legal services were rendered by the wife's employer. Gregg v. Montgomery, 587 So. 2d 928, 1991 Miss. LEXIS 712 (Miss. 1991).

An award of attorney's fees to a wife in the amount of $4,000 was not excessive where the wife's attorney requested a fee of $5,400 for 54 hours of work at a rate of $100 per hour, the attorney explained that he reviewed the case file for purposes of trial preparation and other related matters, and the attorney meticulously detailed the events which transpired between the date the case was accepted to the date of the hearing. However, the wife's request for additional attorney's fees as a result of the husband's appeal was denied since the $4,000 awarded by the chancellor appeared to be sufficient to cover the costs of the appeal. Boykin v. Boykin, 565 So. 2d 1109, 1990 Miss. LEXIS 290 (Miss. 1990).

Where a decree awarding the husband a divorce on the alleged ground of his wife's adultery was reversed on appeal and a judgment entered granting to the wife a divorce on the grounds of cruel and inhuman treatment, counsel fees were awarded to the wife by the supreme court in the amount of $250, in view of the husband's reported income of $4,750 for the preceding year, and testimony that such amount was a reasonable fee for counsel's services. Thames v. Thames, 233 Miss. 24, 100 So. 2d 868, 1958 Miss. LEXIS 352 (Miss. 1958), but see Cheatham v. Cheatham, 537 So. 2d 435, 1988 Miss. LEXIS 627 (Miss. 1988).

Where husband appealed from decree granting divorce to wife and awarding her custody of children and sum of money for their support, wife was entitled to counsel fees. Howell v. Howell, 44 So. 2d 401 (Miss. 1950).

Although denying wife divorce, court did not err in fixing the amount of attorney's fees allowed her. McNees v. McNees, 24 So. 2d 751 (Miss. 1946).

Although decree denying wife a divorce was affirmed, she was allowed attorney's fee in the supreme court of $125. McNees v. McNees, 24 So. 2d 751 (Miss. 1946).

Where divorced wife's award of alimony in the sum of $60 per month, together with the use and occupancy of the home, was small, and divorced husband sought modification of the decree without justification, wife was entitled to counsel fees in the sum of $100 for counsel's services in the trial court and $50 for his services on appeal. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

Wife, granted divorce, who successfully appealed alimony decree, held entitled to allowance of $125 for services of her solicitor in supreme court. Gresham v. Gresham, 198 Miss. 43, 21 So. 2d 414, 1945 Miss. LEXIS 167 (Miss. 1945).

This section [Code 1942, § 2743] contemplates that children should be supported by father, if necessary, and necessarily implies that court may impose on father obligation to pay expenses incident to petition for support, including attorney's fee, so that divorced mother, unable to support child and prepare petition, was entitled to allowance for attorney's fee for filing and presenting petition. Walters v. Walters, 180 Miss. 268, 177 So. 507, 1937 Miss. LEXIS 122 (Miss. 1937).

67. —Fees not granted—to party able to pay.

In a case where a divorce was granted to a wife based on a husband's habitual drunkenness, a wife's request for attorney's fees and costs was properly denied because the parties made almost the same amount; moreover, the wife was unable to prove that she had to take out a loan to pay for such. Dorsey v. Dorsey, 972 So. 2d 48, 2008 Miss. App. LEXIS 18 (Miss. Ct. App. 2008).

There was no evidence in the record to show that the wife was unable to pay her own attorney fees; since the wife did not show an inability to pay her own attorney fees, the appellate court reversed and rendered the award. Seymour v. Seymour, 960 So. 2d 513, 2006 Miss. App. LEXIS 805 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 382 (Miss. 2007).

Where the chancellor found that neither party had sufficient income to pay attorney's fees, but that each party had sufficient assets from which to pay his or her respective fees, he did not abuse his discretion in denying attorney's fees to both parties. Ferro v. Ferro, 871 So. 2d 753, 2004 Miss. App. LEXIS 90 (Miss. Ct. App. 2004).

Attorney fee award should not be granted to spouse who can afford to pay his or her own fees. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

Former wife was not entitled to attorney fees incurred in postdivorce custody dispute absent showing of inability to pay. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

A chancellor erred in awarding a husband more than $25,000 in attorney's fees after awarding him over $93,000 worth of contested property, since the husband was more than able to pay both his attorney's fees and court costs out of the proceeds from the property award. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

Although awarding attorney's fees in a divorce action is entrusted to the discretion of the chancellor, an award of attorney's fees to a former wife in an action for modification of child custody brought by her former husband, was error where there was no evidence offered to show that the wife was unable to pay, and the judge did not make a finding that the husband pursued his litigation merely to harass the wife. Jones v. Starr, 586 So. 2d 788, 1991 Miss. LEXIS 755 (Miss. 1991).

A wife was not entitled to an award of attorney's fees and court costs where the husband and the wife were equally vested with the property, except for a 101-acre tract of land in which the wife had a lesser interest, the parties' respective incomes and ability to gain income were practically the same, and the wife did not attempt to demonstrate her inability to pay for attorney's fees. Martin v. Martin, 566 So. 2d 704, 1990 Miss. LEXIS 466 (Miss. 1990).

A mother was not automatically entitled to reasonable attorney's fees merely because she successfully defeated the father's efforts to reduce his child support obligation. The general rule that a father who seeks alteration of his child support liability to the mother without justification should pay for the mother's attorney's fees does not hold where the equities are otherwise. Thus, a court was within its authority when it held that the mother was not entitled to an award of attorney's fees where there had been a large volume of claims and counterclaims and intervening discovery disputes, so that the equities differed and were relatively balanced. Additionally, the mother possessed the ability to earn sufficient income to pay reasonable attorney's fees, and much of the expense that the mother's attorneys incurred in litigating the case was unreasonable. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

In a divorce proceeding, an award of attorney's fees to the wife was an abuse of discretion requiring reversal of the award where there was insufficient evidence of the wife's inability to pay her attorney. Cheatham v. Cheatham, 537 So. 2d 435, 1988 Miss. LEXIS 627 (Miss. 1988).

If a wife is financially able to pay her attorney, she is not entitled to an attorney's fee award. Carpenter v. Carpenter, 519 So. 2d 891, 1988 Miss. LEXIS 49 (Miss. 1988).

Party defending petition to modify divorce decree who has separate estate is not entitled to award of attorney fees. Craft v. Craft, 478 So. 2d 258, 1985 Miss. LEXIS 2258 (Miss. 1985).

Allowance of solicitor's fees of $250 in divorce action by wife is erroneous when wife has ample means to engage services of attorney. Brown v. Ohman, 43 So. 2d 727 (Miss. 1949).

68. — —Miscellaneous.

Unsubstantiated request for attorney fees would be denied, given that there were no "good guys" in child custody modification action at issue and that former husband's appeal raised issue of first impression with regard to scope of psychotherapist-patient privilege. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

It was error for a chancellor to require a husband pay his wife's attorney's fees and accountant's fees where the wife did not prove the reasonableness of those fees; however, there was no error in the chancellor's assessment of the costs of court to the husband where the divorce was granted on the ground of the husband's adultery. Brooks v. Brooks, 652 So. 2d 1113, 1995 Miss. LEXIS 152 (Miss. 1995).

In a proceeding on a father's petition for abatement of child support, the chancellor erred in awarding the mother attorney's fees based on a finding that the father was in contempt, in spite of the mother's argument that the father made no effort toward complying with the support order once he had filed for an abatement, where the father had promptly filed for a reduction in child support when his financial circumstances changed and while he was still in compliance with the previous decree. Setser v. Piazza, 644 So. 2d 1211, 1994 Miss. LEXIS 526 (Miss. 1994).

A husband was not entitled to an award of attorney's fees where he presented no evidence as to the wife's ability to pay his requested costs and fees, and he made no showing of his inability to pay them. Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

In a divorce proceeding, the chancellor abused his discretion in awarding attorney's fees where there was no substantiating evidence, such as the number of hours required or the usual charge in the community, upon which to base such an award. Holleman v. Holleman, 527 So. 2d 90, 1988 Miss. LEXIS 270 (Miss. 1988).

Chancellor abused his discretion in awarding attorney's fees to ex-wife where she was unsuccessful both in opposing modification of divorce decree and in urging contempt against ex-husband. Milam v. Milam, 509 So. 2d 864, 1987 Miss. LEXIS 2509 (Miss. 1987).

Award of attorney's fees to grandmother who unsuccessfully sought custody of minor children was reversed because there was no precedent for award of attorney's fees to unsuccessful third party seeking to take custody of children from natural parents, and because grandmother was in much better financial condition than father and amply able to pay her own attorney fees. Milam v. Milam, 509 So. 2d 864, 1987 Miss. LEXIS 2509 (Miss. 1987).

Where the wife did not ask for or obtain an allowance for counsel fees in the chancery court, a motion in the supreme court for counsel fees for resisting husband's appeal would be overruled, without prejudice to a claim therefor when the cause would be heard on the merits. Ladner v. Ladner, 233 Miss. 222, 102 So. 2d 195, 1958 Miss. LEXIS 375 (Miss. 1958).

Upon an appeal from a judgment awarding the wife a divorce, wife's attorneys' motion, filed in their own names, for allowance of additional counsel fees for services rendered on appeal was denied. Blount v. Blount, 231 Miss. 398, 95 So. 2d 545, 96 So. 2d 232, 97 So. 2d 240, 1957 Miss. LEXIS 525, 1957 Miss. LEXIS 526, 1957 Miss. LEXIS 527 (Miss. 1957).

Where a wife filed no brief in support of her motion for the allowance to her of a solicitor's fee after husband's filing of grounds for denial of wife's motion, supreme court rule required dismissal of motion. Lewis v. Lewis, 203 Miss. 355, 35 So. 2d 441, 1948 Miss. LEXIS 277 (Miss. 1948).

A husband is not entitled to a refund of fees paid to his wife's attorney should she later become able to make such refund. Wilson v. Wilson, 202 Miss. 545, 32 So. 2d 688, 1947 Miss. LEXIS 314 (Miss. 1947).

69. Guardian ad litem fees.

In a proceeding for modification of visitation in which the Department of Human Services joined the action and supported the father, the department was properly required to pay guardian ad litem fees, including those incurred after the date that the department was made a passive litigant in the case; notwithstanding the department's passive role, it previously became a litigant when it adopted the position of the father and alleged child abuse, and taking a passive role in the litigation did not change its status as a party to the case. Mississippi Dep't of Human Servs. v. Murr, 797 So. 2d 818, 2000 Miss. LEXIS 184 (Miss. 2000).

In a proceeding for modification of visitation in which the Department of Human Services joined the action and supported the father and the department was then required to pay guardian ad litem fees, the court had the authority to require the parents to reimburse the department for such fees by making periodic payments, notwithstanding the department's argument that such an "installment plan" was impermissible and amounted to an interest-free loan to the parents. Mississippi Dep't of Human Servs. v. Murr, 797 So. 2d 818, 2000 Miss. LEXIS 184 (Miss. 2000).

Where each parent had been accused of some form of abuse by the other, the chancellor properly ordered the parents to split the fees of the guardian ad litem. Foster v. Foster, 788 So. 2d 779, 2000 Miss. App. LEXIS 472 (Miss. Ct. App. 2000).

70. Jurisdiction.

The mandatory filing provisions for contested and irreconcilable differences divorces are clearly stated in Miss. Code Ann. § 93-5-11. The statutory requirements for proper filing of a divorce action are straightforward and clear and may not be circumvented by an attempt to expand § 93-5-11 through the use of Miss. Code Ann. § 93-11-65, nor indirectly through Miss. Code Ann. § 93-5-23; to find otherwise would negate the need for Miss. Code Ann. § 93-5-11 and create judicial conflict. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

71. Conservatorship.

Chancery court erred by applying the legal standard for modification of child custody in appointing the mother as the son's conservator and the appointment was reversed. Ravenstein v. Hawkins, 167 So. 3d 210, 2014 Miss. LEXIS 326 (Miss. 2014).

RESEARCH REFERENCES

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Wife's misconduct or fault as affecting her right to temporary alimony or suit money. 2 A.L.R.2d 307.

Right to credit on accrued support payments for time child is in father's custody or for other voluntary expenditures. 2 A.L.R.2d 831.

Jurisdiction to award custody of child having legal domicil in another state. 4 A.L.R.2d 7.

Validity of provision of separation agreement for cessation or diminution of payments for wife's support upon specified event. 4 A.L.R.2d 732.

Husband's default, contempt, or other misconduct as affecting modification of decree for alimony, separate maintenance, or support. 6 A.L.R.2d 835.

Divorced wife's subsequent misconduct as authorizing or affecting modification of decree for alimony. 6 A.L.R.2d 859.

Retrospective modification of, or refusal to enforce, decree for alimony, separate maintenance, or support. 6 A.L.R.2d 1277.

Support provisions of judicial decree or order as limit of father's liability for expenses of child. 7 A.L.R.2d 491.

Jurisdiction of court to award custody of child domiciled in state but physically outside it. 9 A.L.R.2d 434.

Material facts existing at time of rendition of decree of divorce but not presented to court, as ground for modification of provision as to custody of child. 9 A.L.R.2d 623.

Misconduct of wife to whom divorce is decreed as affecting allowance of alimony, or amount allowed. 9 A.L.R.2d 1026.

Standing of strangers to divorce proceeding to attack validity of divorce decree. 12 A.L.R.2d 717.

Nonresidence as affecting one's right to custody of child. 15 A.L.R.2d 432.

Right of former wife to counsel fees upon application after absolute divorce to increase or decrease alimony. 15 A.L.R.2d 1252.

Power of court, on its own motion, to modify provisions of divorce decree as to custody of children, upon application for other relief. 16 A.L.R.2d 664.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance. 18 A.L.R.2d 10.

Death of obligor parent as affecting decree for support of child. 18 A.L.R.2d 1126.

Trial court's jurisdiction as to alimony or maintenance pending appeal of matrimonial action. 19 A.L.R.2d 703.

Pension of husband as resource which court may consider in determining amount of alimony. 22 A.L.R.2d 1421.

Right to interest on unpaid alimony. 33 A.L.R.2d 1455.

Allowance of permanent alimony to wife against whom divorce is granted. 34 A.L.R.2d 313.

Consideration of investigation by welfare agency or the like in making or modifying award as between parents of custody of children. 35 A.L.R.2d 629.

Right to custody of child as affected by death of custodian appointed by divorce decree. 39 A.L.R.2d 258.

Death of husband as affecting alimony. 39 A.L.R.2d 1406.

Service of notice to modify divorce decree or other judgment as to child's custody upon attorney who represented opposing party. 42 A.L.R.2d 1115.

Remarriage of parent as ground for modification of divorce decree as to custody of child. 43 A.L.R.2d 363.

Domestic divorce decree without adjudication as to alimony, rendered on personal service or equivalent, as precluding later alimony award. 43 A.L.R.2d 1387.

Race as factor in custody award or proceedings. 57 A.L.R.2d 678.

Decree for periodical payments for support or alimony as a lien or the subject of a declaration of lien. 59 A.L.R.2d 656.

Necessity of personal service within state upon nonresident spouse as prerequisite of court's power to modify its decree as to alimony or child support in matrimonial action. 62 A.L.R.2d 544.

Husband's right to alimony, maintenance, suit money, or attorneys' fees. 66 A.L.R.2d 880.

Father's liability for support of child furnished after entry of decree of absolute divorce not providing for support. 69 A.L.R.2d 203.

Court's power to modify child custody order as affected by agreement which was incorporated in divorce decree. 73 A.L.R.2d 1444.

Allocation or apportionment of previous combined award of alimony and child support. 78 A.L.R.2d 1110.

Property of reference in connection with fixing amount of alimony. 85 A.L.R.2d 801.

Right to credit for payments on temporary alimony pending appeal, against liability for permanent alimony. 86 A.L.R.2d 696.

Comment note. – "Split," "divided," or "alternate" custody of children. 92 A.L.R.2d 695.

Comment note. – Propriety and effect of undivided award for support of more than one person. 2 A.L.R.3d 596.

Court's establishment of trust to secure alimony or child support in divorce proceedings. 3 A.L.R.3d 1170.

Child's wishes as factor in awarding custody. 4 A.L.R.3d 1396.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child. 7 A.L.R.3d 1096.

Power of court to award absolute divorce in favor of party who desires only limited decree, or vice versa. 14 A.L.R.3d 703.

Power of divorce court, after child attained majority, to enforce by contempt proceedings payment of arrears of child support. 32 A.L.R.3d 888.

Divorce: Wife's right to award of counsel fees in final judgment of trial or appellate court as affected by the fact that judgment was rendered against her. 32 A.L.R.3d 1227.

Income of child from other source as excusing parent's compliance with support provisions of divorce decree. 39 A.L.R.3d 1292.

Divorce and separation: mutual mistake as to tax consequences as ground for relief against property settlement. 39 A.L.R.3d 1376.

Annulment of later marriage as reviving prior husband's obligation under alimony decree or separation agreement. 45 A.L.R.3d 1033.

Right to credit on accrued support payments for time child is in father's custody or for other voluntary expenditures. 47 A.L.R.3d 1031.

Valid foreign divorce as affecting local order previously entered for separate maintenance. 49 A.L.R.3d 1266.

Divorce or separation: consideration of tax liability or consequences in determining alimony or property settlement provisions. 51 A.L.R.3d 461.

Divorce: withholding or denying visitation rights for failure to make alimony or support payments. 51 A.L.R.3d 520.

Retrospective increase in allowance for alimony, separate maintenance, or support. 52 A.L.R.3d 156.

Effect of remarriage of spouses to each other on permanent alimony provisions in final divorce decree. 52 A.L.R.3d 1334.

Physical abuse of child by parent as ground for termination of parent's right to child. 53 A.L.R.3d 605.

Divorce: provision in decree that one party obtain or maintain life insurance for benefit of other party or child. 59 A.L.R.3d 9.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision. 59 A.L.R.3d 1337.

Wife's possession of independent means as affecting her right to alimony pendente lite. 60 A.L.R.3d 728.

Wife's possession of independent means as affecting her right to child support pendente lite. 60 A.L.R.3d 832.

Divorce: power of court to modify decree for support of child was based on agreement of parties. 61 A.L.R.3d 657.

Evaluation of interest in law firm or medical partnership for purposes of division of property in divorce proceedings. 74 A.L.R.3d 621.

Provision in divorce decree requiring husband to pay certain percentage of future salary increases as additional alimony or child support. 75 A.L.R.3d 493.

Right to allowance of permanent alimony in connection with decree of annulment. 81 A.L.R.3d 281.

Statute expressly allowing alimony to wife, but not expressly allowing alimony to husband, as unconstitutional sex discrimination. 85 A.L.R.3d 940.

Adulterous wife's right to permanent alimony. 86 A.L.R.3d 97.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support. 91 A.L.R.3d 530.

Propriety in divorce proceedings of awarding rehabilitative alimony. 97 A.L.R.3d 740.

Divorced wife's subsequent sexual relations or misconduct as warranting, alone or with other circumstances, modification of alimony decree. 98 A.L.R.3d 453.

Propriety of decree in proceeding between divorced parents to determine mother's duty to pay support for children in custody of father. 98 A.L.R.3d 1146.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child. 99 A.L.R.3d 268.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education. 99 A.L.R.3d 322.

Action based upon reconveyance, upon promise of reconciliation, of property realized from divorce award or settlement. 99 A.L.R.3d 1248.

Custodial parent's sexual relations with third person as justifying modification of child custody order. 100 A.L.R.3d 625.

Admissibility of social worker's expert testimony on child custody issues. 1 A.L.R.4th 837.

Visitation rights of persons other than natural parents or grandparents. 1 A.L.R.4th 1270.

Parent's physical disability or handicap as factor in custody award or proceedings. 3 A.L.R.4th 1044.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement. 4 A.L.R.4th 1294.

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Right to credit on child support for contributions to housing costs, utility bills, and other alleged household necessities made for child's benefit while child is not living with obligor parent. 123 A.L.R.5th 565.

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Right to credit against child support arrearages for time child lived with noncustodial parent, other than for visitation or by court order, with approval of custodial parent. 120 A.L.R.5th 229.

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Parents' Work Schedules and Associated Dependent Care Issues as Factors in Child Custody Determinations. 26 A.L.R.6th 331.

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1B Am. Jur. Legal Forms 2d, Alimony and Separation Agreements §§ 17:9 et seq. (separation agreements); §§ 17.108 et seq. (property settlement agreements); §§ 17:27 et seq. (separation agreements with provisions for custody and support of children).

22 Am. Jur. Trials, Child Custody Litigation §§ 1 et seq.

15 Am. Jur. Proof of Facts, Child Custody, § 36 (proof that wife is fit person to be awarded custody of children); § 37 (proof that wife is unfit person to be awarded custody of children).

1B Am. Jur. Proof of Facts 2d, Change in Circumstances Justifying Modification of Child Support Order, §§ 6 et seq. (proof of change in circumstances justifying increase in child support payments); §§ 17 et seq. (proof of change in circumstances justifying decrease in child support payments).

2 Am. Jur. Proof of Facts 2d, Wife's Ability to Support Herself, §§ 5 et seq. (proof of former wife's independent means of support); §§ 15 et seq. (proof of former wife's ability to earn own support).

2 Am. Jur. Proof of Facts 2d, Denial of Child Visitation Rights, §§ 5 et seq. (proof of denial of visitation rights); §§ 8 et seq. (proof of justification of denial of visitation rights).

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 25 et seq. (proof of physical neglect – malnutrition and lack of adequate clothing); §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition); §§ 72 et seq. (proof of medical neglect-parent's refusal to consent to blood transfusion during surgery for alleviation of facial disfigurement).

6 Am. Jur. Proof of Facts 2d, Change in Circumstances Justifying Modification of Child Custody Order, §§ 7 et seq. (proof of change in circumstances justifying modification of child custody order – in general); §§ 26 et seq. (proof of change in circumstances justifying modification of child custody order – remarriage of noncustodian); §§ 35 et seq. (proof of change in circumstances justifying modification of child custody order – remarriage of custodian).

15 Am. Jur. Proof of Facts 2d 659, Change in Circumstances Justifying Modification of Child Visitation Rights.

17 Am. Jur. Proof of Facts 2d 345, Forensic Economics – Use of Economists in Cases of Dissolution of Marriage.

32 Am. Jur. Proof of Facts 2d 439, Spousal Support on Termination of Marriage.

32 Am. Jur. Proof of Facts 2d 491, Modification of Spousal Support Award.

34 Am. Jur. Proof of Facts 2d 407, Child Custody Determination on Termination of Marriage.

6 Am. Jur. Proof of Facts 3d, Modification of Spousal Support on Ground of Supported Spouse's Cohabitation, §§ 1 et seq.

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§ 93-5-24. Types of custody awarded by court; joint custody; no presumption in favor of maternal custody; access to information pertaining to child by noncustodial parent; restrictions on custody by parent with history of perpetrating family violence; rebuttable presumption that such custody is not in the best interest of the child; factors in reaching determinations; visitation orders.

(1) Custody shall be awarded as follows according to the best interests of the child:

(a) Physical and legal custody to both parents jointly pursuant to subsections (2) through (7).

(b) Physical custody to both parents jointly pursuant to subsections (2) through (7) and legal custody to either parent.

(c) Legal custody to both parents jointly pursuant to subsections (2) through (7) and physical custody to either parent.

(d) Physical and legal custody to either parent.

(e) Upon a finding by the court that both of the parents of the child have abandoned or deserted such child or that both such parents are mentally, morally or otherwise unfit to rear and train the child the court may award physical and legal custody to:

(i) The person in whose home the child has been living in a wholesome and stable environment; or

(ii) Physical and legal custody to any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

In making an order for custody to either parent or to both parents jointly, the court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) Joint custody may be awarded where irreconcilable differences is the ground for divorce, in the discretion of the court, upon application of both parents.

(3) In other cases, joint custody may be awarded, in the discretion of the court, upon application of one or both parents.

(4) There shall be a presumption that joint custody is in the best interest of a minor child where both parents have agreed to an award of joint custody.

(5)(a) For the purposes of this section, "joint custody" means joint physical and legal custody.

(b) For the purposes of this section, "physical custody" means those periods of time in which a child resides with or is under the care and supervision of one (1) of the parents.

(c) For the purposes of this section, "joint physical custody" means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents.

(d) For the purposes of this section, "legal custody" means the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of a child.

(e) For the purposes of this section, "joint legal custody" means that the parents or parties share the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of a child. An award of joint legal custody obligates the parties to exchange information concerning the health, education and welfare of the minor child, and to confer with one another in the exercise of decision-making rights, responsibilities and authority.

An award of joint physical and legal custody obligates the parties to exchange information concerning the health, education and welfare of the minor child, and unless allocated, apportioned or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities and authority.

(6) Any order for joint custody may be modified or terminated upon the petition of both parents or upon the petition of one (1) parent showing that a material change in circumstances has occurred.

(7) There shall be no presumption that it is in the best interest of a child that a mother be awarded either legal or physical custody.

(8) Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including, but not limited to, medical, dental and school records, shall not be denied to a parent because the parent is not the child's custodial parent.

(9)(a)(i) In every proceeding where the custody of a child is in dispute, there shall be a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence. The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one (1) incident of family violence that has resulted in serious bodily injury to, or a pattern of family violence against, the party making the allegation or a family household member of either party. The court shall make written findings to document how and why the presumption was or was not triggered.

(ii) This presumption may only be rebutted by a preponderance of the evidence.

(iii) In determining whether the presumption set forth in subsection (9) has been overcome, the court shall consider all of the following factors:

1. Whether the perpetrator of family violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child because of the other

parent's absence, mental illness, substance abuse or such other circumstances which affect the best interest of the child or children;

2. Whether the perpetrator has successfully completed a batterer's treatment program;

3. Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate;

4. Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate;

5. If the perpetrator is on probation or parole, whether he or she is restrained by a protective order granted after a hearing, and whether he or she has complied with its terms and conditions; and

6. Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

(iv) The court shall make written findings to document how and why the presumption was or was not rebutted.

(b)(i) If custody is awarded to a suitable third person, it shall not be until the natural grandparents of the child have been excluded and such person shall not allow access to a violent parent except as ordered by the court.

(ii) If the court finds that both parents have a history of perpetrating family violence, but the court finds that parental custody would be in the best interest of the child, custody may be awarded solely to the parent less likely to continue to perpetrate family violence. In such a case, the court may mandate completion of a treatment program by the custodial parent.

(c) If the court finds that the allegations of domestic violence are completely unfounded, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegations.

(d)(i) A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.

(ii) In a visitation order, a court may take any of the following actions:

1. Order an exchange of the child to occur in a protected setting;

2. Order visitation supervised in a manner to be determined by the court;

3. Order the perpetrator of domestic or family violence to attend and complete to the satisfaction of the court a program of intervention for perpetrators or other designated counseling as a condition of visitation;

4. Order the perpetrator of domestic or family violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for twenty-four (24) hours preceding the visitation;

5. Order the perpetrator of domestic or family violence to pay a fee to defray the cost of supervised visitation;

6. Prohibit overnight visitation;

7. Require a bond from the perpetrator of domestic or family violence for the return and safety of the child; or

8. Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of family or domestic violence, or other family or household member.

(iii) Whether or not visitation is allowed, the court may order the address of the child or the victim of family or domestic violence to be kept confidential.

(e) The court may refer but shall not order an adult who is a victim of family or domestic violence to attend counseling relating to the victim's status or behavior as a victim, individually or with the perpetrator of domestic or family violence, as a condition of receiving custody of a child or as a condition of visitation.

(f) If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.

HISTORY:

Laws, 1983, ch. 513, §§ 1, 2; Laws, 2000, ch. 453, § 1; Laws, 2003, ch. 475, § 1, eff from and after July 1, 2003.

Cross References —

Authority of court to make orders touching on custody of children, see § 93-5-23.

Criminal sanctions against noncustodial parent or relative for removal of child under age of fourteen from state in violation of court order, see § 97-3-51.

JUDICIAL DECISIONS

ANALYSIS

1. Factors affecting custody — In general.
2. —Abuse of child or parent.
3. —Interference with parent's visitation.
4. —Parent's sexual relations.
5. —Preference of child.
6. — Relocation of parent.
7. —Separation of siblings.
8. —Miscellaneous.
9. Rights of grandparents.
10. Joint custody.
11. Rights of stepparents.
12. Modification denied.
13. Modification proper.
14. Modification improper.
15. Natural-parent presumption.
16. Family-violence presumption.

1. Factors affecting custody — In general.

Award of custody to a father was proper because the trial court found that the Albright factors of the age, health, and sex of the child, parenting skills, physical and mental health and age of the parents, moral fitness of the parents, and stability of the home environment and employment favored the father and only the continuity of care factor favored the mother; nothing showed that the trial court was manifestly wrong in applying the Albright factors or in determining the child's best interest. Under Miss. Code Ann. § 93-5-24(7), awarding custody to the mother was no longer presumed to be in the child's best interest. Crabb v. Bowden, 110 So. 3d 346, 2013 Miss. App. LEXIS 96 (Miss. Ct. App. 2013).

Order awarding custody to a mother, in a paternity case brought by the father, was proper because the chancellor issued a written opinion containing a discussion of each Albright factor, as well as an overall analysis regarding the child's best interest, and there was no basis to overturn the decision; among other things, there was simply no competent evidence that the child's health would have been better served in the father's custody, even the father acknowledged that the child spent more time with the mother, and both parties demonstrated that they were willing and able to care for the child. Even if the appellate court disagreed with the chancellor on some of the individual factors, it would not substitute its judgment for his as to the child's best interest, absent a showing of a manifest abuse of discretion, and that burden was nearly insurmountable in close cases. Solangi v. Croney, 118 So. 3d 173, 2013 Miss. App. LEXIS 100 (Miss. Ct. App. 2013).

In evaluating custody, the trial court focused on the father's desire to have custody of the child, but the undisputed record revealed that for two and a half years, the father had no contact with the child; further, the father provided no financial support, nor did he send any birthday or Christmas cards or gifts to the child. As a matter of law the father's actions (or lack thereof) during the two and a half years before the mother's death constituted desertion; because the evidence of desertion was clear, the trial court erred in awarding custody to the natural father without an on-the-record analysis of the child's best interests utilizing the Albright factors. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424, 2009 Miss. LEXIS 599 (Miss. 2009).

Chancery court abused its discretion in reducing a mother's visitation because the primary concern in determining visitation was to be the best interests of the children and the chancery court's decision appeared to be punishment for the disruptive behavior of the mother and her family in court and for continuing to discuss the legal proceedings with the children after the chancellor had repeatedly admonished the mother to refrain from doing so. Wilburn v. Wilburn, 991 So. 2d 1185, 2008 Miss. LEXIS 487 (Miss. 2008).

In reviewing the denial of a mother's motion for modification of a custody award, the appellate court rejected the mother's argument that, although the couple's property settlement agreement provided that the father would have primary physical custody, the couple had actually agreed to shared custody and that the father's breach of that agreement warranted a change in custody because it would constitute a fraud upon the court for parties to present a property settlement agreement that was incorporated into the final decree while actually intended to abide by a contradictory private contract; because such a circumstance would clearly be against public policy, the court declined to enforce the secret contract and held that the chancery court did not abuse its discretion in refusing to modify custody. Wilburn v. Wilburn, 991 So. 2d 1185, 2008 Miss. LEXIS 487 (Miss. 2008).

Chancery court properly denied a mother's petition for modification of child custody because the chancellor was in the best position to assess the witnesses, did not believe a mother's assertions of sexual abuse, and did believe a father's explanations with regard to the allegations. The father explained that their daughter had a diaper rash requiring him to put Desitin on the affected area and that the daughter was bitten while playing at school with other children. Lorenz v. Strait, 987 So. 2d 427, 2008 Miss. LEXIS 359 (Miss. 2008).

Trial court did not err by awarding the wife sole legal and physical custody where the trial court determined that it was not in the best interests of the children to be shuttled back and forth between the two households. Henderson v. Henderson, 952 So. 2d 273, 2006 Miss. App. LEXIS 869 (Miss. Ct. App. 2006), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 165 (Miss. 2007).

Where a temporary child custody order remained uncontested for three years, it acquired incidents of permanency, necessitating that it be treated as permanent for the purpose of assigning the burden of proof; the father was granted permanent physical custody where the mother failed to prove a material change in circumstances since the date of the temporary order. Swartzfager v. Derrick, 942 So. 2d 255, 2006 Miss. App. LEXIS 823 (Miss. Ct. App. 2006).

None of the purported incidents between the child's parents amounted to family violence, and even if they had, Miss. Code Ann. § 93-5-24(9) gave the chancellor the discretion to grant the father custody of the child because the father would not continue to perpetrate family violence. Cockrell v. Watkins, 936 So. 2d 970, 2006 Miss. App. LEXIS 611 (Miss. Ct. App. 2006).

Although chancellor found that the following factors were neutral and did not weigh in favor of either parent: (1) the age of the child; (2) the health and sex of the child; (3) the age, physical, and mental health of the parents, and the moral fitness of the parents; and (4) the emotional ties of parent and child, the chancellor concluded that factors such as the best parenting skills, willingness and capacity to provide primary child care, employment responsibilities, and the child's home, school, and community records all favored the father; additionally, factors such as the stability of the home environment and employment of each parent also tilted in the father's favor. Thus, after thoroughly weighing the evidence and each Albright factor, the chancellor did not err in awarding physical custody of the child to the father. C.W.L. v. R.A., 919 So. 2d 267, 2005 Miss. App. LEXIS 438 (Miss. Ct. App. 2005).

Chancery court erred in failing to identify a specific material change in circumstance in the custodial home. Without a finding of such a material change or a finding that an actual custodial arrangement was detrimental to the well-being of a child, child custody could not be modified; the appellate court declined to apply a totality of the circumstances standard, as the case at bar did not represent one of the rare situations that said standard was intended to address (the latter standard was used where a custodial parent continued her drug use, a fact known when the parent was awarded custody, but conditions failed to improve). Beasley v. Beasley, 913 So. 2d 358, 2005 Miss. App. LEXIS 271 (Miss. Ct. App. 2005).

Physical custody of an 18-month-old child was properly awarded to the husband in a divorce case because the trial court examined all of the applicable factors before determining that the father had the best parenting skills, his employment was more flexible, he provided more continuous care, and the sex of the child favored custody by the father; although the tender years doctrine slightly favored the mother, this was not a ground for reversal, and there was no rule that the best interest of the child was served by keeping siblings together. Copeland v. Copeland, 904 So. 2d 1066, 2004 Miss. LEXIS 1490 (Miss. 2004).

Denial of custody to a natural parent in favor of a third party should be granted only when there is a clear showing that the natural parent has relinquished his parental rights, that he has no meaningful relationship with his children, or that the parent's conduct is clearly detrimental to his children. Brown v. Wiley (In re Brown), 902 So. 2d 604, 2004 Miss. App. LEXIS 1082 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 337 (Miss. 2005).

In a child custody case, the failure to stay current on child support goes to whether a natural parent has abandoned his child and cannot be a factor in determining whether a natural parent is otherwise unfit. Brown v. Wiley (In re Brown), 902 So. 2d 604, 2004 Miss. App. LEXIS 1082 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 337 (Miss. 2005).

Miss. Code Ann. [former] § 93-15-103(3), which lists the grounds for termination of parental rights, is helpful in selecting the factors a court should consider in deciding whether a natural parent is otherwise unfit for taking care of his children. Brown v. Wiley (In re Brown), 902 So. 2d 604, 2004 Miss. App. LEXIS 1082 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 337 (Miss. 2005).

Chancellor properly determined that there had been a material change in circumstances that adversely affected the child's well-being based on the following findings: (1) the child had moved at least 10 times in the four years since the child's parents had separated; (2) the child had failed first grade and was doing poorly academically; (3) the child was exposed to pornographic tapes while in the custody of the mother; (4) the mother's new job schedule caused problems as to the child's care; and (5) the mother's frequent relationships with different men was not healthy for the child. Thus, where the record showed that the father's employment was more conducive to parenting responsibilities and that the father would provide the child with a more stable home environment, modification of physical custody was proper. Brown v. White, 875 So. 2d 1116, 2004 Miss. App. LEXIS 597 (Miss. Ct. App. 2004).

Award of custody to the father was improper where he had a hectic work schedule, his mother took care of the children more than he did, and the child old enough to express a preference stated that she wanted to live with her mother. Watts v. Watts, 854 So. 2d 11, 2003 Miss. App. LEXIS 143 (Miss. Ct. App.), cert. denied, 859 So. 2d 392, 2003 Miss. LEXIS 378 (Miss. 2003).

In matters concerning child custody, reviewing court will not reverse Chancery Court's factual findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence in the record supporting these findings of fact. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Chancellor's findings regarding child custody will not be disturbed when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

In all child custody cases, polestar consideration is the best interest of the child. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Custody may be modified where environment provided by the custodial parent is found to be adverse to the child's best interest and circumstances of the noncustodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Isolated incident, e.g., an unwarranted striking of a child, does not in and of itself justify a change of custody; rather, it must be the overall circumstances in which a child lives, likely to remain unchanged in the foreseeable future and adversely impacting a child, to warrant change of custody. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Change in circumstances warranting modification of custody is one in overall living conditions in which child is found. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Totality of circumstances must be considered in determining whether to modify child custody. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Change of circumstances in noncustodial parent is not in and of itself sufficient to warrant a modification of custody. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

When environment provided by custodial parent is found to be adverse to child's best interest, and circumstances of noncustodial parent have changed such that he or she is able to provide an environment more suitable than that of custodial parent, Chancellor may modify custody accordingly. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

In all child custody cases, polestar consideration is best interest of child. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Where a child living in a custodial environment clearly adverse to child's best interest somehow appears to remain unscarred by his or her surroundings, Chancellor is not precluded from removing child for placement in a healthier environment. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Chancellor is never obliged to ignore a child's best interest in weighing a custody change; in fact, a Chancellor is bound to consider child's best interest above all else. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Test for custody modification need not be applied so rigidly, nor in such a formalistic manner, so as to preclude Chancellor from rendering a decision appropriate to facts of individual case. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

The doctrine of unclean hands cannot override a chancellor's duty to award custody in the best interests of the child. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

Even if the original divorce decree in awarding custody of children between their parents could be said to be a joint custody arrangement, the chancellor could modify such decree only upon a finding that there had been a material change of circumstances affecting the children. Rutledge v. Rutledge, 487 So. 2d 218, 1986 Miss. LEXIS 2436 (Miss. 1986).

2. —Abuse of child or parent.

Appellate court could not say that the rebuttable presumption that it was detrimental to a child and not in the best interest of the child to be placed in the sole custody of a parent who had a history of perpetrating family violence applied in light of the conflicting testimony and inconclusive evidence at trial when each parent accused the other of abuse, but each also denied the other's allegations. Vassar v. Vassar, 228 So. 3d 367, 2017 Miss. App. LEXIS 607 (Miss. Ct. App. 2017).

Appellate court could not say that the rebuttable presumption that it was detrimental to a child and not in the best interest of the child to be placed in the sole custody of a parent who had a history of perpetrating family violence applied in light of the conflicting testimony and inconclusive evidence at trial when each parent accused the other of abuse, but each also denied the other's allegations. Vassar v. Vassar, 228 So. 3d 367, 2017 Miss. App. LEXIS 607 (Miss. Ct. App. 2017).

Chancellor did not abuse the chancellor's discretion in finding that a wife was a perpetrator of domestic violence because, according to a paternal grandparent, the husband said that the wife threw an aerosol can at the husband's head, which drew blood, and stated that it was the wife's "missile of choice," indicating that it had happened often. Furthermore, the chancellor did not err in awarding only supervised discretionary visitation to the parents, even though the husband denied the statements at trial. Randallson v. Green, 203 So. 3d 1190, 2016 Miss. App. LEXIS 401 (Miss. Ct. App.), cert. denied, 204 So. 3d 290, 2016 Miss. LEXIS 484 (Miss. 2016).

Chancellor did not erroneously overlook the issue of family violence in awarding primary physical custody of a minor child to a parent, because, despite an altercation between the parent and another, older child, neither parent had a history of perpetuating family violence on any household member and neither parent was responsible for an incident of family violence that resulted in serious bodily injury. Hammonds v. Hammonds, 174 So. 3d 947, 2015 Miss. App. LEXIS 464 (Miss. Ct. App. 2015).

Chancery court erred in denying a father visitation because it did did not consider whether adequate provisions could be made that would allow the father to have visitation with the daughter; the chancery court did not consider whether any of the restrictions would be adequate for the safety of the daughter and the mother if visitation was allowed. Smiley v. Smiley, 165 So. 3d 481, 2015 Miss. App. LEXIS 167 (Miss. Ct. App. 2015).

Decision to award the mother custody was supported by the evidence because the father offered no proof of counseling or participation in a parenting program or proof that he had complied with any of the factors in the statute that would entitle him to a finding that he rebutted the presumption that it was detrimental to the daughter and not in her best interest to be placed in sole custody, joint legal, or joint physical custody of a parent who had a history of perpetrating family violence. Smiley v. Smiley, 165 So. 3d 481, 2015 Miss. App. LEXIS 167 (Miss. Ct. App. 2015).

Chancellor did not abuse the chancellor's discretion in refusing to apply the statutory presumption regarding domestic violence set forth in Miss. Code Ann. § 93-5-24 against either parent because, while the chancellor may not have found the presumption to have been applicable, the chancellor did make written findings based on the chancellor's consideration of the domestic violence evidence against both of the parents. Braddy v. Jenkins, 126 So. 3d 963, 2013 Miss. App. LEXIS 788 (Miss. Ct. App. 2013).

Award of physical custody of the parties' four children to the husband and not the wife was appropriate pursuant to Miss. Code Ann. § 93-5-24(9)(a)(i) because the husband did not have a history of perpetuating family violence. A single incident did not result in "serious bodily injury," to support a finding of a history of family violence and the chancellor did not abuse her discretion in finding no "history of family violence" as defined by the statute. Brumfield v. Brumfield, 49 So. 3d 138, 2010 Miss. App. LEXIS 633 (Miss. Ct. App. 2010).

Chancellor did not err by finding that the father's conduct amounted to family violence under Miss. Code Ann. § 93-5-24(9) because she determined that the father's physical altercation with the child caused serious bodily injury by slapping her several times and causing her nose to bleed and that the father had a history of perpetrating family violence. J.P. v. S.V.B., 987 So. 2d 975, 2008 Miss. LEXIS 394 (Miss. 2008).

Based on the chancellor's specific findings of violence and a history of violence on the part of the father, Miss. Code Ann. § 93-5-24(9) was applicable to the parties' action concerning, in part, child custody; on remand, the chancellor was directed to consider and comply with § 93-5-24(9). Lawrence v. Lawrence, 956 So. 2d 251, 2006 Miss. App. LEXIS 633 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 294 (Miss. 2007).

Chancellor concluded that the testimony of the parties at most documented general yelling and screaming which, on a few occasions, resulted in slapping and perhaps one incident of choking, but there was no serious or even moderate injuries resulting from the same; thus, the chancellor failed to find the existence of a pattern of family violence pursuant to Miss. Code Ann. § 93-5-24(9)(a)(i), which provided for custody restrictions on parents with a history of perpetrating family violence. Therefore, the chancellor did not err in awarding custody of the child to the father. C.W.L. v. R.A., 919 So. 2d 267, 2005 Miss. App. LEXIS 438 (Miss. Ct. App. 2005).

In a father's action seeking a change in child custody from the mother to the father, evidence of the father's treatment of the mother and the child prior to the parties' divorce was manifestly material to the issue of the fitness of the father to have custody of the child, where the divorce decree indicated that the court had found merit to the mother's charges of habitual cruel and inhuman treatment. Herring v. Herring, 571 So. 2d 239, 1990 Miss. LEXIS 703 (Miss. 1990).

A mother was unfit to have custody of her children where she had used marijuana in the children's presence, she sometimes slept until 11:00 a.m. and the children would already be outside, unsupervised, by that time, and there was testimony that the children had not been adequately fed or clothed and that there had been a resulting deleterious effect on their health. White v. Thompson, 569 So. 2d 1181, 1990 Miss. LEXIS 631 (Miss. 1990).

3. —Interference with parent's visitation.

Based on the evidence before the chancellor at the time of the divorce, the chancellor did not abuse her discretion in ordering the husband to bear the transportation costs for visitation because, as to the interference with his visitation rights, the husband merely asserted that bearing the transportation costs would pose a financial strain; and, although the husband might eventually be able to establish an undue financial burden or interference with his visitation rights, he could do so in a modification proceeding at a later date. Branch v. Branch, 174 So. 3d 932, 2015 Miss. App. LEXIS 470 (Miss. Ct. App. 2015).

Although the chancellor did not alter visitation to account for the distance between the wife's place of residence and the husband's place of residence, the chancellor enjoyed wide discretion in setting visitation and was not required to do so; thus, the husband failed to show the visitation arrangement compromised his relationship with his children or undermined the best interests of the children. Branch v. Branch, 174 So. 3d 932, 2015 Miss. App. LEXIS 470 (Miss. Ct. App. 2015).

Where the mother had a record of hostility toward the father and interfered with his court ordered visitation, the chancellor did not err by determining that a change in custody from the mother to the father was in the best interest of the child even though the guardian ad litem recommended that the child continue to live with the mother. The mother's allegations of sexual abuse by the father were unsubstantiated. Potter v. Greene, 973 So. 2d 291, 2008 Miss. App. LEXIS 30 (Miss. Ct. App. 2008).

When a non-custodial parent has unsupervised visitation rights, the custodial parent has no right to interfere with the non-custodial parent's visitation with his or her children. Thus, a mother's wishes that her children not fly in a private plane was not sufficient to deny the father the right to provide flying lessons or to fly his children in his private airplane during his visitation hours, where there was no evidence that flying would endanger the children's lives or that the children were opposed to flying or taking flying lessons. Mord v. Peters, 571 So. 2d 981, 1990 Miss. LEXIS 716 (Miss. 1990).

A chancellor was not "manifestly in error" in refusing to modify the custody of 2 children from their father to their mother, even though the father's activities in attempting to exclude the mother from the children's lives were very iniquitous and hurtful to the children, where the mother failed to show a material change in circumstances that adversely affected the children. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

4. —Parent's sexual relations.

Chancery court did not place undue weight on a mother's moral fitness in finding it was in the child's best interest for the father to have primary physical custody, Miss. Code Ann. § 93-5-24, because the mother's adultery was important to show how her behavior and relationship with the child had changed; the court's findings were not a sanction against an adulterous parent. Collins v. Collins, 98 So. 3d 506, 2012 Miss. App. LEXIS 614 (Miss. Ct. App. 2012).

A chancellor abused his discretion in enjoining a father from having his children in the presence of his lover where there was no evidence that visitation in the mere presence of the father's lover would be harmful to the children. Dunn v. Dunn, 609 So. 2d 1277, 1992 Miss. LEXIS 785 (Miss. 1992).

A custodial parent's sexual relations with a third person outside of marriage does not, by itself, warrant modification of the child custody order. Phillips v. Phillips, 555 So. 2d 698, 1989 Miss. LEXIS 510 (Miss. 1989).

5. —Preference of child.

Where both parents admitted behaving aggressively with their children, but there was no evidence that either inflicted serious injury on any of them, the chancellor did not abuse his discretion in refusing to apply against the father the presumption of Miss. Code Ann. Miss. Code Ann. § 93-5-24 that he should not have custody because he was the perpetrator of family violence. Rolison v. Rolison, 105 So. 3d 1136, 2012 Miss. App. LEXIS 799 (Miss. Ct. App. 2012).

In divorce proceedings, a chancellor did not err in finding that neither child of the parties was old enough to express a preference with regard to which parent he wished to live with where neither child had reached the age of 12. Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

In determining whether there was a substantial and material change in circumstances to warrant a modification of child custody, the lower court would be required to consider the fact that the child had chosen to live with his mother, as well as the fact that the child had passed 12 years of age and could qualify under § 93-11-65 to choose his custodial parent, as factors to be considered on remand along with any other evidence the parties wished to produce. Polk v. Polk, 589 So. 2d 123, 1991 Miss. LEXIS 820 (Miss. 1991).

6. — Relocation of parent.

Where a mother and father agreed to joint physical and legal custody of their daughter but the father moved for a modification of the custody arrangement based upon a change in circumstances after the mother moved 80 miles away, the trial court did not abuse its discretion in granting the father's motion because shuttling the child between the parents' respective homes each week caused instability and because the girl was about to begin attending school, which meant that she could not split every week between her parents' homes. Pearson v. Pearson, 11 So. 3d 178, 2009 Miss. App. LEXIS 308 (Miss. Ct. App. 2009).

Chancellor erred in finding a material change in circumstances based on the move by the non-custodial parent, as relocation of either parent was insufficient grounds for modification of child custody and the material change in circumstances had to be unforeseeable at the time of the original decree and the husband's reassignment by the U.S. Navy was eminently foreseeable; in addition, the erroneous admission of a social worker's opinion (because if failed to meet the requirements of Miss. R. Evid. 702) prejudiced the wife and constituted an abuse of discretion. Giannaris v. Giannaris, 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Order awarding legal and physical custody of two children to their father was upheld where the chancellor properly made findings regarding the Albright factors; while the chancellor might have emphasized, to some degree, the mother's moving to Iowa, allegedly to follow a convict boyfriend, that was not the sole reason he granted custody to the father. Bradley v. Jones, 949 So. 2d 802, 2006 Miss. App. LEXIS 757 (Miss. Ct. App. 2006).

Modification of a child custody order to the father was affirmed because as the mother had moved to another state and as the trial court found it was in the child's best interest for primary custody to be granted to her father, the appellate court could not state that the finding was clearly erroneous. Franklin v. Winter, 936 So. 2d 429, 2006 Miss. App. LEXIS 572 (Miss. Ct. App. 2006).

Where a former wife entered into a settlement that provided for weekly visitation with the children by the former husband and she did not disclose plans to immediately remarry and locate out of state, such fraud constituted a material change in circumstances placing the primary physical custody of the children with the husband from the previously ordered placement with the wife. Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

Trial court did not err in modifying a custody order in favor of a father since the mother's decision to move to Arizona rendered joint custody virtually impossible; however, the mother was improperly found in contempt as the prior order did not prohibit the move. Elliott v. Elliott, 877 So. 2d 450, 2003 Miss. App. LEXIS 997 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 873 (Miss. 2004).

Trial court erred in changing the primary custody of a minor child because a mother's decision to move adversely impacted a father's ability to exercise visitation rights; the father failed to show that the move posed a clear danger to the child's mental or emotional health. Lambert v. Lambert, 872 So. 2d 679, 2003 Miss. App. LEXIS 999 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032, 2004 Miss. LEXIS 502 (Miss. 2004).

The evidence was not sufficient to support a change in child custody from the mother to the father where the only evidence of the mother's instability was her frequent moves within a short period of time, along with the psychological condition of the children which was questioned at trial. Cooley v. Cooley, 574 So. 2d 694, 1991 Miss. LEXIS 15 (Miss. 1991), overruled, Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

A court order requiring a custodial mother to obtain court approval before she could move her residence was erroneous and unenforceable. It is an incident of custody that the parent having physical custody provide a residence for the child where he or she thinks is appropriate; the location of this residence is a matter committed to the discretion of the custodial parent in the first instance. A court may only intervene where there has been a material change in circumstances which adversely affect the child and it is shown that the best interests of the child require a modification of custody; a change of residence is not per se a change of circumstance. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

A child custody agreement which provides that the child or children must until majority reside in a particular community, is contrary to the best interests of the children and should not be approved by the court. Such agreements that have been approved are unenforceable. It is presumptuous for anyone, court or otherwise, to declare as an absolute that it is in the best interest of a young child that he or she spend his or her entire minority in a single community. Thus, courts may not require that children be reared in a single community come what may, and divorcing parents may not make such agreements which courts are obligated to enforce. Chancery courts must refuse to approve any child custody agreement presented under § 93-5-2 or otherwise which mandates, without exception, that children be raised in a given community. Such agreements do not make "adequate and sufficient" provisions for the care and maintenance of children. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

A custody agreement which called for a change in custody of the children from the mother to the father on relocation by the mother was void and contrary to public policy. The court cannot surrender or subordinate its jurisdiction and authority as to the circumstances and conditions which will cause a change in custody. McManus v. Howard, 569 So. 2d 1213, 1990 Miss. LEXIS 669 (Miss. 1990).

A chancellor was not "manifestly wrong" in changing custody of a daughter from the mother to the father where the mother's move to Alaska had an "adverse effect" on the daughter, the parties' original divorce decree provided custody of the parties' son in the father and custody of their daughter in the mother, the daughter visited with her brother every day prior to the move to Alaska, and the mother had a poor relationship with her son. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

7. —Separation of siblings.

Court properly awarded child custody to a mother because the child had lived in the mother's home his entire life, he did well in school there, the father was physically limited as to what he could do with the child, and there was nothing to indicate that separation from his sister would be in the child's best interest. Owens v. Owens, 950 So. 2d 202, 2006 Miss. App. LEXIS 750 (Miss. Ct. App. 2006).

The presumption in favor of awarding custody of a child to a natural parent should prevail over any imperative regarding the separating of siblings. Sellers v. Sellers, 638 So. 2d 481, 1994 Miss. LEXIS 311 (Miss. 1994).

Although the rules regulating provisions for custody of minor children do not reflect a policy of encouraging separation of siblings, a chancery court did not commit error when it provided that the parties' older child would reside with his father while the younger child would continue to reside with the mother, where the judge conferred with the older child in chambers and found that he wished to live with his father, the child was over 15 years of age, and the court made elaborate provision for assuring that the children were together as much as was reasonably practicable given their residence in separate communities and their attendance at different schools. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

8. —Miscellaneous.

Chancellor properly awarded physical custody of the parties' child to the mother because the chancellor applied and weighed the appropriate factors in the case law and made appropriate findings of fact with support in the evidence. Although the chancellor made statements prior to trial, which seemed to reflect an outdated view of the tender years doctrine, the father's attorney provided the court with case law on the issue, the chancellor corrected himself, and the chancellor's bench ruling and the final judgment correctly applied the law. Harden v. Scarborough, 240 So. 3d 1246, 2018 Miss. App. LEXIS 145 (Miss. Ct. App. 2018).

Chancery court properly awarded custody of the parties' children to the mother because, among other things, the chancellor recited the relevant facts and rendered a rational decision on the continuity of care factor, even if the custody situation prior to trial was the result of an unfair ruling from another court, the Mississippi chancery court entered an order giving the mother temporary custody more than a year prior to trial, and the chancellor assigned great weight to the facts that the mother had the better parenting skills and that the respective employment situations favored the mother, as a school teacher, over the father, a truck driver. In re Marriage of Edwards, 189 So. 3d 1284, 2016 Miss. App. LEXIS 266 (Miss. Ct. App. 2016).

Chancery court did not err in awarding the wife sole legal custody of the children based on the factors of the children's age, health, and sex; continuity of care; parenting skills; employment; moral fitness; the children's home, school, and community record; and the stability of the home environment. Branch v. Branch, 174 So. 3d 932, 2015 Miss. App. LEXIS 470 (Miss. Ct. App. 2015).

Chancellor erred by awarding a maternal grandmother custody of a child because the chancellor failed to apply the legal presumption that it was in the child's best interest for her father to have custody; the chancellor treated the particular custody battle as a modification, failing to recognize that the grandmother had no right to custody as against the father. Wilson v. Davis, 111 So. 3d 1280, 2013 Miss. App. LEXIS 222 (Miss. Ct. App. 2013), aff'd in part and rev'd in part, 181 So. 3d 991, 2016 Miss. LEXIS 4 (Miss. 2016).

Because the chancery court should have considered the natural-parent presumption and whether a father had lost the benefit of the presumption, either through desertion or some other conduct that made him unfit as a parent, before determining who should have custody of the child, it erred in awarding custody to the child's maternal grandmother. Brown v. Hargrave (In re Brown), 66 So. 3d 726, 2011 Miss. App. LEXIS 393 (Miss. Ct. App. 2011).

Given the evidence presented, the court could not conclude that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard when he modified the custodial agreement pursuant to Miss. Code Ann. § 93-5-24 and ruled that the children's best interests were served by granting the father sole physical custody with the mother having liberal rights of visitation. Porter v. Porter, 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

Chancellor's judgment awarding the father primary physical custody of the three minor children was affirmed because: (1) the record reflected that the chancellor specifically considered the potential effect that the separation of the mother's child from a prior relationship from the other children might have had on the children, but she determined it did not outweigh the other factors favoring the father; (2) the chancellor did not err when she failed to provide the mother with the tender-years advantage with respect to the five-year old boy because she did specifically acknowledge the tender-years doctrine and cited case law addressing its diminished application; and (3) the chancellor's finding that the stability of home environment factor favored the father was supported by credible evidence that the father had maintained a stable routine and ensured the children were cared for by his mother while he was at work. Montgomery v. Montgomery, 20 So. 3d 39, 2009 Miss. App. LEXIS 663 (Miss. Ct. App. 2009).

Where a mother and father agreed to joint physical and legal custody of their daughter but the father moved for a modification of the custody arrangement based upon a change in circumstances after the mother moved 80 miles away, the trial court did not err in finding that the Albright mental health factor weighed in favor of the father because testimony from the mother's mother and sister established that the mother went through a stage where she could not take care of herself and the mother testified that she was seeing a psychiatrist and was taking medication for depression, bi-polar disorder, and anxiety. Pearson v. Pearson, 11 So. 3d 178, 2009 Miss. App. LEXIS 308 (Miss. Ct. App. 2009).

In a child custody case, a father was properly awarded custody because several of the best interest of the child factors under Albright v. Albright, 437 So. 2d 1003 (Miss. 1983), favored him; even if a mother exhibited good parenting skills, her use of the Internet to meet people was a cause for concern. Moreover, the father had the more stable environment, the moral fitness factor favored him, and the child would have been uprooted if the mother had custody. Jones v. Jones, 19 So. 3d 775, 2009 Miss. App. LEXIS 172 (Miss. Ct. App. 2009).

Chancellor did not commit reversible error by not following the recommendation of the child's guardian ad litem because she found that the guardian ad litem considered only the isolated incident in which the father physically harmed the child and not all of the times the child witnessed the abuse of her mother and because the guardian failed to recognize Miss. Code Ann. § 93-5-24(9). J.P. v. S.V.B., 987 So. 2d 975, 2008 Miss. LEXIS 394 (Miss. 2008).

Husband was properly awarded child custody under the Albright factors because the chancery court considered the husband's unemployment, the husband's alleged attack on the wife, the daycare facility owned by the husband's family, and the wife's violent live-in boyfriend; the wife was not impermissibly sanctioned for adultery. Weeks v. Weeks (In re Dissolution of Marriage of Weeks), 989 So. 2d 408, 2008 Miss. App. LEXIS 271 (Miss. Ct. App. 2008).

Chancery court did not abuse its discretion under Miss. Code Ann. § 93-5-24(9) in failing to restrict a father to supervised visitation with his child where the chancellor determined appropriate precautions; the chancellor ordered that visitation exchanges take place at the county sheriff's department to prevent future outbursts between the parents. Holliday v. Stockman, 969 So. 2d 136, 2007 Miss. App. LEXIS 758 (Miss. Ct. App. 2007).

Chancellor stated that the mother's mental health was the overriding consideration for the chancery court's decision to award primary custody of the parents' two children to the father; there was substantial evidence supporting the chancellor's finding that the father had a better capacity to care for the children than did the mother due to the mother's mental and emotional condition because, inter alia: (1) she suffered from stress and anxiety that prompted her to pull out her own hair; (2) the father and his parents testified that when the mother became upset she frequently lost control and that the loss of control was sometimes directed against the children; (3) the paternal grandmother testified that the mother used excessive force when spanking the children; (4) the mother once became so frustrated about having to redo a room in a new house they were building that she picked up pieces of drywall and started hitting herself over the head with them; (5) the guardian ad litem interviewed the police officers who had arrested the mother for domestic violence/simple assault against the father and the eldest son and they described the mother as being completely out of control; and (5) the officers who had been to the parents' home on prior occasions reported the same bizarre behavior and expressed concern for the mother's own safety and the children's safety. Gilliland v. Gilliland, 969 So. 2d 56, 2007 Miss. App. LEXIS 195 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 656 (Miss. 2007).

Chancellor harbored serious concerns about the mother's treatment of the children when in her custody where the chancellor found that the mother's past treatment of the children neared physical and mental child abuse and that her overzealousness had adversely affected the children; also, the mother's mental health was the overriding consideration for the court's decision to award primary custody of both children to the father, and thus the chancellor acted within his discretion in finding that a more limited visitation schedule suited the best interests of the children. Gilliland v. Gilliland, 969 So. 2d 56, 2007 Miss. App. LEXIS 195 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 656 (Miss. 2007).

Chancery court properly found material change in circumstances adversely impacting a child for custody modification under Miss. Code Ann. § 93-5-24 because mother's drug addiction transpired after original custody arrangement and possibility of future relapse, along with current depression, could be considered in determining child's best interest. McSwain v. McSwain, 943 So. 2d 1288, 2006 Miss. LEXIS 691 (Miss. 2006).

Former wife was properly awarded physical and legal custody of two minor children because the trial court analyzed the appropriate factors in determining the best interest of the children under Miss. Code Ann. § 93-5-24; the age, sex, health, and continuity of care were the only factors that favored the wife. Henderson v. Henderson, 952 So. 2d 273, 2006 Miss. App. LEXIS 869 (Miss. Ct. App. 2006), cert. denied,

951 So. 2d 563, 2007 Miss. LEXIS 165 (Miss. 2007).

Mother's argument that as a result of her daughter's sex and the fact that the mother had custody of her daughter in the past the trial court should have found in her favor under the age, health, and sex of child factor when considering the father's motion for a modification of custody was rejected because under Miss. Code Ann. § 93-5-24, there was no presumption that the best interests of a child were furthered by awarding custody to a mother. Ellis v. Ellis, 952 So. 2d 982, 2006 Miss. App. LEXIS 833 (Miss. Ct. App. 2006).

Father's infrequent physical visits with his children could not be used as a factor in deciding that he was otherwise unfit to care for his children because (1) he made frequent telephone calls to his children; and (2) he was a bus driver who had difficulty earning a decent income and who was physically far away from his children, and he simply did not have the time or money to make frequent visits from Pennsylvania to Mississippi. Brown v. Wiley (In re Brown), 902 So. 2d 604, 2004 Miss. App. LEXIS 1082 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 337 (Miss. 2005).

In divorce proceedings, a chancellor did not err in finding that the health of the parties' children favored neither parent where the evidence showed that the former husband was present for all of one child's surgeries and had administered medication to the child since the child was placed primarily with the husband, even though the former wife had administered the medication before the change in placement. Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the parenting skills factor favored neither party because even though the former wife was not employed full time and the former husband was employed as a teacher, the children would have been with the wife in the summer and the husband had evidenced adequate after-school care and had a job that did not require overnight travel. Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the mental health of the parents favored a former husband based on a psychological assessment indicating that the former wife was more unstable than the husband, where the wife had committed fraud toward the trial court and the husband by negotiating a settlement as to visitation and custody while not disclosing her plans to immediately remarry and relocate Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the emotional tie of the parent and the children factor favored neither party, even though the former husband had not visited the children while they visited the former wife after her relocation to another state. Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the moral fitness of the parents favored the former husband where the chancellor based the finding on the fact that the mother had negotiated a settlement regarding custody and weekly visitation without disclosing her plans to immediately remarry and relocate out of state. Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the home and school community slightly favored a former husband, even though the husband did not have a lease on the house he was renting, where the house in question had been the former marital residence. Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

Chancellor incorrectly applied the law in finding that the father was an unfit parent because the chancellor denied custody to the father due to his inability to pay his child support in full and his inability to visit his children on a regular basis, but, in doing so, the chancellor was, in effect, denying the father custody on the grounds of abandonment while simultaneously holding that the father had not abandoned his children. Additionally, the chancellor's holding that the father was not emotionally available for his children when their mother died was unsupported by the record; therefore, the trial court's judgment denying the father custody and awarding custody of the children to their maternal grandmother was erroneous. Brown v. Wiley (In re Brown), 902 So. 2d 604, 2004 Miss. App. LEXIS 1082 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 337 (Miss. 2005).

In divorce proceedings, a chancellor did not err in finding that the stability of home and employment slightly favored a former husband where the former wife had remarried upon little consideration immediately upon receiving a divorce and the husband had stable employment in the community. Pulliam v. Smith, 872 So. 2d 790, 2004 Miss. App. LEXIS 428 (Miss. Ct. App. 2004).

Neither nasty exchanges between former spouses when picking up or dropping off child for visitation, nor former wife's implication that former husband had sexually abused child warranted change in custody; although child was subjected to some gross unpleasantries between his parents, record did not remotely suggest that these episodes were characteristic of the overall circumstances in which he lived. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Trial court did not abuse its discretion by excluding, in custody modification proceeding, arguably repetitive testimony concerning incident in which mother bit another woman on the arm. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Evidence that home of custodial parent is site of dangerous and illegal behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that environment has adversely affected child's welfare. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Once Chancellor determined that mother's home was site of illegal drug use, as well as other behavior adverse to child's welfare, and determined that father's circumstances had improved such that he was able to provide a good home for child, it was within his discretion to transfer custody from mother to father, despite fact that Chancellor could not discern any negative effect on child caused by mother's home environment. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

A chancellor did not err in awarding permanent primary child custody to the mother, even though she had committed adultery and temporary custody had been awarded to the father, where the chancellor found that the mother had greater willingness and capacity to learn proper parenting skills, the father's psychological profile was potentially detrimental to the children, and "coaching" of the children had occurred while they were in the father's custody. Williams v. Williams, 656 So. 2d 325, 1995 Miss. LEXIS 280 (Miss. 1995).

A chancellor erred in changing custody of a 6-year-old girl from her mother to her father based solely on the child's unusual knowledge of sexual conduct allegedly gained from her accidental exposure to sexual relations between her mother and stepfather where the totality of the facts and circumstances failed to support a finding that the child's best interest would be served by a change in custody. Smith v. Jones, 654 So. 2d 480, 1995 Miss. LEXIS 151 (Miss. 1995).

A chancellor erred in failing to grant a father's request for modification of custody of his 18-year old daughter where both parents and the daughter agreed that she should be in the father's custody, she had been living with the father, and the chancellor had reduced the father's child support obligation to reflect this living arrangement. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

A chancellor did not abuse his discretion in awarding custody of a 14-year-old boy to his mother on the ground that the father was unfit to be a parent, even though the child testified that he preferred to live with his father, where the child's testimony indicated that his relationship with his mother would seriously deteriorate if he were allowed to live with his father, and the father had encouraged the child to ignore and disobey his mother, allowed him to chew tobacco and dip snuff, allowed him to ride a 4-wheeler without adult supervision, allowed him to carry and shoot a .357 magnum pistol without adult supervision, kept his supply of pornographic movies in the child's bedroom, told him he would buy the child a truck if he stayed with him after the divorce, and belittled his wife in the child's presence and encouraged the child to do the same. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

A chancellor erred in awarding custody of a child to her maternal aunt rather than her father where there was no finding that the father was unfit to have custody of the child, and the main foundation for the ruling was the chancellor's concern about separating the child from her half-brother; while the separation of siblings may be an important consideration, it may not be used as a basis to deprive a parent of his or her child in favor of a third party unless the parent has been found to be unfit. Sellers v. Sellers, 638 So. 2d 481, 1994 Miss. LEXIS 311 (Miss. 1994).

A chancellor did not err in awarding custody of a child to his father, even though the mother "may have presented enough evidence at trial to let one conclude that custody should have been awarded to her," where the weight of the evidence in favor of the mother was not so great as to make an award of custody to the father erroneous, the wife stated that the father was a good parent and that he and the child were close, and the only evidence of the father's alleged physical abuse of the child was the mother's uncorroborated testimony. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

In a proceeding to determine custody of a minor child, the chancellor erred in rendering his opinion based on the summarized testimony of what the attorneys believed vital witnesses would have said; in utilizing the summarized testimony, the chancellor was not in a position to view the demeanor and judge the credibility of the witnesses, and therefore failed to fully assess and consider the fitness of the parties to care for the child. Murphy v. Murphy, 631 So. 2d 812, 1994 Miss. LEXIS 76 (Miss. 1994).

In a hearing on a motion for a new trial in a proceeding to determine custody of a minor child, the chancellor erred in rendering the issue of the parties' fitness res judicata and refusing to hear additional testimony and consider expert reports submitted by social workers; chancellors in child custody cases should consider any and all evidence which aids them in reaching the ultimate custody decision, and the ability to hear and consider additional evidence is at all times within a chancellor's authority in matters concerning child custody. Murphy v. Murphy, 631 So. 2d 812, 1994 Miss. LEXIS 76 (Miss. 1994).

A chancellor did not err in awarding physical custody of 2 minor children to their mother where the chancellor awarded the parents joint legal custody, both parents were found to be fit and proper parents, the mother was the primary caregiver though both parents played active parenting roles, the father had a work schedule based on 12-hour shifts and the only option he had considered for child care while he was at work was his elderly mother who had suffered a stroke, the father did not dispute the mother's ability to care for the children, and the father was given liberal visitation rights. Moak v. Moak, 631 So. 2d 196, 1994 Miss. LEXIS 44 (Miss. 1994).

A child custody order awarding the father custody of the parties' 2 children would be vacated where the mother did not have sufficient time to prepare for 2 adverse witnesses and the custody question was extremely close, so that the mother's lack of an opportunity to prepare for the witnesses could have affected the evidence presented and, necessarily, the chancellor's decision. Schepens v. Schepens, 592 So. 2d 108, 1991 Miss. LEXIS 983 (Miss. 1991).

9. Rights of grandparents.

Chancellor did not err in finding that it was in a child's best interest and welfare to award joint custody of the child to the child's maternal great-grandparents and paternal grandmother, because of the unfit parents—given the severity of the father's drug problems, mental-health issues, and violent tendencies and the mother's extensive drug and alcohol abuse—to protect the child from potential violence. Darby v. Combs, 229 So. 3d 108, 2017 Miss. LEXIS 433 (Miss. 2017).

Chancellor did not abuse its discretion in awarding joint physical custody of a child to the paternal grandparent and to the maternal great-grandparents of the child, after finding both natural parents unfit, because the chancellor considered the statutory and the caselaw factors, and acted within its authority, in determining the best interests of the child. Moreover, the chancellor's award of joint custody was supported by substantial evidence. Darby v. Combs, 229 So. 3d 136, 2016 Miss. App. LEXIS 681 (Miss. Ct. App. 2016), aff'd, 229 So. 3d 108, 2017 Miss. LEXIS 433 (Miss. 2017).

Chancellor did not err by awarding the grandparents custody of the child because she made sufficient, specific findings to support her conclusion that the parents did not provide evidence to rebut the presumption of § 93-5-24(9)(a)(iii), (iv). The only counseling or parenting classes either party attended were self-taught. J.P. v. S.V.B., 987 So. 2d 975, 2008 Miss. LEXIS 394 (Miss. 2008).

Grandparents have no right to custody of a grandchild as against a natural parent; thus, a chancellor erred in awarding custody of a child to his grandmother based on the finding that the child's father was "unprepared" where the chancellor did not make a specific finding as to whether the father was an unfit parent. Carter v. Taylor, 611 So. 2d 874, 1992 Miss. LEXIS 790 (Miss. 1992).

10. Joint custody.

Chancery court properly denied a father's request for sole physical custody and increased his custody time instead because the chancellor's minor changes to the custody schedule were supported by the record, the chancellor's decision to award the father half of the child's spring break served the purpose of joint custody—to award each custodial parent equal and significant periods of physical custody—and the appealed judgment was indeed a final judgment inasmuch as the chancellor adjudicated the merits of the father's petition and settled all issues between the father and the mother. Gaddis v. Wilkerson, 235 So. 3d 1446, 2018 Miss. App. LEXIS 13 (Miss. Ct. App. 2018).

Chancellor considered the best interest factors in making the joint physical custody decision, and his findings were sup-ported by substantial evidence; both parents were employed and capable of providing for the child, both had a stable home, and the chancellor's failure to specifically address each best interest factor was not reversible error. Rayner v. Sims,— So. 3d —, 2017 Miss. App. LEXIS 612(Miss. Ct. App. Oct. 17, 2017).

Chancellor did not err in granting joint physical custody of the child, given that both parents were capable of sharing joint custody cooperatively, as they were willing and able to communicate with each other regarding the child. Rayner v. Sims, — So. 3d —, 2017 Miss. App. LEXIS 612 (Miss. Ct. App. Oct. 17, 2017).

Chancery court's award of joint physical custody did not violate the statute because the case did not involve an irreconcilable differences divorce, and the father requested sole custody or, in the alternative, joint custody. Roberts v. Eads, — So. 3d —, 2017 Miss. App. LEXIS 600 (Miss. Ct. App. Oct. 10, 2017).

Chancellor did not err in awarding a mother and a father joint physical and legal custody of their child because it properly analyzed and applied the Albright factors; because the chancellor considered the mother's stability when favoring the father in the stability of the home environment factor, he did not err in finding that that factor was neutral, and he found that there was evidence that both parties were a part of the child's life. Brown v. Anslum, — So. 3d —, 2018 Miss. App. LEXIS 340 (Miss. Ct. App. July 24, 2018).

Chancery court did not abuse its discretion in allocating to the mother the decision-making authority in regard to where the child attended school because it was within its discretion to allocate the decision-making to one parent, and caselaw favored the custodial parent having the discretion for such a decision Taylor v. Timmons (In re C.T.), 228 So. 3d 311, 2017 Miss. App. LEXIS 332 (Miss. Ct. App. 2017).

Parents may resolve a custody schedule issue through an agreement that a chancellor finds adequate and sufficient before incorporating it into an amended divorce judgment, or they could allow the chancellor to resolve the issue for them. A joint-physical-custody schedule should provide each parent with significant periods of physical custody in such a way so as to assure their child of frequent and continuing contact with both parents, but that does not necessarily mean that each parent would have to get equal time with their child. Todd v. Todd, 216 So. 3d 1178, 2017 Miss. App. LEXIS 214 (Miss. Ct. App. 2017).

Chancery court's award of joint physical custody did not violate the statute because the case did not involve an irreconcilable-differences divorce, and the father requested sole custody or, in the alternative, joint custody. Roberts v. Eads, 235 So. 3d 1425, 2017 Miss. App. LEXIS 600 (Miss. Ct. App. 2017).

Chancellor did not err in granting joint physical custody of the child, given that both parents were capable of sharing joint custody cooperatively, as they were willing and able to communicate with each other regarding the child. Rayner v. Sims, 228 So. 3d 353, 2017 Miss. App. LEXIS 612 (Miss. Ct. App. 2017).

Chancellor considered the best interest factors in making the joint physical custody decision, and his findings were supported by substantial evidence; both parents were employed and capable of providing for the child, both had a stable home, and the chancellor's failure to specifically address each best interest factor was not reversible error. Rayner v. Sims, 228 So. 3d 353, 2017 Miss. App. LEXIS 612 (Miss. Ct. App. 2017).

Chancellor did not err by awarding sole custody over the parties' children to the father where he found that it was in the children's best interest to give custody to the father and he was not required to mention joint custody in his order. White v. White, 166 So. 3d 574, 2015 Miss. App. LEXIS 335 (Miss. Ct. App. 2015).

Chancellor did not err by failing to determine if a mother and father could cooperate before awarding joint custody of the parties' children because (1) the parties consented to the chancellor's determination of custody, meeting the "application of both parents" requirement in Miss. Code Ann. § 93-5-24(2) (2013), (2) the chancellor was in the best position to evaluate the parties' ability to cooperate, and (3) the facts supported the chancellor's decision. Keyes v. Keyes, 134 So. 3d 388, 2014 Miss. App. LEXIS 128 (Miss. Ct. App. 2014).

Because a chancery court did not consider the propriety of granting joint physical custody, as the chancery court may have erroneously concluded that it was not authorized under Miss. Code Ann. § 93-5-24 to consider joint physical custody in an irreconcilable-differences divorce, reversal of the chancery court's judgment and remand of the case to the chancery court for it to reconsider its award of custody, including the propriety of awarding joint physical custody, was appropriate. Clark v. Clark, 126 So. 3d 122, 2013 Miss. App. LEXIS 759 (Miss. Ct. App. 2013).

In a custody modification proceeding, a chancellor erred in finding that the parties had shared de facto joint custody under Miss. Code Ann. § 93-5-24(5)(c) because the parties' marital dissolution agreement explicitly stated that the father had physical custody of the children. Self v. Lewis, 64 So. 3d 578, 2011 Miss. App. LEXIS 269 (Miss. Ct. App. 2011).

It was proper for the chancellor to consider and award joint custody here, even though the husband did not request it because the chancellor thoroughly considered the issues and ramifications of maintaining joint custody. Phillips v. Phillips, 45 So. 3d 684, 2010 Miss. App. LEXIS 171 (Miss. Ct. App.), cert. denied, 49 So. 3d 636, 2010 Miss. LEXIS 546 (Miss. 2010).

In a child custody case in which the mother argued that the chancellor's final custody order was erroneous due to its ambiguity of the term custody, the record failed to support a grant of legal custody to the mother, and in light of the guidance provided by the Lowery decision, a plain reading of the chancellor's judgment reflected that the chancellor granted full legal custody to the father. The case lacked any agreement regarding arrangement of shared custody, and the record failed to support an award of legal custody to the mother. Wheat v. Koustovalas, 42 So. 3d 606, 2010 Miss. App. LEXIS 98 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 462 (Miss. 2010).

Concern for a parent's access to information does not justify granting joint legal custody under Miss. Code Ann. § 93-5-24(5)(e), as such access is guaranteed by Miss. Code Ann. § 93-5-24(8). Lowrey v. Lowrey, 25 So. 3d 274, 2009 Miss. LEXIS 549 (Miss. 2009).

Court did not err when it failed to award the parties joint legal custody of the children under Miss. Code Ann. § 93-5-24(2) because the husband and the wife's consent to allow the chancery court to determine custody gave the chancellor the option to award joint-custody to the parties, and although the chancellor rejected the guardian ad litem's recommendation of joint custody, without explanation, and granted legal and physical custody of the children to the husband, chancellors were not required to defer to the findings of a guardian ad litem. Furthermore, in cases where the appointment of a guardian ad litem is discretionary, or not required by statute, the chancellor was not bound to explain his decision to reject the guardian ad litem's recommendations. McCullough v. McCullough, 52 So. 3d 373, 2009 Miss. App. LEXIS 671 (Miss. Ct. App. 2009).

Court's award of child custody constituted joint physical custody because the amount of custodial time awarded to the father, while not generous, still afforded the father significant periods of physical custody and assured the child frequent and continuing contact with both the father and the mother. The chancellor's decision that the child should remain with the mother during the school week was reasonable because there was testimony that the child's grades suffered during the separation period when the father and the mother shuffled him back and forth. Collins v. Collins, 20 So. 3d 683, 2008 Miss. App. LEXIS 739 (Miss. Ct. App. 2008), cert. denied, 2009 Miss. LEXIS 542 (Miss. Nov. 5, 2009).

Even though the parties had not agreed on joint custody, it was not subject to modification based on this fact where it had been determined that such an award was in the best interest of the children; the strained relationship between the parties existed at the time of the divorce. Grissom v. Grissom, 952 So. 2d 1023, 2007 Miss. App. LEXIS 171 (Miss. Ct. App. 2007).

Trial court granted the parties' joint legal and physical custody of the minor child, but the trial court also specified visitation for the mother which did not comply with Miss. Code Ann. § 93-5-24's requirement of significant periods of physical custody; thus, the trial court, on remand, had to clarify the contradictory language used in its judgment. Rush v. Rush, 932 So. 2d 794, 2006 Miss. LEXIS 354 (Miss. 2006).

Trial court erred in finding the father in contempt for violations of a custody agreement and for aiding and supporting his daughter's decision not to return to her mother's custody after visiting with the father because the evidence showed the father enlisted the aid of law enforcement, an attorney, and a psychologist in an attempt to get his daughter to comply with a court order to return to her mother. Although the mother had sole physical custody of the children, the father was a joint legal custodian and under Miss. Code Ann. § 93-5-24(5)(e) he had a right to share in the decision-making process and discuss the benefits and consequences of the mother's out-of-state move with the children. D.A.P. v. C.A.P.R. (In re E. C. P.), 918 So. 2d 809, 2005 Miss. App. LEXIS 439 (Miss. Ct. App. 2005).

Appellate court interpreted Miss. Code Ann. § 93-5-24(2) to prohibit a chancellor from awarding joint custody in irreconcilable differences divorce cases unless both parents specifically requested joint custody, but the Mississippi Supreme Court rejected that interpretation; the Supreme Court held that when parties consented in writing to the chancery court's determination of custody, they were consenting to that determination and this met the statutory directive of "joint application" in § 93-5-24(2). The Supreme Court found that this was the only statutory interpretation that conformed to the primary directive of Miss. Code Ann. § 93-5-24(1) that custody should be awarded according to the best interests of the child; it was the chancellor who had to determine what was in the best interests of the child, and it was the chancellor who determined the level of commitment parents had to sharing joint custody. Crider v. Crider, 904 So. 2d 142, 2005 Miss. LEXIS 222 (Miss. 2005).

In an irreconcilable differences divorce case, the parties asked the chancellor to decide the issues of primary custody, property settlement, and support, pursuant to Miss. Code Ann. § 93-5-2(3); because the parties consented to the chancellor determination of custody, that met the statutory directive of "joint application" in § 93-5-24(2). Because the parents had been sharing joint legal and physical custody since their separation, on their own initiative, the chancellor found that there was a proven willingness from both parties to cooperate; thus, the chancellor did not err in awarding joint custody of the child to the parties. Crider v. Crider, 904 So. 2d 142, 2005 Miss. LEXIS 222 (Miss. 2005).

Where divorce was granted on the ground of irreconcilable differences, the trial court improperly awarded joint custody when neither of the parties requested it; the appellate court had consistently interpreted Miss. Code Ann. § 93-5-24(2) to require the consent of both parents before joint custody could be awarded in an irreconcilable differences divorce. Crider v. Crider, 905 So. 2d 706, 2004 Miss. App. LEXIS 757 (Miss. Ct. App. 2004), rev'd, 904 So. 2d 142, 2005 Miss. LEXIS 222 (Miss. 2005).

Pursuant to Miss. Code Ann. § 93-5-24, a chancellor could award sole legal custody of children to one parent and joint physical custody to both parents; the chancellor was correct in denying the wife's request to modify the original child custody order where she had not met her required burden of proving a material change in circumstances. Mabus v. Mabus, 847 So. 2d 815, 2003 Miss. LEXIS 274 (Miss. 2003).

Two fleeting references to the possibility of joint custody – during a trial in which both parents fought hard for sole custody – were an insufficient to amend a parent's pleadings under a theory of implied consent, to include a petition for joint custody. Mabus v. Mabus, 890 So. 2d 806, 2003 Miss. LEXIS 62 (Miss. 2003).

Although the Legislature has had numerous opportunities to change the requirement that joint custody be requested by both parents in an irreconcilable differences divorce, they have not done so and, therefore, in such a case, joint custody should be awarded only where both parties request such an award. Dearman v. Dearman, 811 So. 2d 308, 2001 Miss. App. LEXIS 27 (Miss. Ct. App. 2001).

Although an award of joint custody was not proper where the parties, who were divorced on the ground of irreconcilable differences, did not ask for joint custody, the court nevertheless upheld the custody order as it was mislabeled as "joint custody" since it amounted to de facto physical custody to the father with liberal visitation rights to the mother. Dearman v. Dearman, 811 So. 2d 308, 2001 Miss. App. LEXIS 27 (Miss. Ct. App. 2001).

Where neither party agreed to nor requested joint custody, the chancellor erred in awarding joint custody. Morris v. Morris, 758 So. 2d 1020, 1999 Miss. App. LEXIS 307 (Miss. Ct. App. 1999).

11. Rights of stepparents.

Stepfather's rights under the Due Process Clause of U.S. Const. Amend. XIV were not violated by the chancery court's dismissal of his action seeking to enforce a visitation order against a father because the clause protected the fundamental right of parents to make decisions concerning the care, custody, and control of their children and the stepfather had no visitation rights. Pruitt v. Payne, 14 So. 3d 806, 2009 Miss. App. LEXIS 481 (Miss. Ct. App. 2009).

12. Modification denied.

Chancellor's dismissal of a father's petition to modify custody was appropriate because the chancellor did not err in finding that the father failed to prove a material change in circumstances that adversely affected the parties' child as there was no evidence that an incident in which the child consumed beer, the wife's temper and profanity, and incidents at baseball games had any adverse effect on the child. Furthermore, the child performed well in school, was in good physical and mental health, and had good relationships with both parents. Shows v. Cross, 238 So. 3d 1224, 2018 Miss. App. LEXIS 99 (Miss. Ct. App. 2018).

Because a mother failed to show a material change in circumstances had occurred in a father's home environment warranting a change in physical custody, the chancery court did not err in refusing the mother's request to modify the order regarding the physical custody of the parties' children pursuant to under Miss. Code Ann. § 93-5-24(6). Mercier v. Mercier, 11 So. 3d 1283, 2009 Miss. App. LEXIS 365 (Miss. Ct. App. 2009).

13. Modification proper.

Chancellor did not err by modifying a child-custody arrangement because of a material change in circumstances. The chancellor found that the custodial parent was pregnant and in an extramarital relationship with the parent's fiance, the custodial parent unilaterally reduced and virtually eliminated the non-custodial parent's extended visitation periods and attempted to interfere with the relationship between the non-custodial parent and the child, and the child had been adversely affected by the custodial parent's actions. Martin v. Stevenson, 139 So. 3d 740, 2014 Miss. App. LEXIS 62 (Miss. Ct. App. 2014).

Chancery court did not err in awarding a father custody of his child because it applied the correct legal standard in modifying custody, and its decision to modify custody from the mother to the father was based upon substantial evidence; the mother removed the child in the middle of the night in violation of a court order and then refused to accept phone calls from either the father or the guardian ad litem, the guardian ad litem's report stated that the mother missed appointments and did not regularly make the child available to speak on the phone, and the chancery court discounted the child's stated preference to live with the mother because it found that his desire was motivated by the mother not properly disciplining him. White v. White, 26 So. 3d 342, 2010 Miss. LEXIS 43 (Miss. 2010).

14. Modification improper.

Reversal of a chancellor's judgment and remand of a case for further consideration was appropriate because, following a father's successful request for custody modification and physical custody of the parties' child, the chancellor mistakenly held that the father did not have to prove a material change in circumstances adverse to the child's best interests. Todd v. Todd, 216 So. 3d 1178, 2017 Miss. App. LEXIS 214 (Miss. Ct. App. 2017).

In a child custody modification case, a finding that there was a material change of circumstances that had adversely affected a child was improper since there was no evidence as to how a mother's living situation since the original divorce decree adversely affected the child, much less any evidence of harm or danger. There was no evidence to support an allegation that the mother had been using drugs, and a chancellor did not explain how any material change was adverse to the child's best interest. Mize v. Mize, 176 So. 3d 99, 2015 Miss. App. LEXIS 34 (Miss. Ct. App.), cert. denied, 178 So. 3d 333, 2015 Miss. LEXIS 523 (Miss. 2015).

Chancellor erred by awarding one parent sole legal custody of the parties' children because there was no evidence that the children had been adversely affected by the joint-legal-custody arrangement to which the parents had agreed when they divorced. Hickey v. Hickey, 166 So. 3d 43, 2014 Miss. App. LEXIS 728 (Miss. Ct. App. 2014), cert. denied, 166 So. 3d 38, 2015 Miss. LEXIS 332 (Miss. 2015).

Trial court erred in modifying custody based on a material change in circumstances–the mother's inability to set and enforce boundaries for the children–as its finding that the mother imposed little or no discipline on the children was not supported by substantial, credible evidence. A.M.L. v. J.W.L., 98 So. 3d 1001, 2012 Miss. LEXIS 398 (Miss. 2012).

15. Natural-parent presumption.

In a child custody case between maternal grandparents and a father, a chancery court properly found that a father was entitled to the natural-parent presumption due to the progress that he made in rehabilitating himself as a parent; the presumption was not rebutted by clear and convincing evidence. Inter alia, the father had taken legal action when denied visitation with his child, had visited the child, and had demonstrated that he was drug free for more than a year prior to his being awarded temporary custody. Altom v. Jones, 209 So. 3d 434, 2016 Miss. App. LEXIS 242 (Miss. Ct. App. 2016).

16. Family-violence presumption.

Chancery court's child custody award erred because, in finding a mother unfit and invoking the family-violence presumption, the court (1) relied on inadmissible hearsay in a guardian ad litem's report and testimony and (2) conducted no Albright analysis. Ballard v. Ballard, — So. 3d —, 2017 Miss. LEXIS 206 (Miss. May 25, 2017).

RESEARCH REFERENCES

ALR.

Jurisdiction to award custody of child having legal domicil in another state. 4 A.L.R.2d 7.

Jurisdiction of court to award custody of child domiciled in state but physically outside it. 9 A.L.R.2d 434.

Material facts existing at the time of rendition of decree of divorce but not presented to court, as ground for modification of provision as to custody of child. 9 A.L.R.2d 623.

Nonresidence as affecting one's right to custody of child. 15 A.L.R.2d 432.

Power of court, on its own motion, to modify provisions of divorce decree as to custody of children, upon application for other relief. 16 A.L.R.2d 664.

Consideration of investigation by welfare agency or the like in making or modifying award as between parents of custody of children. 35 A.L.R.2d 629.

Right to custody of child as affected by death of custodian appointed by divorce decree. 39 A.L.R.2d 258.

Service of notice to modify divorce decree or other judgment as to child's custody upon attorney who represented opposing party. 42 A.L.R.2d 1115.

Remarriage of parent as ground for modification of divorce decree as to custody of child. 43 A.L.R.2d 363.

Race as factor in custody award or proceedings. 57 A.L.R.2d 678.

Court's power to modify child custody order as affected by agreement which was incorporated in divorce decree. 73 A.L.R.2d 1444.

Comment Note. – "Split," "divided," or "alternate" custody of children. 92 A.L.R.2d 695.

Child's wishes as factor in awarding custody. 4 A.L.R.3d 1396.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child. 7 A.L.R.3d 1096.

Physical abuse of child by parent as ground for termination of parent's right to child. 53 A.L.R.3d 605.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision. 59 A.L.R.3d 1337.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child. 99 A.L.R.3d 268.

Custodial parent's sexual relations with third person as justifying modification of child custody order. 100 A.L.R.3d 625.

Admissibility of social worker's expert testimony on child custody issues. 1 A.L.R.4th 837.

Visitation rights of persons other than natural parents or grandparents. 1 A.L.R.4th 1270.

Parent's physical disability or handicap as factor in custody award or proceedings. 3 A.L.R.4th 1044.

Initial award or denial of child custody to homosexual or lesbian parent. 6 A.L.R.4th 1297.

Award of custody of child where contest is between natural parent and stepparent. 10 A.L.R.4th 767.

Race as factor in custody award or proceedings. 10 A.L.R.4th 796.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights. 10 A.L.R.4th 827.

Propriety of awarding joint custody of children. 17 A.L.R.4th 1013.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country. 20 A.L.R.4th 677.

Religion as factor in child custody and visitation cases. 22 A.L.R.4th 971.

Propriety of provision of custody or visitation order designed to insulate child from parent's extramarital sexual relationships. 40 A.L.R.4th 812.

Primary caretaker role of respective parents as factor in awarding custody of child. 41 A.L.R.4th 1129.

Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born. 84 A.L.R.4th 655.

Child custody and visitation rights of person infected with AIDS. 86 A.L.R.4th 211.

Continuity of residence as factor in contest between parent and nonparent for custody of child who has been residing with nonparent – modern status. 15 A.L.R.5th 692.

Age of parent as factor in awarding custody. 34 A.L.R.5th 57.

Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children. 51 A.L.R.5th 241.

Mental health of contesting parent as factor in award of child custody. 53 A.L.R.5th 375.

Child custody and visitation rights arising from same-sex relationship. 80 A.L.R.5th 1.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation §§ 807 et seq.

22 Am. Jur. Trials, Child Custody Litigation §§ 1 et seq.

15 Am. Jur. Proof of Facts, Child Custody, § 36 (proof that wife is fit person to be awarded custody of children); § 37 (proof that wife is unfit person to be awarded custody of children).

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 25 et seq. (proof of physical neglect – malnutrition and lack of adequate clothing); §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition); §§ 72 et seq. (proof of medical neglect – parent's refusal to consent to blood transfusion during surgery for alleviation of facial disfigurement).

6 Am. Jur. Proof of Facts 2d, Change in Circumstances Justifying Modification of Child Custody Order, §§ 7 et seq. (proof of change in circumstances justifying modification of child custody order – in general); §§ 26 et seq. (proof of change in circumstances justifying modification of child custody order – remarriage of noncustodian); §§ 35 et seq. (proof of change in circumstances justifying modification of child custody order – remarriage of custodian).

CJS.

27C C.J.S., Divorce §§ 976–987, 1050.

Law Reviews.

Patterson, In "the best interest of the child": a practical guide to child custody litigation. 13 Miss. C. L. Rev. 109, Fall, 1992.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

Family Law At the Turn of the Century, 71 Miss. L.J. 781, Spring, 2002.

Remembering the Best Interest of the Child in Child Custody Disputes between a Natural Parent and a Third Party: Grant v. Martin, 757 So. 2d 264 (Miss. 2000), 21 Miss. C. L. Rev. 311, Spring, 2002.

§ 93-5-25. Effect of judgment of divorce.

The judgment of divorce shall not render illegitimate the children begotten between the parties during lawful marriage; but if the judgment be rendered because one (1) of the parties was married to another at the time of the marriage or pretended marriage between the parties, it shall adjudge the marriage between the parties to have been invalid and void from the beginning and the issue thereof shall be illegitimate and subject to the disabilities of illegitimate children. And the judgment may provide, in the discretion of the court, that a party against whom a divorce is granted, because of adultery, shall not be at liberty to marry again; in which case such party shall remain in law as a married person. Provided, however, that after one (1) year, the court may remove the disability and permit the person to marry again, on petition and satisfactory evidence of reformation, or for good cause shown, on the part of the party so barred from remarriage; but the actions of the court under the foregoing proviso shall not be construed as affecting any judgment of divorce granted in any case where the discretion of the chancellor has been exercised in barring one (1) party from remarriage on account of adultery.

HISTORY:

Codes, 1857, ch. 40, arts. 12, 14; 1871, § 1769; 1880, § 1158; 1892, § 1563; 1906, § 1670; Hemingway's 1917, § 1412; 1930, § 1422; 1942, § 2744; Laws, 1924, ch. 163; Laws, 1991, ch. 573, § 133, eff from and after July 1, 1991.

Cross References —

Jurisdiction of family masters in chancery with respect to orders of support, see § 9-5-255.

Provisions relative to access by consumer reporting agencies to information concerning overdue support payments, see § 93-11-69.

Provisions relative to judgments in the amount of overdue child support payments, see § 93-11-71.

Provisions relative to orders for withholding amounts of overdue child support payments from income of obligors, see §§ 93-11-101 through 93-11-119.

RESEARCH REFERENCES

ALR.

Presumption of legitimacy of child born after annulment, divorce, or separation. 46 A.L.R.3d 158.

Divorce: power of court to modify decree for alimony or support of spouse which was based on agreement of parties. 61 A.L.R.3d 520.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incidental thereto. 78 A.L.R.3d 846.

Vacating or setting aside divorce decree after remarriage, of party. 17 A.L.R.4th 1153.

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree. 26 A.L.R.4th 325.

Retirement of husband as change of circumstances warranting modification of divorce decree – Prospective retirement. 110 A.L.R.5th 237.

Am. Jur.

24 Am. Jur. 2d, Divorce and Separation §§ 357, 358 et seq.

§ 93-5-26. Noncustodial parent's right of access to records and information pertaining to minor children.

Notwithstanding any other provisions of law, except those provisions protecting the confidentiality of adoption records and except for cases in which parental rights have been legally terminated, access to records and information pertaining to a minor child, including but not limited to medical, dental and school records, shall not be denied to a parent because the parent is not the child's custodial parent if such parent's parental rights have not been terminated by adoption or by a termination of parental rights proceeding.

HISTORY:

Laws, 1989, ch. 581, § 1, eff from and after passage (approved April 21, 1989).

OPINIONS OF THE ATTORNEY GENERAL

Absent a chancery court order to the contrary, a school district must release children's school records to the non-custodial parent. 2005 Miss. Op. Att'y Gen. 433.

§ 93-5-27. Marital rights cease with judgment of divorce.

In all cases of divorce from the bonds of matrimony, the marital rights shall cease with the judgment.

HISTORY:

Codes, 1930, § 1423; 1942, § 2745; Laws, 1924, ch. 163; Laws, 1991, ch. 573, § 134, eff from and after July 1, 1991.

JUDICIAL DECISIONS

1. In general.

Husband's testimony, excluding that pertaining to alleged adultery, would not support a divorce on grounds of habitual cruel and inhuman treatment, where he testified that wife had cursed him on several occasions, that their sex life had decreased in frequency, that wife had been cold toward him since their reconciliation, and that he was suspicious of wife's relation with another man. Moreover, with respect to the alleged adultery, since the alleged act occurred in the interim between an earlier divorce decree and the revocation of that decree, the wife was then a single woman and could not have committed adultery against her marital status with husband. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Mississippi Code § 97-5-27 means what it says-namely, that the divorce is absolute. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

With the entry of a divorce decree, the marital rights of the parties, as related to one another, cease and the status of the parties is that of unmarried persons who may contract another marriage unless prohibited by the decree. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Since a wife granted a decree on March 25, 1982 was a single person until the divorce decree was revoked pursuant to Mississippi Code § 93-5-31 on July 7, 1982, she could not commit adultery as an offense against her marital status with her husband during the interim. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

The revocation of a divorce decree pursuant to Mississippi Code § 93-5-31 does not nullify the divorce decree, at least not to such extent as though the parties were never divorced so that any act by either of the parties in the interim between the divorce decree and the revocation of that decree could be construed by the law to be an offense against their marital status. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Language "marital rights shall cease with decree," in divorce statute, means only that divorce is absolute. Crawford v. Crawford, 158 Miss. 382, 130 So. 688, 1930 Miss. LEXIS 75 (Miss. 1930).

RESEARCH REFERENCES

ALR.

Prior institution of annulment proceedings or other attack on validity of one's marriage as barring or estopping one from entitlement to property rights as surviving spouse. 31 A.L.R.4th 1190.

Effect of death of party to divorce proceeding pending appeal or time allowed for appeal. 33 A.L.R.4th 47.

§ 93-5-29. Divorced persons not to cohabit.

If any person who shall be divorced on account of their being within the degrees prohibited by law, shall afterwards cohabit, they shall be liable to the pains and penalties provided by law against incest. If any persons who shall be divorced on account of a prior marriage, adultery, or other cause, shall afterwards cohabit, they shall be liable to all the pains provided by law against adultery.

HISTORY:
Codes, Hutchinson's 1848, ch. 34, art. 2 (8, 9); 1857, ch. 40, art. 16; 1871, § 1771; 1880, § 1160; 1892, § 1566; 1906, § 1674; Hemingway's 1917, § 1416; 1930, § 1424; 1942, § 2746.

Cross References —
Criminal offense of persons divorced for incest thereafter having sexual intercourse, see § 97-29-29.

JUDICIAL DECISIONS

1. In general.
This section [Code 1942, § 2746] does not conclusively forbid contraction of a valid subsequent common-law marriage between divorced persons. Oatis v. Mingo, 199 Miss. 896, 26 So. 2d 453, 1946 Miss. LEXIS 259 (Miss. 1946).

RESEARCH REFERENCES

Am. Jur.
24A Am. Jur. 2d, Divorce and Separation §§ 1063, 1064 et seq.

§ 93-5-31. Judgment of divorce may be revoked.

The judgment of divorce from the bonds of matrimony may be revoked at any time by the court which granted it, under such regulations and restrictions as it may deem proper to impose, upon the joint application of the parties, and upon the production of satisfactory evidence of their reconciliation.

HISTORY:
Codes, 1857, ch. 40, art. 14; 1871, § 1769; 1880, § 1158; 1892, § 1564; 1906, § 1672; Hemingway's 1917, § 1414; 1930, § 1425; 1942, § 2747; Laws, 1991, ch. 573, § 135, eff from and after July 1, 1991.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Death of party.

1. In general.
There was no authority for the special chancellor's decision to set aside divorce decree because neither party asked the special chancellor to set aside the divorce decree but were before the court on a contempt petition; the former husband made a motion for a directed verdict, and the only relief allowed was for the chancellor to either grant the motion and dismiss the former wife's contempt petition or deny the motion and allow the contempt claim to proceed. Jones v. Jones, 239 So. 3d 1091, 2018 Miss. App. LEXIS 106 (Miss. Ct. App. 2018).

The revocation of a divorce decree pursuant to Mississippi Code § 93-5-31 does not nullify the divorce decree, at least not to such extent as though the parties were never divorced so that any act by either of the parties in the interim between the divorce decree and the revocation of that decree could be construed by the law to be an offense against their marital status. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Since a wife granted a decree on March 25, 1982 was a single person until the divorce decree was revoked pursuant to Mississippi Code § 93-5-31 on July 7, 1982, she could not commit adultery as an offense against her marital status with her husband during the interim. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

Husband's testimony, excluding that pertaining to alleged adultery, would not support a divorce on grounds of habitual cruel and inhuman treatment, where he testified that wife had cursed him on several occasions, that their sex life had decreased in frequency, that wife had been cold toward him since their reconciliation, and that he was suspicious of wife's relation with another man. Moreover, with respect to the alleged adultery, since the alleged act occurred in the interim between an earlier divorce decree and the revocation of that decree, the wife was then a single woman and could not have committed adultery against her marital status with husband. Devereaux v. Devereaux, 493 So. 2d 1310, 1986 Miss. LEXIS 2627 (Miss. 1986).

2. Death of party.

Because the wife met every requirement in Miss. Code Ann. § 93-5-31 to have a divorce revoked, the appellate court erred in reversing the chancery court's revocation of the parties' divorce; in part, there was sufficient evidence of reconciliation and no statutory reference was made to the death of one of the parties. Because the action was not abated upon husband's death, Miss. Code Ann. § 15-1-69 was inapplicable. Carlisle v. Allen, 40 So. 3d 1252, 2010 Miss. LEXIS 391 (Miss. 2010).

Revocation of the couple's divorce was inappropriate because the chancery court should not have conducted a hearing on the matter of revoking the divorce following the decedent husband's death. The purpose of the joint application to revoke the divorce was to revoke the divorce; when one of the parties died, there could be no successful resolution of the application. Carlisle v. Allen, 40 So. 3d 1265, 2009 Miss. App. LEXIS 349 (Miss. Ct. App. 2009), rev'd, 40 So. 3d 1252, 2010 Miss. LEXIS 391 (Miss. 2010).

RESEARCH REFERENCES

ALR.

False allegation of plaintiff's domicil or residence in the state as ground for vacation of default decree of divorce. 6 A.L.R.2d 596.

Power of court, in absence of express authority, to grant relief from judgment by default in divorce action. 22 A.L.R.2d 1312.

Court's power to vacate decree of divorce or separation upon request of both parties. 3 A.L.R.3d 1216.

Vacating or setting aside divorce decree after remarriage of party. 17 A.L.R.4th 1153.

Reconciliation as affecting decree for limited divorce, separation, alimony, separate maintenance, or spousal support. 36 A.L.R.4th 502.

Retirement of husband as change of circumstances warranting modification of divorce decree – Prospective retirement. 110 A.L.R.5th 237.

§ 93-5-33. Statistical requirements.

All complaints for divorce shall name the parties to the suit, when married, and the number and names of the living minor children born of the marriage. It shall be the duty of each chancery clerk in the state to make a report of each divorce granted in his county; and on forms furnished by the State Board of Health, to show the following information, as correctly as he is able to make such report: Names of parties; when married; state of residence; children under eighteen (18) in this family as of date couple last resided in same household; custody of children; and the page and book in which judgment is recorded. He shall certify to the said report and affix thereunto his seal, and he shall forward it to the State Board of Health within ten (10) days after adjournment of each term of court in his county. For his services in preparing and forwarding said records to the State Board of Health he shall receive the sum of Thirty-five Cents (35¢) for each completed record, to be taxed to costs in each divorce case as other fees are taxed.

HISTORY:

Codes, 1906, § 1671; Hemingway's 1917, § 1413; 1930, § 1426; 1942, § 2748; Laws, 1928, ch. 132; Laws, 1989, ch. 511, § 5; Laws, 1991, ch. 573, § 136; Laws, 2002, ch. 385, § 1, eff from and after July 1, 2003.

Cross References —

Vital statistics generally, see §§ 41-57-1 et seq.

RESEARCH REFERENCES

ALR.

Health provider's agreement as to patient's copayment liability after award by professional service insurer as unfair trade practice under Federal Law. 79 A.L.R. Fed. 870.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-5-34. Child custody and visitation when a parent receives temporary duty, deployment or mobilization orders from the military.

(1) It is the purpose of this section to provide a means by which to facilitate a fair, efficient and swift process to resolve matters regarding custody and visitation when a parent receives temporary duty, deployment or mobilization orders from the military. It is also the purpose of this section to facilitate continued communication between military parents and their minor children when the parent is on temporary duty or under deployment or mobilization orders.

(2) As used in this section:

(a) The term "deployment" means the temporary transfer of a service member serving in an active-duty status to another location in support of combat or some other military operation.

(b) The term "mobilization" means the call-up of a National Guard or Reserve service member to extended active duty status. For purposes of this definition, "mobilization" does not include National Guard or Reserve annual training.

(c) The term "temporary duty" means the transfer of a service member from one military base to a different location, usually another base, for a limited period of time to accomplish training or to assist in the performance of a noncombat mission.

(d) The term "family member" means a person related by blood or marriage and may include, for purposes of this statute, a step-parent, grandparent, aunt, uncle, adult sibling or other person related by blood or marriage.

(3) When a parent who has custody, or has joint custody with primary physical custody, receives temporary duty, deployment or mobilization orders from the military that involve moving a substantial distance from the parent's residence having a material effect on the parent's ability to exercise custody responsibilities:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten (10) days after the parent returns, but shall not impair the discretion of the court to conduct a hearing for emergency custody upon return of the parent and within ten (10) days of the filing of a verified motion for emergency custody alleging an immediate danger of irreparable harm to the child; and

(b) The temporary duty, mobilization or deployment of the service member and the temporary disruption to the child's schedule shall not be factors in a determination of change of circumstances if a motion is filed to transfer custody from the service member.

(c) Any order entered under this section shall require that:

(i) The non-deployed parent shall make the child or children reasonably available to the deployed parent when the latter parent has leave;

(ii) The non-deployed parent shall facilitate opportunities for telephonic, "webcam," and electronic mail contact between the deployed parent and the child or children during deployment; and

(iii) The deployed parent shall provide timely information regarding the parent's leave schedule to the non-deployed parent.

(4) If the parent with visitation rights receives military temporary duty, deployment or mobilization orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise rights, the court otherwise may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the service member's minor child for the duration of the parent's absence, if delegating visitation rights is in the child's best interest.

(5) Upon motion of a parent who has received military temporary duty, deployment or mobilization orders, the court shall, for a good cause shown, hold an expedited hearing in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing.

(6) Upon motion of a parent who has received military temporary duty, deployment or mobilization orders, the court shall, upon reasonable advance notice and for good cause shown, allow the parent to present testimony and evidence by affidavit or electronic means in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability to appear in person at a regularly scheduled teleconference, or the Internet.

(7) Nothing in this section shall alter the duty of the court to consider the best interest of the child in deciding custody or visitation matters.

(8) Any hearing pursuant to this section shall take precedence over all other causes not involving the public interest, to the end that these cases may be expedited.

HISTORY:

Laws, 2008, ch. 389, § 1; Laws, 2010, ch. 519, § 1, eff from and after July 1, 2010.

JUDICIAL DECISIONS

1. Best interest of the child.

While the effect of military deployment cannot be a factor in determining whether a change of circumstances has occurred, Miss. Code Ann. § 93-5-34 does not prohibit courts from considering the effect of military service in determining the best interest of a child. Morris v. Morris, 5 So. 3d 476, 2008 Miss. App. LEXIS 612 (Miss. Ct. App. 2008).

Awarding child custody to a former wife was in the best interest of the parties' children because the former husband's military service limited his capacity to provide primary care to the children where the husband was on call twenty-four hours a day and it remained possible that the husband could be deployed overseas. Because the best interest of the children was the paramount consideration, the chancery court was not barred from considering the husband's military service. Morris v. Morris, 5 So. 3d 476, 2008 Miss. App. LEXIS 612 (Miss. Ct. App. 2008).

CHAPTER 7.

ANNULMENT OF MARRIAGE

Sec.
93-7-1. Annulment of void marriages.
93-7-3. Causes for annulment of marriages.
93-7-5. Legitimation of issue.
93-7-7. Custody of children.
93-7-9. Filing of complaint.
93-7-11. Jurisdiction; pleading; process.
93-7-13. Duty of court to make report.

§ 93-7-1. Annulment of void marriages.

All bigamous or incestuous marriages are void, and a declaration of nullity may be obtained at the suit of either party.

HISTORY:

Codes, 1942, § 2748-01; Laws, 1962, ch. 278, § 1, eff from and after 60 days after passage (approved May 16, 1962).

Cross References —

Criminal offense of bigamy, see § 97-29-13.

Criminal offense of incest, see § 97-29-27.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

ALR.

Right to attack validity of marriage after death of party thereto. 47 A.L.R.2d 1393.

Am. Jur.

4 Am. Jur. 2d, Annulment of Marriage §§ 1, 2 et seq.

1 Am. Jur. Pl & Pr Forms (Rev), Annulment of Marriage, Forms 31 et seq. (complaint, petition, or declaration for annulment on ground of undissolved prior marriage); Forms 41, 42 (complaint, petition, or declaration for annulment on ground of incestuous marriage).

2 Am. Jur. Legal Forms 2d, Annulment of Marriage §§ 22:1 et seq.

42 Am. Jur. Proof of Facts 2d 665, Annulment of Marriage.

CJS.

55 C.J.S., Marriage §§ 50 et seq.

Practice References.

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Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-7-3. Causes for annulment of marriages.

A marriage may be annulled for any one (1) of the following causes existing at the time of the marriage ceremony:

(a) Incurable impotency.

(b) Adjudicated mental illness or incompetence of either or both parties. Action of a spouse who has been adjudicated mentally ill or incompetent may be brought by guardian, or in the absence of a guardian, by next friend, provided that the suit is brought within six (6) months after marriage.

(c) Failure to comply with the provisions of Sections 93-1-5 through 93-1-9 when any marriage affected by that failure has not been followed by cohabitation.

Or, in the absence of ratification:

(d) When either of the parties to a marriage is incapable, from want of age or understanding, of consenting to any marriage, or is incapable from physical causes of entering into the marriage state, or where the consent of either party has been obtained by force or fraud, the marriage shall be void from the time its nullity is declared by a court of competent jurisdiction.

(e) Pregnancy of the wife by another person, if the husband did not know of the pregnancy.

Suits for annulment under paragraphs (d) and (e) shall be brought within six (6) months after the ground for annulment is or should be discovered, and not thereafter.

The causes for annulment of marriage set forth in this section are intended to be new remedies and shall in no way affect the causes for divorce declared elsewhere to be the law of the State of Mississippi as they presently exist or as they may from time to time be amended.

HISTORY:

Codes, 1942, § 2748-02; Laws, 1962, ch. 278, § 2; Laws, 2008, ch. 442, § 28, eff from and after July 1, 2008.

JUDICIAL DECISIONS

1. In general.

An action for annulment which was not instituted within six months after the marriage was barred by this section. Haralson v. Haralson, 362 So. 2d 190, 1978 Miss. LEXIS 2081 (Miss. 1978).

RESEARCH REFERENCES

ALR.

Effect of annulment of marriage on rights arising out of acts of or transactions between parties during the marriage. 2 A.L.R.2d 637.

Antenuptial knowledge relating to alleged grounds as barring right to annulment. 15 A.L.R.2d 706.

Right to attack validity of marriage after death of party thereto. 47 A.L.R.2d 1393.

Concealed premarital unchastity or parenthood as ground of divorce or annulment. 64 A.L.R.2d 742.

Rights in wedding presents as between spouses. 75 A.L.R.2d 1365.

Concealment or misrepresentation relating to religion as ground for annulment. 44 A.L.R.3d 972.

What constitutes mistake in the identity of one of the parties to warrant annulment of marriage. 50 A.L.R.3d 1295.

Incapacity for sexual intercourse as ground for annulment. 52 A.L.R.3d 589.

Spouse's secret intention not to abide by written antenuptial agreement relating to financial matters as ground for annulment. 66 A.L.R.3d 1282.

Homosexuality, transvestism, and similar sexual practices as grounds for annulment of marriage. 68 A.L.R.4th 1069.

Am. Jur.

4 Am. Jur. 2d, Annulment of Marriage §§ 3 et seq.

1 Am. Jur. Pl & Pr Forms (Rev), Annulment of Marriage, Forms 31, 32 (complaint, petition, or declaration for annulment on ground that party was under age of consent); Forms 51 et seq. (complaint, petition, or declaration for annulment on grounds of fraud, unchastity, or concealed pregnancy); Forms 71, 72 (complaint, petition, or declaration for annulment on ground of duress); Forms 81 et seq. (complaint, petition, or declaration for annulment on ground of mental incapacity); Forms 91 et seq. (complaint, petition, or declaration for annulment on grounds of physical incapacity, defect, infirmity, or disease).

2 Am. Jur. Legal Forms 2d, Annulment of Marriage §§ 22:1 et seq.

42 Am. Jur. Proof of Facts 2d 665, Annulment of Marriage.

CJS.

55 C.J.S., Marriage § 52.

§ 93-7-5. Legitimation of issue.

Except for incestuous marriages, the issue of the parties to a void marriage conceived subsequent to the date thereof is legitimate, whether the marriage be declared void because of a prior existing marriage, or is annulled for some other cause.

HISTORY:

Codes, 1942, § 2748-03; Laws, 1962, ch. 278, § 3, eff from and after 60 days after passage (approved May 16, 1962).

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2748-03] reflects a legislative intent to require a judicial declaration of legitimacy. Stutts v. Estate of Stutts, 194 So. 2d 229, 1967 Miss. LEXIS 1405 (Miss. 1967), rev'd, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

This section [Code 1942, § 2748-03] contemplates more than a mere adulterous or illicit relationship, and is not effective to legitimate the issue resulting from a meretricious cohabitation, where there was never any kind of a marriage, either ceremonial or common law. Stutts v. Estate of Stutts, 194 So. 2d 229, 1967 Miss. LEXIS 1405 (Miss. 1967), rev'd, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

A "valid marriage" under this section [Code 1942, § 2748-03] must have been entered into innocently and in good faith by at least one of the parties, and unless this factor exists it is not a "valid marriage" as contemplated here. Stutts v. Estate of Stutts, 194 So. 2d 229, 1967 Miss. LEXIS 1405 (Miss. 1967), rev'd, 529 So. 2d 177, 1988 Miss. LEXIS 352 (Miss. 1988).

RESEARCH REFERENCES

ALR.

Determination of paternity, legitimacy, or legitimation in action for divorce, separation, or annulment. 65 A.L.R.2d 1381.

Presumption of legitimacy of child born after annulment, divorce, or separation. 46 A.L.R.3d 158.

Am. Jur.

4 Am. Jur. 2d, Annulment of Marriage § 89.

42 Am. Jur. Proof of Facts 2d 665, Annulment of Marriage.

§ 93-7-7. Custody of children.

When an annulment shall be adjudged or a marriage declared void, the chancery court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody, and maintenance of the children of the marriage; and the court may, afterwards, on complaint, change the judgment and make from time to time such new judgment as the case may require.

HISTORY:

Codes, 1942, § 2748-04; Laws, 1962, ch. 278, § 4; Laws, 1991, ch. 573, § 137, eff from and after July 1, 1991.

RESEARCH REFERENCES

ALR.

Court's power as to custody and visitation of children in marriage annulment proceedings. 63 A.L.R.2d 1008.

Court's power as to support and maintenance of children in marriage annulment proceedings. 63 A.L.R.2d 1029.

Child support: court's authority to reinstitute parent's support obligation after terms of prior decree have been fulfilled. 48 A.L.R.4th 952.

Child custody and visitation rights arising from same-sex relationship. 80 A.L.R.5th 1.

Am. Jur.

4 Am. Jur. 2d, Annulment of Marriage §§ 87, 88.

1 Am. Jur. Pl & Pr Forms (Rev), Annulment of Marriage, Forms 101 et seq. (custody of children, support, and litigation expenses).

22 Am. Jur. Trials, Child Custody Litigation §§ 1 et seq.

34 Am. Jur. Proof of Facts 2d 407, Child Custody Determination on Termination of Marriage.

CJS.

55 C.J.S., Marriage § 71.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

Patterson, In "the best interest of the child": a practical guide to child custody litigation. 13 Miss. C. L. Rev. 109, Fall, 1992.

§ 93-7-9. Filing of complaint.

The complaint for annulment shall be filed in the county where the defendant resides, or in the county where the marriage license was issued, or in the county where the plaintiff resides, if the defendant be a nonresident of this state.

HISTORY:

Codes, 1942, § 2748-05; Laws, 1962, ch. 278, § 5; Laws, 1991, ch. 573, § 138, eff from and after July 1, 1991.

RESEARCH REFERENCES

Am. Jur.

16 Am. Jur. Proof of Facts 2d 175, Matrimonial Dispute: Vexatious Choice of Forum.

§ 93-7-11. Jurisdiction; pleading; process.

The chancery courts of the State of Mississippi shall have jurisdiction to hear and determine all suits for annulment and all suits for annulment shall be tried in term time or vacation, and the same rules of pleading and procedure shall apply as in divorce cases, and the laws of process now in force in divorce cases in this state shall apply in all suits for annulment.

HISTORY:

Codes, 1942, § 2748-06; Laws, 1962, ch. 278, § 6, eff from and after 60 days after passage (approved May 16, 1962).

Cross References —

Jurisdiction of chancery court in general, see § 9-5-81.

Divorce generally, see §§ 93-5-1 et seq.

Another section derived from same 1942 code section, see § 93-7-13.

RESEARCH REFERENCES

ALR.

Applicability, to annulment actions, of residence requirements of divorce statutes. 32 A.L.R.2d 734.

"Domestic relations" exception to jurisdiction of federal courts under diversity of citizenship provisions of 28 USCS § 1332(a). 100 A.L.R. Fed. 700.

Am. Jur.

4 Am. Jur. 2d, Annulment of Marriage §§ 46 et seq.

16 Am. Jur. Proof of Facts 2d 175, Matrimonial Dispute: Vexatious Choice of Forum.

CJS.

55 C.J.S., Marriage § 54.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-7-13. Duty of court to make report.

It shall be the duty of the chancery clerk to make a report of each annulment granted in his county to the state board of health on forms furnished by the state board of health in the same manner as now required by law for reporting divorces.

HISTORY:

Codes, 1942, § 2748-06; Laws, 1962, ch. 278, § 6, eff from and after 60 days after passage (approved May 16, 1962).

Cross References —

Records to be kept by clerk of chancery court generally, see § 9-5-137.

Statistical requirements in bills for divorce, see § 93-5-33.

Another section derived from same 1942 code section, see § 93-7-11.

CHAPTER 9.

PARENTAGE

Uniform Law on Paternity. 93-9-1
Death of Mother or Child. 93-9-71

UNIFORM LAW ON PATERNITY

Sec.
93-9-1. Short title.
93-9-3. Construction.
93-9-5. Application of Uniform Law on Paternity.
93-9-7. Obligations of father.
93-9-9. Enforcement; attorney's fees and costs; surname of child; request for genetic testing by alleged father; tolling of one-year time limit to rescind voluntary acknowledgement of paternity.
93-9-10. Disestablishment of paternity.
93-9-11. Limitation on recovery from father.
93-9-13. Limitation on recovery from father's estate.
93-9-15. Jurisdiction and remedies; right to trial by jury.
93-9-17. Venue.
93-9-19. Time of trial; perpetuation of testimony.
93-9-21. Blood tests and other tests; enforcement of order to submit; notice of witnesses testifying as to sexual intercourse with mother.
93-9-23. Blood tests and other tests; appointment of experts; affidavits of experts; challenging test results.
93-9-25. Blood tests and other tests; costs; compensation of experts.
93-9-27. Blood tests; effect of test results; no right to jury trial in paternity proceedings.
93-9-28. Procedures for voluntary acknowledgement of paternity.
93-9-29. Order.
93-9-30. Full faith and credit to foreign paternity determinations.
93-9-31. Security; commitment; probation.
93-9-33. Commitment for contempt.
93-9-35. Support by mother.
93-9-37. False declaration of identity.
93-9-39. Probation.
93-9-41. Appeals.
93-9-43. Prosecuting official.
93-9-45. Costs.
93-9-47. No explicit reference to illegitimacy to appear in certain records.
93-9-49. Settlement agreements.

§ 93-9-1. Short title.

Sections 93-9-1 through 93-9-49 may be cited as the "Mississippi Uniform Law on Paternity."

HISTORY:

Codes, 1942, § 383-24; Laws, 1962, ch. 312, § 24, eff from and after July 1, 1962.

Cross References —

Jurisdiction of family masters in chancery with respect to paternity matters brought pursuant to the Mississippi Uniform Law on Paternity (§§ 93-9-1 et seq.), see § 9-5-255.

Descent among illegitimates, see § 91-1-15.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am. Jur.
Am. Jur. 2d Desk Book, Doc. No. 129, Jurisdictions adopting Uniform Law on Paternity.

Law Reviews.
Paternal inheritance rights of illegitimates under Mississippi law: greater than equal protection?, 53 Miss. L. J. 303, June, 1983.

Practice References.
Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-9-3. Construction.

Nothing herein contained shall be construed as abridging the power and jurisdiction of the chancery courts of the State of Mississippi, exercised over the estates of minors, nor as an abridgment of the power and authority of said chancery courts or the chancellor in vacation or chancery clerk in vacation to appoint guardians for minors. The Uniform Law on Paternity shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

HISTORY:
Codes, 1942, § 383-23; Laws, 1962, ch. 312, § 23, eff from and after July 1, 1962.

§ 93-9-5. Application of Uniform Law on Paternity.

Sections 93-9-1 through 93-9-49 apply to all cases of birth out of lawful matrimony as defined in Section 93-9-7.

HISTORY:
Codes, 1942, § 383-25; Laws, 1962, ch. 312, § 25, eff from and after July 1, 1962.

JUDICIAL DECISIONS

1. In general.
This section [Code 1942, § 383-25] makes clear the legislative intent, indicated in the Uniform Law on Paternity, that the law is applicable to all fathers of illegitimate children, irrespective of the date of birth. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

§ 93-9-7. Obligations of father.

The father of a child which is or may be born out of lawful matrimony is liable to the same extent as the father of a child born of lawful matrimony, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement, and for the education, necessary support and maintenance, and medical and funeral expenses of the child. A child born out of lawful matrimony also includes a child born to a married woman by a man other than her lawful husband.

HISTORY:

Codes, 1942, § 383-01; Laws, 1962, ch. 312, § 1, eff from and after July 1, 1962.

Cross References —

Support of illegitimate children by department of public welfare, see § 43-15-5.

Aid to dependent children, see §§ 43-17-1 et seq.

Status of illegitimate child under workmen's compensation law, see § 71-3-3.

Claim against estate of father for liabilities under this section, see § 93-9-13.

Joinder of natural parent or parents in adoption proceedings, see § 93-17-5.

Adultery and fornication generally, see §§ 97-29-1 et seq.

Penalty for second offense of bastardy, see § 97-29-11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction.

1. In general.

Chancery court properly awarded a mother back child support and attorney's fees and denied compensation for pregnancy and childbirth expenses or allergy-proofing her home due to her child's medical needs because, while the biological father was responsible for the child, the mother failed to offer proper proof of those expenses to the court. Smith v. Williams, 199 So. 3d 705, 2016 Miss. App. LEXIS 527 (Miss. Ct. App. 2016).

Even in cases in which a parent has extraordinary wealth, the essential purpose of child support remains the support of the child. Moulds v. Bradley, 791 So. 2d 220, 2001 Miss. LEXIS 187 (Miss. 2001).

Where no error in jury's verdict and order of filiation was found, and where sufficient evidence of father's ability to pay and child's reasonable needs was offered so that matter should have been resolved by court below in favor of order for support, remand for determination of support obligations of father pursuant to § 93-9-7 and for entry of final order of filiation providing for support, education, and expenses of child as provided in § 93-9-29 was appropriate. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

Under Mississippi law, the father of a child born out of lawful matrimony, including a child born to a married woman by a man other than her husband, is liable to the same extent as a legal father for his child's necessary support and maintenance. Ingalls Shipbuilding Corp. v. Neuman, 322 F. Supp. 1229, 1970 U.S. Dist. LEXIS 9119 (S.D. Miss. 1970), aff'd, 448 F.2d 773, 1971 U.S. App. LEXIS 8062 (5th Cir. Miss. 1971).

The Uniform Law on Paternity applies to children born before, as well as after, its effective date. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

Application of the Uniform Law on Paternity in the case of children born before its effective date does not contravene constitutional prohibition of ex post facto laws. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

The purpose of the Uniform Law on Paternity is to make provision for the support of a dependent illegitimate child. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

2. Construction.

Order making parents equally responsible for their out-of-wedlock child's medical expenses was upheld; the trial judge did not declare Miss. Code Ann. § 93-9-7 unconstitutional, but merely stated that an inaccurate interpretation of the statute making the father solely responsible for all of the child's medical expenses would violate equal protection laws. Dobbins v. Coleman, 930 So. 2d 1246, 2006 Miss. LEXIS 191 (Miss. 2006).

RESEARCH REFERENCES

ALR.

Right of putative father to visit illegitimate child. 15 A.L.R.3d 887.

Rights and obligations resulting from human artificial insemination. 83 A.L.R.4th 295.

Liability of Father for Retroactive Child Support on Judicial Determination of Paternity. 87 A.L.R.5th 361.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children §§ 1, 91, 93, 94.

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Forms 22 et seq. (support; custody); Forms 91 et seq. (civil filiation, bastardy, or paternity proceedings).

3B Am. Jur. Legal Forms 2d, Bastards

§§ 40:2 et seq. (support agreements).

10 Am. Jur. Trials, Disputed Paternity Cases §§ 1 et seq.

2 Am. Jur. Proof of Facts, Bastards, Proof No. 1 (fatherhood of illegitimate child).

19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

CJS.

14 C.J.S., Children-Out-of-Wedlock §§ 38, 40–45, 56.

§ 93-9-9. Enforcement; attorney's fees and costs; surname of child; request for genetic testing by alleged father; tolling of one-year time limit to rescind voluntary acknowledgement of paternity.

(1) Paternity may be determined upon the petition of the mother, or father, the child or any public authority chargeable by law with the support of the child; provided that such an adjudication after the death of the defendant must be made only upon clear and convincing evidence. If paternity has been lawfully determined, or has been acknowledged in writing according to the laws of this state, the liabilities of the noncustodial parent may be enforced in the same or other proceedings by the custodial parent, the child, or any public authority which has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support and maintenance, and medical or funeral expenses for the custodial parent or the child. The trier of fact shall receive without the need for third-party foundation testimony certified, attested or sworn documentation as evidence of (a) childbirth records; (b) cost of filing fees; (c) court costs; (d) services of process fees; (e) mailing cost; (f) genetic tests and testing fees; (g) the department's attorney's fees; (h) in cases where the state or any of its entities or divisions have provided medical services to the child or the child's mother, all costs of prenatal care, birthing, postnatal care and any other medical expenses incurred by the child or by the mother as a consequence of the mother's pregnancy or delivery; and (i) funeral expenses. All costs and fees shall be ordered paid to the Department of Human Services in all cases successfully prosecuted with a minimum of Two Hundred Fifty Dollars ($250.00) in attorney's fees or an amount determined by the court without submitting an affidavit. Proceedings may be instituted at any time until such child attains the age of twenty-one (21) years unless the child has been emancipated as provided in Section 93-5-23 and Section 93-11-65. In the event of court-determined paternity, the surname of the child shall be that of the father, unless the judgment specifies otherwise.

(2) If the alleged father in an action to determine paternity to which the Department of Human Services is a party fails to appear for a scheduled hearing after having been served with process or subsequent notice consistent with the Rules of Civil Procedure, his paternity of the child(ren) shall be established by the court if an affidavit sworn to by the mother averring the alleged father's paternity of the child has accompanied the complaint to determine paternity. Said affidavit shall constitute sufficient grounds for the court's finding of the alleged father's paternity without the necessity of the presence or testimony of the mother at the said hearing. The court shall, upon motion by the Department of Human Services, enter a judgment of paternity.

Any person who shall willfully and knowingly file a false affidavit shall be subject to a fine of not more than One Thousand Dollars ($1,000.00).

(3) Upon application of both parents to the State Board of Health and receipt by the State Board of Health of a sworn acknowledgement of paternity executed by both parents subsequent to the birth of a child born out of wedlock, the birth certificate of the child shall be amended to show such paternity if paternity is not shown on the birth certificate. Upon request of the parents for the legitimization of a child under this section, the surname of the child shall be changed on the certificate to that of the father.

(4)(a) A signed voluntary acknowledgment of paternity is subject to the right of any signatory to rescind the acknowledgment within the earlier of:

(i) One (1) year; or

(ii) The date of a judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party.

(b) After the expiration of the one-year period specified in subsection (4)(a)(i) of this section, a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress or material mistake of fact, with the burden of proof upon the challenger; the legal responsibilities, including child support obligations, of any signatory arising from the acknowledgment may not be suspended during the pendency of the challenge, except for good cause shown.

(c) During the one-year time period specified in subsection (4)(a)(i) of this section, the alleged father may request genetic testing through the Department of Human Services in accordance with the provisions of Section 93-9-21.

(d) The one-year time limit, specified in subsection (4)(a)(i) of this section, for the right of the alleged father to rescind the signed voluntary acknowledgement of paternity shall be tolled from the date the alleged father files his formal application for genetic testing with the Department of Human Services until the date the test results are revealed to the alleged father by the department. After the one-year time period has expired, not including any period of time tolled for the purpose of acquiring genetic testing through the department, the provisions of subsection (4)(b) of this section shall apply.

HISTORY:

Codes, 1942, § 383-02; Laws, 1962, ch. 312, § 2; Laws, 1981, ch. 529, § 2; Laws, 1989, ch. 438, § 1; Laws, 1994, ch. 614, § 2; Laws, 1996, ch. 339, § 1; Laws, 1997, ch. 588, § 143; Laws, 1999, ch. 512, § 10; Laws, 2003, ch. 514, § 6; Laws, 2008, ch. 426, § 1; Laws, 2009, ch. 370, § 1; Laws, 2011, ch. 530, § 6, eff from and after July 1, 2011.

Editor's Notes —

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Cross References —

Jurisdiction of family masters in chancery with respect to paternity matters brought pursuant to the Mississippi Uniform Law on Paternity (§§ 93-9-1 et seq.), see § 9-5-255.

Name of the father to be added to birth certificate if notarized affidavit by both parents acknowledging paternity is received on the form prescribed or as provided in this section, see § 41-57-23.

Criminal offense of non-support of children, see § 97-5-3.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.
3. Limitations of actions.
4. Standing—alleged father.
5. —Department of Public Welfare.
6. Venue.
7. Proof of paternity.
8. Fees and expenses.
9. Illustrative cases.

1. In general.

In a paternity action, the mother argued that she had a fundamental right, as a mother, to retain the birth name given to her child, and that the paternal presumption in Miss. Code Ann. § 93-9-9(1) constituted both a due process and equal protection violation, but she had waited three years (until the final hearing on custody, support, and visitation), to act on her prior motion to amend the earlier judgment of the chancellor, which had given the child the father's surname. The Mississippi Supreme Court held: (1) although other jurisdictions had established that a parent had a fundamental constitutional right in his/her child's name, the supreme court had yet to recognize that same was fundamental; (2) the mother had made no challenge to the constitutionality of § 93-9-9(1) in her motion to alter or amend, and the father and the trial court were first apprised of her constitutional challenge when she appealed to the instant court; (3) the Mississippi Attorney General had received no notice of her constitutional challenge until he received her appellate brief; and (4) consequently, the issue was procedurally barred pursuant to Miss. R. Civ. P. 24(d), and because she had failed to raise the constitutional issue in the trial court. Powers v. Tiebauer, 939 So. 2d 749, 2005 Miss. LEXIS 533 (Miss. 2005).

In a paternity action filed by the alleged father, the Mississippi chancery court had personal jurisdiction over the mother, a Lousiana native who was in Mississippi for the sole purpose of attending a Mississippi university, since the child was conceived in Mississippi and the father was a Mississippi resident; Miss. Code Ann. § 37-103-5 deals with tuition cost and did not deprive the Mississippi chancery court of personal jurisdiction over the mother. Venegas v. Gurganus, 911 So. 2d 562, 2005 Miss. App. LEXIS 868 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 639 (Miss. 2005).

The general purpose of this statute [Code 1972, § 93-9-9] is to provide a uniform system of enforcement of the obligation of the father of a child which is born out of lawful matrimony to bear the reasonable expenses of the mother's pregnancy and confinement and the education, support, maintenance, medical and funeral expenses for the child, and nothing in this section deprives the chancery court of the power to entertain a suit under Code 1972, § 93-11-65, where the suit is based on the averment that the child was born in wedlock or that the child was one of the marriage within the meaning of Code 1972, § 91-1-15. Harper v. Harper, 300 So. 2d 132, 1974 Miss. LEXIS 1602 (Miss. 1974).

Mississippi's wrongful death statute which does not permit an illegitimate child to sue for or recover damages for the wrongful death of the father, where the father has not acknowledged the child, does not deny an illegitimate child who had not been acknowledged by the deceased equal protection of the laws, in view of the fact that it is a simple matter to prove the maternity of an illegitimate child, but it is infinitely more complex and difficult to prove paternity, and in Mississippi the requirements are simple and easy for a father to legitimize his child under the law. Sanders v. Tillman, 245 So. 2d 198, 1971 Miss. LEXIS 1362 (Miss. 1971).

The only issue to be tried by the jury in a bastardy case is whether the defendant was the father of the child born to the plaintiff, and the introduction of evidence for the purpose of contradicting the defendant on his testimony that he had not made another woman pregnant constituted reversible error; for the effect of the introduction of such evidence was to contradict the defendant on a matter immaterial to the issue before the court. Price v. Simpson, 205 So. 2d 642, 1968 Miss. LEXIS 1539 (Miss. 1968).

The basis of liability under the Uniform Law on Paternity is not the fathering of the illegitimate child, but the purpose of such law is to make provision for the support of the illegitimate child if and when it becomes a dependent child under the law. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

The Uniform Law on Paternity places certain limitations on the rights of claimants under it. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

A proceeding under the Uniform Law on Paternity is civil in nature, save as it provides for the arrest of a recalcitrant defendant. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

2. Constitutionality.

State statutory presumption that husband of child's mother is child's father did not violate unwed putative father's procedural and substantive due process rights under Fourteenth Amendment; child had no due process right to maintain filial relationships with both putative father and mother's husband, and statute did not violate child's equal protection rights. In determining whether due process liberty interest exists regarding an asserted right, inquiry focuses on whether most specific relevant societal tradition that can be identified protects such a right. Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91, 1989 U.S. LEXIS 2977 (U.S. 1989).

Mississippi Code § 93-9-9 is constitutional as against a contention that it discriminates against a class of non-welfare recipient mothers as well as a class of alleged fathers of children born to welfare recipient mothers. Minor v. State Dep't of Public Welfare, 486 So. 2d 1253, 1986 Miss. LEXIS 2431 (Miss. 1986).

3. Limitations of actions.

Though a 29-year-old alleged son filed a paternity action not to enforce his alleged father's child support obligations, but for the sole purpose of knowing his ancestry, the trial court properly dismissed the case as time-barred; whether Miss. Code Ann. §§ 93-9-9 or 15-1-49 was the applicable statute of limitations was immaterial, as under the first, his suit was time-barred when he turned 21, and under the second, when he turned 24 (i.e., three years after he turned 21). Autrey v. Parson, 864 So. 2d 294, 2003 Miss. App. LEXIS 685 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 43 (Miss. 2004), cert. denied, 543 U.S. 831, 125 S. Ct. 216, 160 L. Ed. 2d 49, 2004 U.S. LEXIS 5831 (U.S. 2004).

The doctrine of laches cannot be applied in a paternity action brought by a state agency on behalf of a minor within the statutory limitation period; as a matter of public policy, the "best interest of the child" outweighs whatever inconvenience the putative father may experience as a result of delay. Mississippi Dep't of Human Servs. v. Molden, 644 So. 2d 1230, 1994 Miss. LEXIS 531 (Miss. 1994).

Laches cannot be asserted against a minor child in a suit to determine the child's paternity. McGlaston ex rel. McGlaston v. Cook, 576 So. 2d 1268, 1991 Miss. LEXIS 110 (Miss. 1991).

A child born out of wedlock is not limited to one year limitation imposed on mothers by Mississippi Code § 93-9-9; rather, such child, by its next friend, has right to petition to have paternity determined which is limited only by Mississippi Code § 93-9-13. Minor v. State Dep't of Public Welfare, 486 So. 2d 1253, 1986 Miss. LEXIS 2431 (Miss. 1986).

Under this section the limitation on the time during which the mother may commence proceedings is not applicable to the child; thus, in an action brought by the child and not by the mother, in which the status of the mother as next friend was clearly set forth in the petition, the one year limitation was not applicable. Palmer v. Mangum, 338 So. 2d 1002, 1976 Miss. LEXIS 1645 (Miss. 1976).

Paternity proceedings initiated by two infants each of whom was over a year old, were not barred by the section [Code 1942, § 383-02], which merely prohibits such proceedings from being instituted by the mother after the child has reached the age of one year. Sandifer v. Womack, 230 So. 2d 212, 1970 Miss. LEXIS 1542 (Miss. 1970).

4. Standing—alleged father.

The alleged natural father of a child had standing to bring a paternity action, against himself individually and the child's mother, as the child's "next friend." Adoption of Karenina v. Presley, 526 So. 2d 518, 1988 Miss. LEXIS 244 (Miss. 1988).

5. —Department of Public Welfare.

Where children are receiving public assistance from the Department of Human Services, the department has legal standing to bring an action against an alleged father to determine the paternity of those children, where the children are presumed to be the legitimate children of their mother's husband by virtue of having been born to a lawful marriage. Department of Human Servs. v. Gaddis, 730 So. 2d 1116, 1998 Miss. LEXIS 635 (Miss. 1998).

Mississippi Code § 93-9-9 combined with Mississippi Code § 43-19-35 grant the Department of Public Welfare the right to petition the chancery court to have the paternity of a child born out of wedlock determined, and the department's right is independent of the mother's which is limited by the first indicated statute to one year from the birth of the child. Minor v. State Dep't of Public Welfare, 486 So. 2d 1253, 1986 Miss. LEXIS 2431 (Miss. 1986).

In a proceeding brought by the legal section of the department of public welfare, pursuant to Miss. Code Ann. §§ 43-19-31 and 93-9-9, to adjudicate paternity and responsibility for child support, the mother is not a necessary party; the only interest of the department of public welfare is in seeing that the taxpayers are relieved of some, or all of the burden in supporting an indigent child. McCollum v.

State Dep't of Public Welfare, 447 So. 2d 650, 1984 Miss. LEXIS 1686 (Miss. 1984).

Since child support is usually furnished by the state department of public welfare, that agency now has the right, where it provides such support, to petition the court for an adjudication of paternity and an order requiring the putative father to support his child. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

6. Venue.

Proper venue for an action involving determination of paternity would be the county where the father resides if he resides or is domiciled within the state, even though the action also involved a determination of child support, for which proper venue would be the county of the mother's residence, the county of the father's residence, or the county of the child's residence. Metts v. State Dep't of Public Welfare, 430 So. 2d 401, 1983 Miss. LEXIS 2558 (Miss. 1983).

7. Proof of paternity.

In a proceeding to establish the paternity of an infant, an instruction to the jury regarding blood tests submitted into evidence constituted reversible error where the blood tests established a 99.99 percent probability that the defendant was the father, and the instruction stated that the blood tests were "not conclusive of the issue of paternity and merely establish that out of the black male population it is biologically possible for the defendant to be the father"; although the test results did not constitute conclusive evidence of paternity, it was error to instruct the jury that the tests meant that paternity was a biological "possibility" since this language tended to discredit the evidence in that it reduced the 99.99 percent probability to a mere possibility. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

In a proceeding to establish the paternity of an infant, an instruction to the jury regarding the issue of whether the mother and the defendant had sexual intercourse during the period of probable conception constituted reversible error where the instruction stated that the jury would have to find that the couple had sexual intercourse without regard to the blood test results, which established a 99.99 percent probability that the defendant was the infant's father, or that the tests could not be a factor in the jury's conclusion on this question of fact; although such test results, standing alone, are insufficient to prove this element of a paternity claim, test results of this nature are relevant to whether sexual intercourse took place during the period of possible conception since they tend to make the existence of the fact that sexual intercourse took place during that time period more probable. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

In a proceeding to establish the paternity of an infant, statements made by the defendant's attorney during closing argument that the mother was unmarried and had illegitimate children other than the infant in question were improper; the statements were irrelevant to the issue of whether the defendant was the infant's father as they had no tendency to make the proposition that the defendant was the father any more or less probable. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

Undisputed evidence that there was sexual intercourse between mother of child on whose behalf petition for order of filiation and support has been filed and alleged father, that no birth control was used, that mother's menstrual periods stopped after intercourse, that child was born in what could easily be deemed normal gestation period following intercourse, and that alleged father made declarations and admissions acknowledging child is sufficient to present at least prima facie case that alleged father is in fact father of child. Gordon v. Wheat, 465 So. 2d 1087, 1985 Miss. LEXIS 1990 (Miss. 1985).

8. Fees and expenses.

The natural and legal father of the minor child, who was not the mother's husband at the time, was required to pay attorney's fees and expenses to both the putative father and the biological mother, as well as back child support and outstanding medical bills for the child. R. E. v. C. E. W., 752 So. 2d 1019, 1999 Miss. LEXIS 397 (Miss. 1999).

9. Illustrative cases.

Because the maternal grandparents, who were awarded physical custody of a father's child, did not contest the change-of-name request by the father and failed to show by a preponderance of the evidence that it was not in the best interest of the child to bear the father's surname, the appellate court found that it was appropriate to reverse the decision of the chancery court and to render the change of the child's surname from the mother's surname to the father's surname. Flynn v. Bland, 213 So. 3d 85, 2016 Miss. App. LEXIS 564 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 433, 2017 Miss. LEXIS 70 (Miss. 2017).

OPINIONS OF THE ATTORNEY GENERAL

An acknowledgment of paternity in the manner prescribed prior to July 1, 1994, was sufficient to impose liability upon the natural father. 1998 Miss. Op. Att'y Gen. 813.

Where the chancery court is contemplating issuing an order directing the Department of Health to change a birth certificate in fact situations covered by Section 41-57-23, the chancery court should require that the Department of Health be made a party to the lawsuit; nevertheless, in cases where a chancery court has ordered the Department of Health to make a correction to a birth certificate without having first made the department a party, the department should proceed based on that court order. Thompson, Jr., 2000 Miss. Op. Att'y Gen. 507.

RESEARCH REFERENCES

ALR.

Effect of death of child prior to institution of bastardy proceedings by mother. 7 A.L.R.2d 1397.

Maintainability of bastardy proceedings by infant prosecutrix in her own name and right. 50 A.L.R.2d 1029.

Propriety and effect, in bastardy case, of instructions that child is likely to become public charge, that or the like. 51 A.L.R.2d 940.

Right of nonresident mother to maintain bastardy proceedings. 57 A.L.R.2d 689.

Maintainability of bastardy proceedings against infant defendant without appointment of guardian ad litem. 69 A.L.R.2d 1379.

Lump-sum compromise and settlement, or release, of bastardy claim or of bastardy or paternity proceedings. 84 A.L.R.2d 524.

Avoidance of lump-sum settlement or release of bastardy claim on grounds of fraud, mistake, or duress. 84 A.L.R.2d 593.

Effect of marriage of woman to one other than defendant upon her right to institute or maintain bastardy proceeding. 98 A.L.R.2d 256.

Bastardy proceedings: Propriety of exhibition of child to jury to show family resemblance, or lack of it, on issue of paternity. 55 A.L.R.3d 1087.

Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity. 59 A.L.R.3d 659.

Statute of limitations in illegitimacy or bastardy proceedings. 59 A.L.R.3d 685.

Long-arm statutes: obtaining jurisdiction over nonresident parent in filiation or support proceeding. 76 A.L.R.3d 708.

Determination of paternity of child as within scope of proceeding under Uniform Reciprocal Enforcement of Support Act. 81 A.L.R.3d 1175.

Statutes limiting time for commencement of action to establish paternity of illegitimate child as violating child's constitutional rights. 16 A.L.R.4th 926.

Right of illegitimate child to maintain action to determine paternity. 19 A.L.R.4th 1082.

Necessity or propriety of appointment of independent guardian for child who is subject of paternity proceedings. 70 A.L.R.4th 1033.

Rights and obligations resulting from human artificial insemination. 83 A.L.R.4th 295.

Right of Illegitimate Child to Maintain Action to Determine Paternity. 86 A.L.R.5th 637.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children §§ 87 et seq.

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Forms 21 et seq. (support; custody).

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Forms 91 et seq. (civil filiation, bastardy, or paternity proceedings).

3B Am. Jur. Legal Forms 2d, Bastards §§ 40:2 et seq. (support agreements).

10 Am. Jur. Trials, Disputed Paternity Cases §§ 1 et seq.

2 Am. Jur. Proof of Facts, Bastards, Proof No. 1 (fatherhood of illegitimate child).

19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

CJS.

14 C.J.S., Children-Out-of-Wedlock §§ 114 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

1984 Mississippi Supreme Court Review: Domestic Relations. 55 Miss. L. J. 113, March, 1985.

1987 Mississippi Supreme Court Review, Paternity. 57 Miss. L. J. 540, August, 1987.

§ 93-9-10. Disestablishment of paternity.

(1) This section establishes circumstances under which a legal father may disestablish paternity and terminate a child support obligation when the legal father is not the biological father of the child. To disestablish paternity and terminate a child support obligation, the legal father must file a petition in the court having jurisdiction over the child support obligation. The petition must be served on the mother or other legal guardian or custodian of the child. If the Department of Human Services is or has been a party to the establishment of paternity or collection of child support, the Attorney General of the State of Mississippi must be served with a copy of the petition. The petition must include:

(a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination.

(b)(i) The results of a scientific test or tests that are generally acceptable to the scientific community to show a probability of paternity, administered within one (1) year before the filing of the petition, which results indicate that the legal father is excluded as being the biological father of the child, or (ii) an affidavit executed by the petitioner stating that he did not have access to the child to have the scientific testing performed before the filing of the petition. A petitioner who files such an affidavit can request in the petition that the court order the child and mother, if available, be tested.

(2) The court shall grant relief on a petition filed in accordance with subsection (1) of this section upon a finding by the court of all of the following:

(a) Newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination.

(b) The scientific testing required in subsection (1)(b) of this section was properly conducted.

(c) The legal father ordered to pay child support has not adopted the child.

(d) The child was not conceived by artificial insemination while the legal father ordered to pay support and the child's mother were married.

(e) The legal father ordered to pay child support did not act to prevent the biological father of the child from asserting his parental rights with respect to the child.

(3) Notwithstanding subsection (2) of this section, a court shall not set aside the paternity determination or child support order if the legal father engaged in any of the following conduct:

(a) Married or cohabited with the mother of the child and voluntarily assumed the parental obligation and duty to support the child after having knowledge that he is not the biological father of the child;

(b) Consented to be named as the biological father on the child's birth certificate and signed the birth certificate application or executed a simple acknowledgment of paternity and failed to withdraw consent or acknowledgment within the time provided for by law in Sections 93-9-9 and 93-9-28, unless he can prove fraud, duress or material mistake of fact;

(c) Signed a stipulated agreement of paternity that has been approved by order of the court;

(d) Signed a stipulated agreement of support that has been approved by order of the court after having knowledge that he is not the biological father of the child;

(e) Been named as the legal father or ordered to pay support by valid order of the court after having declined genetic testing;

(f) Failed to appear for a scheduled genetic testing draw pursuant to a valid court order compelling him to submit to genetic testing.

(4) If the petitioner fails to make the requisite showing required by this section, the court shall deny the petition.

(5) Relief granted pursuant to this section is limited to the issues of prospective child support payments, past-due child support payments, termination of parental rights, custody, and visitation privileges as otherwise provided by law. This section shall not be construed to create a cause of action to recover child support paid before the filing of the petition to disestablish paternity.

(6) The duty to pay child support and other legal obligations for the child shall not be suspended while the petition is pending except for good cause. However, the court may order that amounts paid as child support be held by the court or the Department of Human Services until final determination of paternity has been made.

(7) The party requesting genetic testing shall pay any fees associated with the testing.

(8) In any action brought pursuant to this section, the court on its own motion, or on the motion of any party, may order the biological mother and child, through the child's legal guardian or custodian, to submit to genetic testing.

(9) If the relief sought under this petition is not granted by the court, the petitioner shall be assessed the court costs, genetic testing fees and reasonable attorney fees.

HISTORY:

Laws, 2011, ch. 530, § 1, eff from and after July 1, 2011.

JUDICIAL DECISIONS

1. Disestablishment denied.

In a case in which a father, who had a genetics test that excluded him as the father of a child, appealed a chancery court's denial of his petition to disestablish paternity, because he signed a stipulated agreement of paternity, the factual scenario addressed by Miss. Code Ann. § 93-9-10(3)(c), that was approved by order of the chancery court, the chancery court properly denied his petition as presented. Jones v. Mallett, 125 So. 3d 650, 2013 Miss. LEXIS 583 (Miss. 2013).

§ 93-9-11. Limitation on recovery from father.

The father's liabilities for past education and necessary support and maintenance and other expenses are limited to a period of one (1) year next preceding the commencement of an action.

HISTORY:

Codes, 1942, § 383-03; Laws, 1962, ch. 312, § 3, eff from and after July 1, 1962.

JUDICIAL DECISIONS

1. In general.

Contract between the mother and an alleged father of an illegitimate child could not, without judicial scrutiny and approval, preclude future paternity proceedings for purposes of child support; the prior agreement between the mother and the father regarding child support was not binding and modifiable, and had not been approved by the chancellor, who was within his authority to formulate a child support order, despite the parties' prior mutual agreement, providing for its effectiveness one year prior to the mother's instituting suit against the father for the adjudication of paternity and child support. Kelley v. Day, 965 So. 2d 749, 2007 Miss. App. LEXIS 625 (Miss. Ct. App. 2007).

Issue of back child support was dismissed where, if the father wanted the chancellor to factor in specific considerations with regard to the back child support, he should have entered them into evidence at trial; the father made no mention as to any specific considerations he may have had regarding child support from 1997 to 2001. McClee v. Simmons, 834 So. 2d 61, 2002 Miss. App. LEXIS 809 (Miss. Ct. App. 2002).

Chancellor did not err in finding that the father was liable for one year of past-due child support where the plain meaning of Miss. Code Ann. § 93-9-11 was such that the non-custodial parent could only be liable for up to one year. Hill v. Brinkley, 840 So. 2d 778, 2003 Miss. App. LEXIS 192 (Miss. Ct. App. 2003).

One-year limitation on a father's liability for past, necessary support and maintenance was just that, a limit; limitation was not a statutory requirement on the amount of support a father was ordered to pay. Burnett v. Burnett, 792 So. 2d 1016, 2001 Miss. App. LEXIS 329 (Miss. Ct. App. 2001).

The natural and legal father of the minor child, who was not the mother's husband at the time, was required to pay attorney's fees and expenses to both the putative father and the biological mother, as well as back child support and outstanding medical bills for the child. R. E. v. C. E. W., 752 So. 2d 1019, 1999 Miss. LEXIS 397 (Miss. 1999).

The Uniform Law on Paternity places certain limitations on the rights of claimants under it. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

RESEARCH REFERENCES

ALR.

Liability of Father for Retroactive Child Support on Judicial Determination of Paternity. 87 A.L.R.5th 361.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children § 55.

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Form 103 (answer in paternity action alleging statute of limitations as defense); Form 104 (answer in paternity action alleging laches as defense).

19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

CJS.

14 C.J.S., Children-Out-Of-Wedlock § 88.

§ 93-9-13. Limitation on recovery from father's estate.

The obligation of the estate of the father for liabilities under Section 93-9-7 is limited to amounts accrued prior to his death. However, in order to hold the estate of the father liable under Section 93-9-7, the action must be filed within one (1) year after the death of the father or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less.

HISTORY:

Codes, 1942, § 383-04; Laws, 1962, ch. 312, § 4; Laws, 1981, ch 529, § 3, eff from and after July 1, 1981.

JUDICIAL DECISIONS

1. In general.

A child born out of wedlock is not limited to one year limitation imposed on mothers by Mississippi Code § 93-9-9; rather, such child, by its next friend, has right to petition to have paternity determined which is limited only by Mississippi Code § 93-9-13. Minor v. State Dep't of Public Welfare, 486 So. 2d 1253, 1986 Miss. LEXIS 2431 (Miss. 1986).

The Uniform Law on Paternity places certain limitations on the rights of claimants under it. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766, 1963 Miss. LEXIS 536 (Miss. 1963).

RESEARCH REFERENCES

ALR.

Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children § 69.

3B Am. Jur. Legal Forms 2d, Bastards §§ 40:2 et seq. (support agreements).

CJS.

14 C.J.S., Children-Out-of-Wedlock § 86.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-9-15. Jurisdiction and remedies; right to trial by jury.

The county court, the circuit court, or the chancery court has jurisdiction of an action under Sections 93-9-1 through 93-9-49, and all remedies for the enforcement of orders awarding custody or for expenses of pregnancy and confinement for a wife, or for education, necessary support and maintenance, or funeral expenses for legitimate children shall apply. The defendant must defend the cause in whichever court the action is commenced. The court has continuing jurisdiction to modify or revoke an order and to increase or decrease amounts fixed by order for future education and necessary support and maintenance. All remedies under the Uniform Interstate Family Support Act, and amendments thereto, are available for enforcement of duties of support and maintenance under Sections 93-9-1 through 93-9-49. Parties to an action to establish paternity shall not be entitled to a jury trial. The court may also order the father to reimburse Medicaid for expenses of the pregnancy and confinement of the mother.

HISTORY:

Codes, 1942, § 383-05; Laws, 1962, ch. 312, § 5; Laws, 1966, ch. 319, § 1; Laws, 1997, ch. 588, § 135; Laws, 2000, ch. 530, § 4; Laws, 2013, ch. 380, § 1; Laws, 2013, ch. 527, § 1, eff from and after passage (approved April 23, 2013).

Joint Legislative Committee Note —

Section 1 of ch. 380, Laws of 2013, effective from and after July 1, 2013 (approved March 20, 2013), amended this section. Section 1 of ch. 527, Laws of 2013, effective from and after passage (approved April 23, 2013), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 527, Laws of 2013, which contains language that specifically provides that it supersedes § 93-9-15 as amended by ch. 380, Laws of 2013.

Editor's Notes —

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Laws, 1999, ch. 432, § 1, provides that:

"SECTION 1. From and after the date Laws, 1999, ch. 432, is effectuated under Section 5 of the Voting Rights Act of 1965, all family courts are abolished. All matters pending in any family court abolished shall be transferred to the county court of the county wherein the family court was located without the necessity for any motion or order of court for such transfer."

Cross References —

Jurisdiction of chancery court in general, see § 9-5-81.

Jurisdiction of family masters in chancery with respect to paternity matters brought pursuant to the Mississippi Uniform Law on Paternity (§§ 93-9-1 et seq.), see § 9-5-255.

General jurisdiction of circuit court, see § 9-7-81.

Remedies under Uniform Interstate Family Support Act, see § 93-25-101 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction.

1. In general.

In simultaneous divorce and paternity actions, the biological father sought to have parental rights terminated, and the husband, who believed for years that the husband was the child's father, sought to be declared the child's legal father, but joinder of claims was not allowed, and with regard to the separate paternity action, the biological father was ordered to pay child support until some further order in the divorce proceedings supplanted that obligation. Griffith v. Pell, 881 So. 2d 227, 2003 Miss. App. LEXIS 786 (Miss. Ct. App. 2003), aff'd, 881 So. 2d 184, 2004 Miss. LEXIS 975 (Miss. 2004).

Absent some statutory pronouncement, as long as a defendant in a paternity action has a right to a jury trial, paternity test results, even though showing a high probability of paternity, cannot be conclusive as a matter of law; the weight to be given such evidence, along with the credibility of the parties involved, remains a question for the chancery court or the jury. Thus, a chancery court did not abuse its discretion in denying a plaintiff's motion for a new trial after the jury found that the defendant was not the father, even though human leukocyte antigen test results showed that there was a probability of 99.59649 percent that the defendant was the child's father, where there was a delay of nearly 12 years between the birth of the child and the filing of the paternity suit, the defendant testified that he had no knowledge of his alleged paternity until the filing of the suit, the plaintiff did not fare well under cross-examination, cross-examination of the defendant was practically non-existent, and the jury was able to view the mother, daughter, and putative father. Chisolm v. Eakes, 573 So. 2d 764, 1990 Miss. LEXIS 793 (Miss. 1990).

Right of trial by jury afforded by § 93-9-15 applies only to issue of paternity, but where each party waives any right to have attorney's fee issue resolved by court such waiver will be given effect, and where question of an award of attorneys fees is submitted to jury as trier of fact, party seeking fee must prove, inter alia, reasonable necessity of rendering of services and spending amount of time for which fee is charged, as well as reasonableness of hourly rate. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

Statute makes trial by jury available only on issue of paternity, but where party waives right to have issue of support and maintenance considered by court alone, appellate court will not interfere. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

Defendant in paternity action not entitled to 12 person jury, because § 93-9-15 does not suggest number of jurors that may be required but only ensures that defendants are entitled to trial by jury; nor does § 31 of Constitution mandate juries of 12 persons in any court. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

In action to determine paternity, putative father had right to resort to immaterial and irrelevant matter on baptismal record to contradict and impeach mother. Cranmer v. Baylis, 493 So. 2d 977, 1986 Miss. LEXIS 2616 (Miss. 1986).

In a proceeding to determine paternity, reference to an alleged finding of paternity by the county youth court was highly prejudicial to defendant's case and required reversal, in that the youth court had no authority to determine paternity; moreover, it was error for the trial court to admit into evidence any references to blood tests performed on the parties pursuant to § 93-9-21, where the trial court refused to allow the reports themselves to be introduced as an exhibit, and where the trial court did not call the expert who had conducted the tests to testify as to his findings. Davis v. Washington, 453 So. 2d 712, 1984 Miss. LEXIS 1833 (Miss. 1984).

Chancery courts have general jurisdiction over bastardy proceedings, for the main purposes of such proceedings are to provide support and education for bastard children, to prevent such children from becoming public charges, and to provide the mother assistance in discharging her duty to support and educate such children. Sturdivant v. Henderson, 186 So. 2d 478, 1966 Miss. LEXIS 1318 (Miss. 1966).

This section [Code 1942, § 383-05] can have no reference to a final order establishing paternity, and such an order, when it becomes final, occupies the same status as any other final judgment and is only subject to being set aside, vacated, or annulled under the same circumstances and for the same reasons as apply to judgments generally. Lawrence v. Grant, 184 So. 2d 412, 1966 Miss. LEXIS 1468 (Miss. 1966).

2. Jurisdiction.

Where the mother of a three-year-old child filed suit against a doctor for declaration of paternity, the County Court of Jackson County, Mississippi, had jurisdiction over the action under Miss. Code Ann. § 93-9-15. Daniels v. Bains, 967 So. 2d 77, 2007 Miss. App. LEXIS 714 (Miss. Ct. App. 2007).

In a paternity action filed by the alleged father, the Mississippi court had personal jurisdiction over the mother, a Lousiana native who was in Mississippi for the sole purpose of attending a Mississippi university, since the child was conceived in Mississippi and the father was a Mississippi resident; Miss. Code Ann. § 37-103-5 deals with tuition cost and did not deprive the Mississippi chancery court of personal jurisdiction over the mother. Venegas v. Gurganus, 911 So. 2d 562, 2005 Miss. App. LEXIS 868 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 639 (Miss. 2005).

Paternity actions can never be brought in youth court. Under Miss. Code Ann. § 93-9-15, the county court, the circuit court, or the chancery court has jurisdiction of actions relating to paternity and the support of illegitimate children; the youth court does not have jurisdiction over those matters, and is unable to act to establish the paternity of a child within its jurisdiction. Helmert v. Biffany, 842 So. 2d 1287, 2003 Miss. LEXIS 188 (Miss. 2003).

OPINIONS OF THE ATTORNEY GENERAL

There is no provision for county court judge, except when sitting as youth court judge, to hear or determine custody matter, although county court previously determined paternity in action. 1994 Miss. Op. Att'y Gen. 974.

RESEARCH REFERENCES

ALR.

Long-arm statutes: obtaining jurisdiction over nonresident parent in filiation or support proceeding. 76 A.L.R.3d 708.

Paternity proceedings: right to jury trial. 51 A.L.R.4th 565.

Family court jurisdiction to hear contract claims. 46 A.L.R.5th 735.

"Domestic relations" exception to jurisdiction of federal courts under diversity of citizenship provisions of 28 USCS § 1332(a). 100 A.L.R. Fed. 700.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children §§ 53, 54.

10 Am. Jur. Trials, Disputed Paternity Cases §§ 24-27, 73.

CJS.

14 C.J.S., Children-Out-of-Wedlock §§ 89 et seq., 117.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-9-17. Venue.

(1) An action under Sections 93-9-1 through 93-9-49 may be brought in

the county where the alleged father is present or has property; or in the county where the mother resides; or in the county where the child resides. However, if the alleged father resides or is domiciled in this state, upon the motion of the alleged father filed within thirty (30) days after the date the action is served upon him, the action shall be removed to the county where the alleged father resides or is domiciled. If no such motion is filed by the alleged father within thirty (30) days after the action is served upon him, the court shall hear the action in the county in which the action was brought.

(2) Subsequent to an initial filing in an appropriate court, any action regarding paternity, support, enforcement or modification and to which the Department of Human Services is a party may be heard in any county by a court which would otherwise have jurisdiction and is a proper venue. Upon written request by the Department of Human Services, the clerk of the court of the original county shall transfer a certified copy of the court file to the clerk of the appropriate transfer county without need for application to the court. Such written request shall certify that the Department of Human Services has issued timely notification of the transfer in writing to all interested parties. Such written request and notice shall be entered into the court file by the transferring clerk of the transferring court. The transferred action shall remain on the docket of the transferred court in which the action is heard, subject to another such transfer.

HISTORY:

Codes, 1942, § 383-06; Laws, 1962, ch. 312, § 6; Laws, 1992, ch. 560 § 1; Laws, 1997, ch. 588, § 136, eff from and after July 1, 1997.

Editor's Notes —

Laws, 1992, ch. 560, § 2, effective from and after passage (approved May 15, 1992) provides as follows:

"SECTION 2. Nothing in this act shall affect any action for paternity commenced before the effective date of this act."

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Cross References —

Venue of civil actions generally, see Chapter 11 of Title 11.

JUDICIAL DECISIONS

1. In general.

Venue may be waived in paternity actions. Atwood v. Hicks, 538 So. 2d 404, 1989 Miss. LEXIS 19 (Miss. 1989).

A minor's attack upon a child support decree of approving his mother's settlement with his putative father on the ground that the decree was procured by fraud was required to be brought in the court wherein the decree was rendered, rather than in the court where the venue of a paternity action would be proper. Atwood v. Hicks, 538 So. 2d 404, 1989 Miss. LEXIS 19 (Miss. 1989).

Putative father sued for support in both paternity proceeding under § 93-9-17 and support proceeding under § 43-19-33 has right to have cause heard in county in which he resides, if he is resident of state of Mississippi; defendant must timely assert right to venue in county of residence via Rule 12(b)(3) motion, and failure to do so amounts to waiver. Belk v. State Dep't of Public Welfare, 473 So. 2d 447, 1985 Miss. LEXIS 2179 (Miss. 1985).

A suit to establish paternity and child support brought by the Department of Public Welfare would be remanded for the chancellor to determine whether to hear all the issues, including a cross bill against the natural mother for custody and a motion to make her a party, in which case he would have authority to hear the case under § 93-11-65 in that one of the issues would be child custody, or to transfer venue to the county of the natural father's residence pursuant to § 93-9-17. McCollum v. State Dep't of Public Welfare, 447 So. 2d 650, 1984 Miss. LEXIS 1686 (Miss. 1984).

A person charged with being the natural father in a paternity action under both Miss. Code Ann. § 43-19-31 and Miss. Code Ann. § 93-9-9 is entitled to be sued in the county of his residence, in that the venue provision of Miss. Code Ann. § 93-9-17 would control; however, if the chancellor could have sustained the requested motion to make the mother a party and also entertained the submitted cross-bill praying for custody, the Chancery Court of the First Judicial District of Hinds County would have authority to hear the case, because one of the issues would have been child custody, and Miss. Code Ann. § 93-11-65 would have been applicable. McCollum v. State Dep't of Public Welfare, 447 So. 2d 650, 1984 Miss. LEXIS 1686 (Miss. 1984).

Where proceedings involved determination of both paternity and child support, defendant would be entitled to a jury trial on the issue of paternity, even though the child support statute did not require a jury trial. Metts v. State Dep't of Public Welfare, 430 So. 2d 401, 1983 Miss. LEXIS 2558 (Miss. 1983).

RESEARCH REFERENCES

ALR.

Long-arm statutes: obtaining jurisdiction over nonresident parent in filiation or support proceeding. 76 A.L.R.3d 708.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children §§ 53, 54.

10 Am. Jur. Trials, Disputed Paternity Cases § 25.

CJS.

14 C.J.S., Children-Out-of-Wedlock, §§ 90, 91.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

1984 Mississippi Supreme Court Review: Domestic Relations. 55 Miss. L. J. 113, March, 1985.

§ 93-9-19. Time of trial; perpetuation of testimony.

If the issue of paternity is raised in an action commenced during the pregnancy of the mother, the trial shall not, without the consent of the alleged father, be held until after the birth or miscarriage, but during such delay testimony may be perpetuated according to the laws of this state.

HISTORY:

Codes, 1942, § 383-07; Laws, 1962, ch. 312, § 7, eff from and after July 1, 1962.

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-9-21. Blood tests and other tests; enforcement of order to submit; notice of witnesses testifying as to sexual intercourse with mother.

(1)(a) In all cases brought pursuant to Title IV-D of the Social Security Act, upon sworn documentation by the mother, putative father, or the Department of Human Services alleging paternity, the department may issue an administrative order for paternity testing which requires the mother, putative father and minor child to submit themselves for paternity testing. The department shall send the putative father a copy of the Administrative Order and a Notice for Genetic Testing which shall include the date, time and place for collection of the putative father's genetic sample. The department shall also send the putative father a Notice and Complaint to Establish Paternity which shall specify the date and time certain of the court hearing by certified mail, restricted delivery, return receipt requested. Notice shall be deemed complete as of the date of delivery as evidenced by the return receipt. The required notice may also be delivered by personal service upon the putative father in accordance with Rule 4 of the Mississippi Rules of Civil Procedure insofar as service of an administrative order or notice is concerned.

(b) If the putative father does not submit to genetic testing, the court shall, without further notice, on the date and time previously set through the notice for hearing, review the documentation of the refusal to submit to genetic testing and make a determination as to whether the complaint to establish paternity should be granted. The refusal to submit to such testing shall create a rebuttable presumption of an admission to paternity by the putative father.

(c) In any case in which the Department of Human Services orders genetic testing, the department is required to advance costs of such tests subject to recoupment from the alleged father if paternity is established. If either party challenges the original test results, the department shall order additional testing at the expense of the challenging party.

(2) In any case in which paternity has not been established, the court, on its own motion or on motion of the plaintiff or the defendant, shall order the mother, the alleged father and the child or children to submit to genetic tests and any other tests which reasonably prove or disprove the probability of paternity. If paternity has been previously established, the court shall only order genetic testing pursuant to Section 93-9-10.

If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order for genetic testing as the rights of others and the interest of justice require.

(3) Any party calling a witness or witnesses for the purpose of testifying that they had sexual intercourse with the mother at any possible time of conception of the child whose paternity is in question shall provide all other parties with the name and address of the witness at least twenty (20) days before the trial. If a witness is produced at the hearing for the purpose provided in this subsection but the party calling the witness failed to provide the twenty-day notice, the court may adjourn the proceeding for the purpose of taking a genetic test of the witness before hearing the testimony of the witness if the court finds that the party calling the witness acted in good faith.

(4) The court shall ensure that all parties are aware of their right to request genetic tests under this section.

(5)(a) Genetic tests shall be performed by a laboratory selected from the approved list as prepared and maintained by the Department of Human Services.

(b) The Department of Human Services shall publicly issue a request for proposals, and such requests for proposals when issued shall contain terms and conditions relating to price, technology and such other matters as are determined by the department to be appropriate for inclusion or required by law. After responses to the request for proposals have been duly received, the department shall select the lowest and best bid(s) on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter into contract(s) with one or more of the laboratories submitting proposals. The department shall prepare a list of all laboratories with which it has contracted on these terms. The list and any updates thereto shall be distributed to all chancery clerks. To be eligible to appear on the list, a laboratory must meet the following requirements:

(i) The laboratory is qualified to do business within the State of Mississippi;

(ii) The laboratory can provide test results in less than fourteen (14) days; and

(iii) The laboratory must have participated in the competitive procurement process.

HISTORY:

Codes, 1942, § 383-08; Laws, 1962, ch. 312, § 8; Laws, 1987, ch. 455, § 1; Laws, 1990, ch. 543, § 3; Laws, 1997, ch. 588, § 133; Laws, 1999, ch. 512, § 2; Laws, 2011, ch. 530, § 5, eff from and after July 1, 2011.

Editor's Notes —

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Cross References —

Authorization for Child Support Unit to enter into contracts for the purpose of performing tests which the department may require, see § 43-19-31.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Non-party witnesses.
3. Refusal to submit to blood test.

1. In general.

Adjudicating a decedent to be a minor's natural father was not error where the dismissal of a first paternity case without prejudice due to insufficient process was not a jurisdictional bar to a second action, and although the father had not submitted to genetic testing because he could not afford it, he had subsequently voluntarily acknowledged his paternity. Mitchell v. Moore, 237 So. 3d 681, 2017 Miss. LEXIS 446 (Miss. 2017).

Husband was not entitled to a paternity test in divorce proceedings because the parties acknowledged that a child born to the wife was not the husband's child. Pace v. Pace, 16 So. 3d 734, 2009 Miss. App. LEXIS 148 (Miss. Ct. App. 2009).

The appellate court affirmed the order of genetic testing on an individual and a mother in the individual's petition for a determination of paternity because the word "shall" used in Miss. Code Ann. § 93-9-21(2) required the trial court to grant the motion for paternity. Thoms v. Thoms, 928 So. 2d 852, 2006 Miss. LEXIS 250 (Miss. 2006).

Miss. Code Ann. § 93-9-21(1) (Rev. 2000) requires neither DNA nor blood testing to establish paternity in cases of descent of an estate among illegitimate children. Jordan v. Baggett, 791 So. 2d 308, 2001 Miss. App. LEXIS 295 (Miss. Ct. App. 2001).

In a proceeding to establish paternity, upon motion by either the plaintiff or defendant for an order requiring blood tests, the trial judge must grant the motion; no discretion is afforded the trial judge. Ivy v. Harrington, 644 So. 2d 1218, 1994 Miss. LEXIS 527 (Miss. 1994).

Statute, prior to amendment, was mandatory and if defendant in paternity action requested blood tests, trial court was required to order them. One effect of amendment to statute, however, was that ordering of blood tests was discretionary, rather than mandatory. Deer v. State Dep't of Public Welfare, 518 So. 2d 649, 1988 Miss. LEXIS 13 (Miss. 1988).

Where there was substantial doubt as to who was father of child, blood test was timely requested by defendant, and only method to prove natural fatherhood, trial court should have ordered blood test. Deer v. State Dep't of Public Welfare, 518 So. 2d 649, 1988 Miss. LEXIS 13 (Miss. 1988).

Lower court erred in ordering blood test at request of plaintiff because statute allows blood test only on motion of defendant who was brought into court against his will. Johnson v. Ladner, 514 So. 2d 327, 1987 Miss. LEXIS 2778 (Miss. 1987), dismissed, 563 So. 2d 1368, 1990 Miss. LEXIS 226 (Miss. 1990).

In a proceeding to determine paternity, reference to an alleged finding of paternity by the county youth court was highly prejudicial to defendant's case and required reversal, in that the youth court had no authority to determine paternity; moreover, it was error for the trial court to admit into evidence any references to blood tests performed on the parties pursuant to § 93-9-21, where the trial court refused to allow the reports themselves to be introduced as an exhibit, and where the trial court did not call the expert who had conducted the tests to testify as to his findings. Davis v. Washington, 453 So. 2d 712, 1984 Miss. LEXIS 1833 (Miss. 1984).

This section [Code 1942, § 383-08] does not require the defendant in a paternity suit to request blood tests; however, if a blood test is requested the results must be introduced in evidence. Price v. Simpson, 205 So. 2d 642, 1968 Miss. LEXIS 1539 (Miss. 1968).

It was error in a bastardy case to grant an instruction for the plaintiff that the defendant could, on his own motion, have requested the court to order the mother, the child, and himself to submit to blood tests; for the defendant is not required to request such tests. Price v. Simpson, 205 So. 2d 642, 1968 Miss. LEXIS 1539 (Miss. 1968).

2. Non-party witnesses.

The statute does not instill the court with the power to compel a non-party witness to take a blood test, though it may be requested by the court; if the court requests that a non-party witness take a blood test and the witness refuses, the court's only option under the statute is be to exclude the testimony of that witness. Brown v. Jackson (In re Estate of Chambers), 711 So. 2d 878, 1998 Miss. LEXIS 251 (Miss. 1998).

3. Refusal to submit to blood test.

A trial court does not have the discretion to decline to enforce a previously issued order for blood testing to establish paternity; the "may" language in the second sentence of subsection (2) of this section indicates that the trial court has two available options from which to choose; specifically, to either issue a default judgment against the refusing party or, alternatively, to enforce the order for blood tests. W. H. W. v. J. J. by & Through Povall, 735 So. 2d 990, 1999 Miss. LEXIS 109 (Miss. 1999).

RESEARCH REFERENCES

ALR.

Admissibility, weight and sufficiency of Human Leukocyte Antigen (HLA) tissue typing tests in paternity cases. 37 A.L.R.4th 167.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 A.L.R.4th 579.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. 75 A.L.R.4th 897.

Admissibility of DNA identification evidence. 84 A.L.R.4th 313.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights. 87 A.L.R.4th 572.

Authentication of blood sample taken from human body for purposes other than determining blood alcohol content. 77 A.L.R.5th 201.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children § 83.

29 Am. Jur. 2d, Evidence §§ 114, 375.

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Form 52 (petition or application for order requiring additional blood grouping test); Bastards, Form 53 (order for blood grouping tests).

10 Am. Jur. Trials, Disputed Paternity Cases §§ 21, 22, 36, 67, 68, 76 et seq.

19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

8 Am. Jur. Proof of Facts 3d 749, Foundation for DNA Fingerprint Evidence.

CJS.

31A C.J.S., Evidence § 139

32 C.J.S., Evidence §§ 732, 733 et seq.

14 C.J.S., Children-Out-of-Wedlock §§ 103, 112.

31A C.J.S., Evidence § 139; 32 C.J.S., Evidence §§ 732, 733 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

Practice References.

Young, Trial Handbook for Mississippi Lawyers § 20:13.

§ 93-9-23. Blood tests and other tests; appointment of experts; affidavits of experts; challenging test results.

(1) Genetic testing shall be made by experts qualified as examiners of genetic tests who shall be appointed by the court pursuant to Section 93-9-21(5). The expert shall attach to the report of the test results an affidavit stating in substance: (a) that the affiant has been appointed by the court to administer the test and shall give his name, address, telephone number, qualifications, education and experience; (b) how the mother, child and alleged father were identified when the samples were obtained; (c) who obtained the samples and how, when and where obtained; (d) the chain of custody of the samples from the time obtained until the tests were completed; (e) the results of the test and the probability of paternity as calculated by an expert based on the test results; (f) the amount of the fee for performing the test; and (g) the procedures performed to obtain the test results. In cases initiated or enforced by the Department of Human Services pursuant to Title IV-D of the Social Security Act, the Department of Human Services shall be responsible for paying the costs of any genetic testing when such testing is required by law to establish paternity, subject to recoupment from the defendant if paternity is established.

(2) The expert or laboratory shall send all parties, or the attorney of record if a party is represented by counsel, a copy of the report by first class mail. The expert or laboratory shall file the original report with the clerk of the court along with proof of mailing to the parties or attorneys. A party may challenge the testing procedure within thirty (30) days of the date of mailing the results. If either party challenges the original test results, the court shall order additional testing at the expense of the challenging party.

(3) If the court, in its discretion, finds cause to order additional testing, then it may do so using the same or another laboratory or expert. If there is no timely challenge to the original test results or if the court finds no cause to order additional testing, then the certified report shall be admitted as evidence in the proceeding as prima facie proof of its contents.

(4) Upon request or motion of any party to the proceeding, the court may require persons making any analysis to appear as a witness and be subject to cross-examination, provided that the request or motion is made at least ten (10) days before the hearing. The court may require the party making the request or motion to pay the costs and/or fees for the expert witness' appearance.

HISTORY:

Codes, 1942, § 383-09; Laws, 1962, ch. 312, § 9; Laws, 1987, ch. 455, § 2; Laws, 1991, ch. 573, § 139; Laws, 1994, ch. 363, § 1; Laws, 1997, ch. 588, § 142; Laws, 1999, ch. 512, § 3, eff from and after July 1, 1999.

Editor's Notes —

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

JUDICIAL DECISIONS

1. In general.

Father did not supply the trial court with expert testimony to show good cause why additional paternity testing was warranted, and without such evidence the trial court found that it could not allow additional testing; the father's request for additional paternity testing was roughly nine years from the issuance of the original paternity evaluation, and any challenge or motion for additional paternity testing grossly exceeded the statutorily provided 30 days. McIntosh v. Dep't of Human Servs., 886 So. 2d 721, 2004 Miss. LEXIS 1168 (Miss. 2004).

Admission of hospital blood test into evidence in a paternity action, without the physician-expert who made the test being available to testify, was not error where the court sustained alleged fathers objections to the use and consideration by the court of the blood tests in making its paternity determination. Harkins v. Fletcher, 499 So. 2d 773, 1986 Miss. LEXIS 2786 (Miss. 1986).

In a proceeding to determine paternity, reference to an alleged finding of paternity by the county youth court was highly prejudicial to defendant's case and required reversal, in that the youth court had no authority to determine paternity; moreover, it was error for the trial court to admit into evidence any references to blood tests performed on the parties pursuant to § 93-9-21, where the trial court refused to allow the reports themselves to be introduced as an exhibit, and where the trial court did not call the expert who had conducted the tests to testify as to his findings. Davis v. Washington, 453 So. 2d 712, 1984 Miss. LEXIS 1833 (Miss. 1984).

RESEARCH REFERENCES

ALR.

Admissibility, weight and sufficiency of Human Leukocyte Antigen (HLA) tissue typing tests in paternity cases. 37 A.L.R.4th 167.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 A.L.R.4th 579.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. 75 A.L.R.4th 897.

Rights and obligations resulting from human artificial insemination. 83 A.L.R.4th 295.

Admissibility of DNA identification evidence. 84 A.L.R.4th 313.

Authentication of blood sample taken from human body for purposes other than determining blood alcohol content. 77 A.L.R.5th 201.

Am. Jur.

8 Am. Jur. Proof of Facts 3d 749, Foundation for DNA Fingerprint Evidence.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-9-25. Blood tests and other tests; costs; compensation of experts.

The costs of the blood or other tests required by the court and the compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, and that, after payment by either of the parties or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.

HISTORY:

Codes, 1942, § 383-10; Laws, 1962, ch. 312, § 10; Laws, 1987, ch. 455, § 3, eff from and after July 1, 1987.

Cross References —

Authorization for Child Support Unit to enter into contracts for the purpose of performing tests which the department may require, see § 43-19-31.

Costs in paternity proceedings, see § 93-9-45.

RESEARCH REFERENCES

Am. Jur.

8 Am. Jur. Proof of Facts 3d 749, Foundation for DNA Fingerprint Evidence.

Practice References.

Young, Trial Handbook for Mississippi Lawyers § 20:13.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-9-27. Blood tests; effect of test results; no right to jury trial in paternity proceedings.

(1) If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If an expert concludes that the blood or other tests show the probability of paternity, that evidence shall be admitted.

(2) There shall be a rebuttable presumption of paternity, affecting the burden of proof, if the court finds that the probability of paternity, as calculated by the experts qualified as examiners of genetic tests, is ninety-eight percent (98%) or greater. This presumption may only be rebutted by a preponderance of the evidence.

(3) Parties to an action to establish paternity shall not be entitled to a jury trial.

(4) The Department of Human Services may statistically report as positive, to the Administration for Children and Families within the United States Department of Health and Human Services, any putative paternity if the probability of paternity, as calculated by the experts qualified as examiners of genetic tests, is ninety-nine percent (99%) or greater, subject only to a later determination of nonpaternity ordered by a court under this chapter.

HISTORY:

Codes, 1942, § 383-11; Laws, 1962, ch. 312, § 11; Laws, 1987, ch. 455, § 4; Laws, 1994, ch. 363, § 2; Laws, 2000, ch. 530, § 5; Laws, 2007, ch. 344, § 1, eff from and after July 1, 2007.

JUDICIAL DECISIONS

1. In general.

Expert was admitted as an expert in the field of molecular biology, forensic DNA analysis and DNA hair analysis, and she was allowed to testify as to the results of her DNA analysis without a specific objection from the defense, and the specific arguments made by defendant on appeal were not presented to the trial court; further, Miss. Code Ann. § 93-9-27, regarding the presumption of paternity genetic tests, did not provide the standard for admission of DNA evidence here, and the trial court did not abuse its discretion in allowing in the statistical results of the DNA tests. Rankin v. State, 963 So. 2d 1255, 2007 Miss. App. LEXIS 553 (Miss. Ct. App. 2007).

Where an expert testified that the probability of paternity was 98.63 percent, the chancellor erred in not considering the statutory presumption. Brown v. Jackson (In re Estate of Chambers), 711 So. 2d 878, 1998 Miss. LEXIS 251 (Miss. 1998).

In a proceeding to establish the paternity of an infant, an instruction to the jury regarding blood tests submitted into evidence constituted reversible error where the blood tests established a 99.99 percent probability that the defendant was the father, and the instruction stated that the blood tests were "not conclusive of the issue of paternity and merely establish that out of the black male population it is biologically possible for the defendant to be the father"; although the test results did not constitute conclusive evidence of paternity, it was error to instruct the jury that the tests meant that paternity was a biological "possibility" since this language tended to discredit the evidence in that it reduced the 99.99 percent probability to a mere possibility. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

In a proceeding to establish the paternity of an infant, an instruction to the jury regarding the issue of whether the mother and the defendant had sexual intercourse during the period of probable conception constituted reversible error where the instruction stated that the jury would have to find that the couple had sexual intercourse without regard to the blood test results, which established a 99.99 percent probability that the defendant was the infant's father, or that the tests could not be a factor in the jury's conclusion on this question of fact; although such test results, standing alone, are insufficient to prove this element of a paternity claim, test results of this nature are relevant to whether sexual intercourse took place during the period of possible conception since they tend to make the existence of the fact that sexual intercourse took place during that time period more probable. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

Absent some statutory pronouncement, as long as a defendant in a paternity action has a right to a jury trial, paternity test results, even though showing a high probability of paternity, cannot be conclusive as a matter of law; the weight to be given such evidence, along with the credibility of the parties involved, remains a question for the chancery court or the jury. Thus, a chancery court did not abuse its discretion in denying a plaintiff's motion for a new trial after the jury found that the defendant was not the father, even though human leukocyte antigen test results showed that there was a probability of 99.59649 percent that the defendant was the child's father, where there was a delay of nearly 12 years between the birth of the child and the filing of the paternity suit, the defendant testified that he had no knowledge of his alleged paternity until the filing of the suit, the plaintiff did not fare well under cross-examination, cross-examination of the defendant was practically non-existent, and the jury was able to view the mother, daughter, and putative father. Chisolm v. Eakes, 573 So. 2d 764, 1990 Miss. LEXIS 793 (Miss. 1990).

Where no error in jury's verdict and order of filiation was found, and where sufficient evidence of father's ability to pay and child's reasonable needs was offered so that matter should have been resolved by court below in favor of order for support, remand for determination of support obligations of father pursuant to § 93-9-7 and for entry of final order of filiation providing for support, education, and expenses of child as provided in § 93-9-29 was appropriate. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

RESEARCH REFERENCES

ALR.

Admissibility, weight and sufficiency of Human Leukocyte Antigen (HLA) tissue typing tests in paternity cases. 37 A.L.R.4th 167.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 A.L.R.4th 579.

Rights and obligations resulting from human artificial insemination. 83 A.L.R.4th 295.

Admissibility of DNA identification evidence. 84 A.L.R.4th 313.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights. 87 A.L.R.4th 572.

Am. Jur.

29 Am. Jur. 2d, Evidence §§ 104, 584.

19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

40 Am. Jur. Proof of Facts 2d 1, Blood Typing.

8 Am. Jur. Proof of Facts 3d 749, Foundation for DNA Fingerprint Evidence.

CJS.

31A C.J.S., Evidence § 149

32 C.J.S., Evidence §§ 856, 857 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-9-28. Procedures for voluntary acknowledgement of paternity.

(1) The Mississippi State Department of Health in cooperation with the Mississippi Department of Human Services shall develop a form and procedure which may be used to secure a voluntary acknowledgement of paternity from the mother and father of any child born out of wedlock in Mississippi. The form shall clearly state on its face that the execution of the acknowledgement of paternity shall result in the same legal effect as if the father and mother had been married at the time of the birth of the child. The form shall also clearly indicate the right of the alleged father to request genetic testing through the Department of Human Services within the one-year time period specified in subsection (2)(a)(i) of this section and shall state the adverse effects and ramifications of not availing himself of this one-time opportunity to definitively establish the paternity of the child. When such form has been completed according to the established procedure and the signatures of both the mother and father have been notarized, then such voluntary acknowledgement shall constitute a full determination of the legal parentage of the child. The completed voluntary acknowledgement of paternity shall be filed with the Bureau of Vital Statistics of the Mississippi State Department of Health. The name of the father shall be entered on the certificate of birth upon receipt of the completed voluntary acknowledgement.

(2)(a) A signed voluntary acknowledgment of paternity is subject to the right of any signatory to rescind the acknowledgment within the earlier of:

(i) One (1) year; or

(ii) The date of a judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party.

(b) After the expiration of the one-year period specified in subsection (2)(a)(i) of this section, a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger; the legal responsibilities, including child support obligations, of any signatory arising from the acknowledgment may not be suspended during the pendency of the challenge, except for good cause shown.

(c) During the one-year time period specified in subsection (2)(a)(i) of this section, the alleged father may request genetic testing through the Department of Human Services in accordance with the provisions of Section 93-9-21.

(d) The one-year time limit, specified in subsection (2)(a)(i) of this section, for the right of the alleged father to rescind the signed voluntary acknowledgement of paternity shall be tolled from the date the alleged father files his formal application for genetic testing with the Department of Human Services until the date the test results are revealed to the alleged father by the department. After the one-year time period has expired, not including any period of time tolled for the purpose of acquiring genetic testing through the department, the provisions of subsection (2)(b) of this section shall apply.

(3) The Mississippi State Department of Health and the Mississippi Department of Human Services shall cooperate to establish procedures to facilitate the voluntary acknowledgement of paternity by both father and mother at the time of the birth of any child born out of wedlock. Such procedures shall establish responsibilities for each of the departments and for hospitals, birthing centers, midwives, and/or other birth attendants to seek and report voluntary acknowledgements of paternity. In establishing such procedures, the departments shall provide for obtaining the social security account numbers of both the father and mother on voluntary acknowledgements.

(4) Upon the birth of a child out of wedlock, the hospital, birthing center, midwife or other birth attendant shall provide an opportunity for the child's mother and natural father to complete an acknowledgement of paternity by giving the mother and natural father the appropriate forms and information developed through the procedures established in subsection (3). The hospital, birthing center, midwife or other birth attendant shall be responsible for providing printed information, and audio visual material if available, related to the acknowledgement of paternity, and shall be required to provide notary services needed for the completion of acknowledgements of paternity. The information described above shall be provided to the mother and natural father, if present and identifiable, within twenty-four (24) hours of birth or before the mother is released. Such information, including forms, brochures, pamphlets, video tapes and other media, shall be provided at no cost to the hospital, birthing center or midwife by the Mississippi State Department of Health, the Department of Human Services or other appropriate agency.

HISTORY:

Laws, 1994, ch. 544, § 1; Laws, 1999, ch. 512, § 11; Laws, 2009, ch. 370, § 2; Laws, 2011, ch. 530, § 7, eff from and after July 1, 2011.

JUDICIAL DECISIONS

ANALYSIS

1. Construction with other law.
2. Illustrative cases.

1. Construction with other law.

Language of Miss. Code Ann. § 93-9-28 satisfies the requirements of Miss. Code Ann. § 91-1-15(3)(a), such that the minor can inherit from his natural father where the father has executed an acknowledgment of paternity; therefore, substantial evidence supported a finding that a decedent's illegitimate minor son was his sole heir at law because, although the son's mother did not institute paternity proceedings within the required time under Miss. Code Ann. § 91-1-15, the father acknowledged paternity pursuant to Miss. Code Ann. § 93-9-28 before his death. In re Estate of Farmer, 964 So. 2d 498, 2007 Miss. LEXIS 516 (Miss. 2007).

2. Illustrative cases.

Where appellant was conceived while a decedent was married to his mother but was born after they divorced, as the decedent had the opportunity to establish his paternity of appellant but did not do so, the fact that he signed appellant's birth certificate as appellant's "listed" father instead of his "natural" father did not establish his paternity of appellant under Miss. Code Ann. § 93-9-28. Ivy v. Ivy (In re Estate of Ivy), 121 So. 3d 226, 2012 Miss. App. LEXIS 816 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 487 (Miss. 2013).

OPINIONS OF THE ATTORNEY GENERAL

Where the chancery court is contemplating issuing an order directing the Department of Health to change a birth certificate in fact situations covered by Section 41-57-23, the chancery court should require that the Department of Health be made a party to the lawsuit; nevertheless, in cases where a chancery court has ordered the Department of Health to make a correction to a birth certificate without having first made the department a party, the department should proceed based on that court order. Thompson, Jr., 2000 Miss. Op. Att'y Gen. 507.

§ 93-9-29. Order.

(1) If the finding be against the defendant, the court shall make an order of filiation, declaring paternity and for the support and education of the child.

(2) The order of filiation shall specify the sum to be paid weekly or otherwise. In addition to providing for the support and education, the order shall also provide for the funeral expenses if the child has died; for the support of the child prior to the making of the order of filiation; and such other expenses as the court may deem proper. In the event the defendant has health insurance available to him through an employer or organization that may extend benefits to the dependents of such defendant, the order of filiation may require the defendant to exercise the option of additional coverage in favor of the child he is legally responsible to support.

(3) The court may require the payment to be made to the mother, or to some person or corporation to be designated by the court as trustee, but if the child is or is likely to become a public charge on a county or the state, the public welfare agent of that county shall be made the trustee. The payment shall be directed to be made to a trustee if the mother does not reside within the jurisdiction of the court. The trustee shall report to the court annually, or oftener as directed by the court, the amounts received and paid over.

HISTORY:

Codes, 1942, § 383-12; Laws, 1962, ch. 312, § 12; Laws, 1981, ch 529, § 4; Laws, 1985, ch. 518, § 17; Laws, 1989, ch. 511, § 6, eff from and after July 1, 1989.

Cross References —

Action for wrongful death of illegitimate child, see § 11-7-13.

Descent and distribution among illegitimate children, see § 91-1-15.

Jurisdiction of chancery court to legitimate offspring, see § 93-17-1.

JUDICIAL DECISIONS

1. In general.

Issue of back child support was dismissed where, if the father wanted the chancellor to factor in specific considerations with regard to the back child support, he should have entered them into evidence at trial; the father made no mention as to any specific considerations he may have had regarding child support from 1997 to 2001. McClee v. Simmons, 834 So. 2d 61, 2002 Miss. App. LEXIS 809 (Miss. Ct. App. 2002).

In an action by an illegitimate child demanding that she be declared the heir of her natural father, capable of inheriting from him under the Mississippi laws of descent and distribution, the order entered in favor of the illegitimate daughter would be reversed and the suit dismissed where the time for bringing the action was six years from the date of the daughter's majority (§ 15-1-49) but the action was not commenced until 18 years after that date. Knight v. Moore, 396 So. 2d 31, 1981 Miss.

LEXIS 1984 (Miss.), cert. denied, 454 U.S. 817, 102 S. Ct. 95, 70 L. Ed. 2d 86, 1981 U.S. LEXIS 3122 (U.S. 1981).

Section 93-9-29, providing for child support for illegitimate children, is unconstitutional to the extent that it limits that support to children under 16 years of age where the right to support of a legitimate child is not so limited. Rias v. Henderson, 342 So. 2d 737, 1977 Miss. LEXIS 2325 (Miss. 1977).

Where the jury, in a bastardy case, by its verdict determined that the defendant was natural father of the child involved, this section [Code 1942, § 383-12] requires the court to enter a judgment against the person found by the jury to be the father of the illegitimate. Poynter v. Trotter, 250 Miss. 812, 168 So. 2d 635, 1964 Miss. LEXIS 506 (Miss. 1964).

OPINIONS OF THE ATTORNEY GENERAL

Where the chancery court is contemplating issuing an order directing the Department of Health to change a birth certificate in fact situations covered by Section 41-57-23, the chancery court should require that the Department of Health be made a party to the lawsuit; nevertheless, in cases where a chancery court has ordered the Department of Health to make a correction to a birth certificate without having first made the department a party, the department should proceed based on that court order. Thompson, Jr., 2000 Miss. Op. Att'y Gen. 507.

RESEARCH REFERENCES

ALR.

Judgment in bastardy proceeding as conclusive of issues on subsequent bastardy proceedings. 37 A.L.R.2d 836.

Allowance of attorneys' fees in bastardy proceedings. 40 A.L.R.2d 961.

Am. Jur.

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Forms 122-124 (judgment or decree adjudicating defendant father and making provision for support).

CJS.

14 C.J.S., Children-Out-Of-Wedlock §§ 122-125.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

Paternal inheritance rights of illegitimates under Mississippi law: greater than equal protection? 53 Miss. L. J. 303, June, 1983.

§ 93-9-30. Full faith and credit to foreign paternity determinations.

In any proceeding in Mississippi, either before a court or administrative tribunal, wherein the question of paternity may arise, and a determination or adjudication of paternity has been made through either a voluntary acknowledgement procedure, an administrative determination or a judicial order in another state or jurisdiction, then upon certification of that determination or adjudication by competent administrative or judicial authority of such state or jurisdiction, the court or administrative tribunal in Mississippi shall give full faith and credit to that foreign determination or adjudication, and it shall be conclusive proof of its substance.

HISTORY:

Laws, 1994, ch. 362, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am. Jur.

16B Am. Jur. 2d, Constitutional Law § 1029.

§ 93-9-31. Security; commitment; probation.

(1) The court shall, if need be, require the father to give security by bond or other security, with sufficient sureties approved by the court, for the payment of the order of filiation. Such security, when required, shall not exceed three (3) times the total periodic sum the father shall be required to pay under the terms of the order of filiation in any one (1) calendar year. If bond or security be required, and in case the action has been instituted by a public welfare official, the defendant shall also be required to give security that he will indemnify the state and the county where the child was or may be born and every other county against any expense for the support and education of the child, which said undertaking shall also require that all arrears shall be paid by the principal and sureties. In default of such security, when required, the court may commit him to jail, or put him on probation. At any time within one (1) year he may be discharged from jail, but his liability to pay the judgment shall not be thereby affected.

(2) Whenever any order of filiation has been made, but no bond or other security has been required for payment of support of the child, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are due, or such person's legal representative, enter an order requiring that bond or other security be given by the father in accordance with and under such terms and conditions as provided for in subsection (1) of this section. The father shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

(3) Where security is given and default is made in any payment, the court shall cite the parties bound by the security requiring them to show cause why judgment should not be given against them and execution issued thereon. If the amount due and unpaid shall not be paid before the return day of the citation, and no cause be shown to the contrary, judgment shall be rendered against those served with the citation for the amount due and unpaid together with costs, and execution shall issue therefor, saving all remedies upon the bond for future default. The judgment is a lien on real estate and in other respects enforceable the same as other judgments. The amount collected on such judgment or such sums as may have been deposited as collateral, in lieu of bond when forfeited, may be used for the benefit of the child, as provided for in the order of filiation.

(4) If at any time after an order of filiation in paternity proceedings shall have been made, and an undertaking given thereon, in accordance with the provisions of Sections 93-9-1 through 93-9-49 and such undertaking shall not be complied with, or that for any reason a recovery thereon cannot be had, or if the original undertaking shall have been complied with, and the sureties discharged therefrom, or if money were deposited in lieu of bail, and the same shall have been exhausted, and the natural child still needs support, the public welfare official of any county where the natural child for whose support the order of filiation was made shall be at the time, or the Commissioner of the

State Welfare Department upon giving proof of the making of the order of filiation, the giving of the above-mentioned undertaking, and the noncompliance therewith, or that the sureties have been discharged from their liability, or that for any reason a recovery cannot be had on such undertaking, may apply to the court in such county having jurisdiction in filiation proceedings, for a warrant for the arrest of the defendant against whom such order of filiation was made, which shall be executed in the manner provided in criminal procedure for the execution of the warrant; upon the arrest and arraignment of the defendant in said court, and upon proof of the making of the order of filiation, the giving of the above-mentioned undertaking, and the noncompliance therewith, or that for any reason a recovery cannot be had on such undertaking, the said court shall make an order requiring him to give a new undertaking, which said undertaking shall also require that all arrears shall be paid by the principal and sureties, or upon his failure to give such new undertaking, shall commit him to jail, or put him on probation.

(5) If the child and mother die, or the father and mother be legally married to each other, the court in which such security is filed, on proof of such fact, may cause the security to be marked "cancelled" and be surrendered to the obligors.

HISTORY:
Codes, 1942, § 383-13; Laws, 1962, ch. 312, § 13; Laws, 1985, ch. 518, § 18, eff from and after July 1, 1985.

Editor's Notes —
Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services, and that the term "State Board of Public Welfare" shall mean the State Board of Human Services.

Cross References —
Criminal offense of non-support of children, see § 97-5-3.

RESEARCH REFERENCES

Am. Jur.
5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Forms 59, 60 (bond for payment of support money).
10 Am. Jur. Trials, Disputed Paternity Cases §§ 73, 74.

CJS.
14 C.J.S., Children-Out-Of-Wedlock §§ 130, 131.

Law Reviews.
Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-9-33. Commitment for contempt.

The court also has power, on default as aforesaid, to adjudge the father in contempt and to order him committed to jail in the same manner and with the same powers as in case of commitment for default in giving security. The commitment of the father shall not operate to stay execution upon the judgment of the bond.

HISTORY:
Codes, 1942, § 383-14; Laws, 1962, ch. 312, § 14, eff from and after July 1, 1962.

JUDICIAL DECISIONS

1. In general.

In an action against a husband for contempt for failing to abide by the terms of a divorce decree, the husband was deprived of due process where, after the husband was held in contempt, the chancellor did not allow him to present evidence in support of his motion for a new trial in order to prove that he had abided by the terms of the divorce decree, and the chancellor then dispensed with the husband's motion for a new trial by denying it without hearing the additional evidence. Weeks v. Weeks, 556 So. 2d 348, 1990 Miss. LEXIS 12 (Miss. 1990).

There was no manifest error in finding of chancellor that while ex-husband was in arrears he was not in contempt in failing to pay child support, because during period that he did not make child support payments he was either in hospital, unable to work, or living below subsistence level, and only surviving with aid of welfare. Milam v. Milam, 509 So. 2d 864, 1987 Miss. LEXIS 2509 (Miss. 1987).

RESEARCH REFERENCES

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children §§ 90-93.

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Form 61 (order for arrest and commitment of father for failure to comply with support order); Form 126 (motion for order to show cause why father should not be punished for contempt for failure to obey support order); Form 127 (order to show cause why father should not be held in contempt for failure to comply with support judgment).

CJS.

14 C.J.S., Children-Out-Of-Wedlock § 11.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-9-35. Support by mother.

(1) If a mother of a natural child be possessed of property and shall fail to support and educate her child, the court having jurisdiction, on the application of the guardian or next friend of the child or, if the child shall receive Temporary Assistance for Needy Families (TANF) benefits or other financial assistance, of the county human services agent or youth counselor, may examine into the matter and after a hearing may make an order charging the mother with the payment of money weekly or otherwise for the support and education of the child.

(2) The court may require the mother to give security, by bond or other security, with sufficient sureties approved by the court, for the payment of the order. In default of such security, when required, the court may commit her to jail, or put her on probation. At any time within one (1) year she may be discharged from jail, but her liability to pay the judgment shall not be thereby affected.

(3) Nothing in this section shall be deemed to relieve the father from liability for support and education of the child in accordance with the provisions of Sections 93-9-1 through 93-9-49.

HISTORY:

Codes, 1942, § 383-15; Laws, 1962, ch. 312, § 15; Laws, 1997, ch. 316, § 18, eff from and after passage (approved March 12, 1997).

Cross References —
Temporary Assistance to Needy Families (TANF) program, see §§ 43-17-1 et seq.

RESEARCH REFERENCES

ALR.
Necessity or propriety of appointment of independent guardian for child who is subject of paternity proceedings. 70 A.L.R.4th 1033.

Am. Jur.
19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

§ 93-9-37. False declaration of identity.

The making of a false complaint as to the identity of the father, or the aiding or abetting therein, shall be punishable as for perjury.

HISTORY:
Codes, 1942, § 383-16; Laws, 1962, ch. 312, § 16, eff from and after July 1, 1962.

Cross References —
Criminal offense of perjury, see § 97-9-59.

RESEARCH REFERENCES

Am. Jur.
19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

§ 93-9-39. Probation.

Upon a failure to give security as provided herein, the court, instead of imposing sentence or of committing the father or mother to jail, or as a condition of his or her release from jail, may place him or her on probation, upon such terms as to payment of support to or on behalf of the child, and as to personal reports, as the court may direct. Upon violation of the terms imposed, the court may proceed to impose the sentence and commit or recommit to jail in accordance with the sentence.

HISTORY:
Codes, 1942, § 383-17; Laws, 1962, ch. 312, § 17, eff from and after July 1, 1962.

§ 93-9-41. Appeals.

An appeal in all cases may be taken by the defendant, a guardian ad litem appointed by the court for the child, the mother or her personal representative, or the public welfare official, from any final order or judgment of any court having jurisdiction of filiation proceedings, as provided for in Sections 93-9-1 through 93-9-49, directly to the supreme court within thirty (30) days after the entry of said order of judgment.

No appeal however shall operate as a stay of execution unless the defendant shall give the security provided for in Sections 93-9-1 through 93-9-49, and further security to pay the costs of such appeal. If any such appeal shall be taken by a guardian ad litem, appointed for the child by the court, the court may in its discretion allow payment, for the actual disbursements made by the said guardian ad litem for taking appeal. When allowed by the judge and duly audited, said disbursement shall become a county charge and shall be paid by the county.

HISTORY:

Codes, 1942, § 383-18; Laws, 1962, ch. 312, § 18, eff from and after July 1, 1962.

JUDICIAL DECISIONS

1. In general.

Appeals in paternity suits are governed exclusively by § 93-9-41, not by § 11-51-79, and such appeals may be made to no other court than the Supreme Court. Grisham v. Britfield, 391 So. 2d 107, 1980 Miss. LEXIS 2171 (Miss. 1980).

RESEARCH REFERENCES

ALR.

Right of mother of illegitimate child to appeal from order or judgment entered in bastardy proceedings. 18 A.L.R.2d 948.

Necessity or propriety of appointment of independent guardian for child who is subject of paternity proceedings. 70 A.L.R.4th 1033.

Am. Jur.

19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

§ 93-9-43. Prosecuting official.

It shall be the duty of the county attorney, in counties having a county attorney, (in the county in which the complaint is made) to prosecute all cases relating to natural children where the complainant is a state or county public welfare official. He shall receive as compensation for his services, when and if performed, not to exceed the sum of One Hundred Dollars ($100.00) for any one month, in addition to compensation provided otherwise, out of the county treasury upon an order of the county, circuit, or chancery judge. In counties not having a county attorney, the complaint shall be prosecuted by the district attorney, or by an attorney representing the state or county public welfare official as the petitioner, who shall receive the same compensation as herein provided for the county attorney.

HISTORY:

Codes, 1942, § 383-19; Laws, 1962, ch. 312, § 19, eff from and after July 1, 1962.

Cross References —

Duties of county attorney generally, see § 19-23-11.

Duties of district attorneys generally, see § 25-31-11.

JUDICIAL DECISIONS

1. In general.

The county prosecuting attorney was entitled to receive a separate fee for trying a suit by the county welfare department to determine the paternity of a child and to require support payments by his father, the fee to be collectible only from the father, since it was the apparent conclusion of the legislature in enacting Code 1942, § 383-20 that although the county attorney receives $100 per month to prosecute paternity cases, in many of them there would be no collection of judgments against fathers of illegitimate children so that the $100 provision stated in Code 1942, § 383-19 was to be in addition to compensation provided otherwise, and that it would be fair and equitable to require a defendant in paternity proceedings to pay his part of the costs including the cost of legal services of the attorney representing the petitioner, this situation being distinguished from the instance where a salaried officer of a governmental agency has been allowed by the court an additional fee for services which he is already being paid to handle. Sparkman v. Hinds County Welfare Dep't, 246 So. 2d 558, 1971 Miss. LEXIS 1425 (Miss. 1971).

OPINIONS OF THE ATTORNEY GENERAL

Under Section 93-9-43, if the County Prosecutors Office prosecutes paternity cases each month, it would be entitled to compensation from the county treasury, not to exceed one hundred dollars for any one month, upon an order of the county, circuit, or chancery judge. 1995 Miss. Op. Att'y Gen. 423.

§ 93-9-45. Costs.

If the court makes an order of filiation, declaring paternity and for the support and maintenance, and education of the child, court costs, including the cost of the legal services of the attorney representing the petitioner, expert witness fees, the court clerk, sheriff and other costs shall be taxed against the defendant.

HISTORY:

Codes, 1942, § 383-20; Laws, 1962, ch. 312, § 20, eff from and after July 1, 1962.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.
3. Reasonable fees.

1. In general.

The natural and legal father of the minor child, who was not the mother's husband at the time, was required to pay attorney's fees and expenses to both the putative father and the biological mother, as well as back child support and outstanding medical bills for the child. R. E. v. C. E. W., 752 So. 2d 1019, 1999 Miss. LEXIS 397 (Miss. 1999).

Implicit in statute providing that in event court enters order of filiation declaring male defendant to be father of child, that defendant shall be taxed with cost of legal services of attorney representing petitioner, is requirement that cost so taxed be reasonable and necessary and that party claiming these costs prove her entitlement. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

Right of trial by jury afforded by § 93-9-15 applies only to issue of paternity, but where each party waives any right to have attorney's fee issue resolved by court such waiver will be given effect, and where question of an award of attorneys fees is submitted to jury as trier of fact, party seeking fee must prove, inter alia, reasonable necessity of rendering of services and spending amount of time for which fee is charged, as well as reasonableness of hourly rate. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

The county prosecuting attorney was entitled to receive a separate fee for trying a suit by the county welfare department to determine the paternity of a child and to require support payments by his father, the fee to be collectible only from the father, since it was the apparent conclusion of the legislature in enacting Code 1942, § 383-20 that although the county attorney receives $100 per month to prosecute paternity cases, in many of them there would be no collection of judgments against fathers of illegitimate children so that the $100 provision stated in Code 1942, § 383-19 was to be in addition to compensation provided otherwise, and that it would be fair and equitable to require a defendant in paternity proceedings to pay his part of the costs including the cost of legal services of the attorney representing the petitioner, this situation being distinguished from the instance where a salaried officer of a governmental agency has been allowed by the court an additional fee for services which he is already being paid to handle. Sparkman v. Hinds County Welfare Dep't, 246 So. 2d 558, 1971 Miss. LEXIS 1425 (Miss. 1971).

The reasonableness of any fee paid to the mother's attorney in a bastardy proceeding would be a matter for the sound discretion of the chancellor, should such question be properly raised. Sturdivant v. Henderson, 186 So. 2d 478, 1966 Miss. LEXIS 1318 (Miss. 1966).

A mother who assigned one half of the judgment awarded her in a bastardy proceeding to her attorney as a fee is a necessary party to an action brought by the attorney against the judgment debtor for a recovery under his partial assignment. Sturdivant v. Henderson, 186 So. 2d 478, 1966 Miss. LEXIS 1318 (Miss. 1966).

2. Applicability.

Award of attorney's fees to a mother based on Miss. Code Ann. § 93-9-45 was error, as that statute applied to paternity cases, and the trial from which the award largely derived was for custody rather than paternity, with paternity being admitted by the parties in their initial pleadings; additionally, the statute stated that costs and fees were to be assessed against the defendant, and given that the mother was the defendant, § 93-9-45 did not authorize an award of costs and fees against the father. Solangi v. Croney, 118 So. 3d 173, 2013 Miss. App. LEXIS 100 (Miss. Ct. App. 2013).

3. Reasonable fees.

Mother was not entitled attorney's fees on appeal because was not the prevailing party on appeal where she did not present any information to the chancellor in order for him to conduct an analysis of the reasonableness of her attorney's fees and she presented no evidence of the fees charged by her attorney or the amount of work involved on appeal. Smith v. Williams, 199 So. 3d 705, 2016 Miss. App. LEXIS 527 (Miss. Ct. App. 2016).

Where the mother prevailed in a paternity suit against the father, the county court did not err by awarding her $ 7,517.18 in attorney's fees based on an invoice submitted by her counsel. Miss. Code Ann. § 93-9-45 makes the award of attorney's fees automatic in a paternity suit where it is found that the man is the biological father of the child; the only qualifier incident to that award is that the attorney's fees must be reasonable. Daniels v. Bains, 967 So. 2d 77, 2007 Miss. App. LEXIS 714 (Miss. Ct. App. 2007).

While the court awarded $500 in attorney fees to the mother, the record reflected that the mother provided an attorney billing invoice reflecting amassed attorney fees in an amount more than $4,000; thus, the award of attorney fees to the mother was reasonable and warranted pursuant to Miss. Code Ann. § 93-9-45. Kelley v. Day, 965 So. 2d 749, 2007 Miss. App. LEXIS 625 (Miss. Ct. App. 2007).

While the awarding of attorney fees and costs appears automatic pursuant to Miss. Code Ann. § 93-9-45, the fees must be reasonable. Dobbins v. Coleman, 930 So. 2d 1246, 2006 Miss. LEXIS 191 (Miss. 2006).

Order awarding reasonable attorney fees to a mother after she brought and maintained a petition to establish paternity for filiation, child support, and other relief was upheld where the record failed to support the father's assertion that the attorney fees were unreasonable. The fees charged by the mother's attorney fell within the customary charge in the community, as explained in two attorney affidavits. Dobbins v. Coleman, 930 So. 2d 1246, 2006 Miss. LEXIS 191 (Miss. 2006).

RESEARCH REFERENCES

ALR.

Allowance of attorneys' fees in bastardy proceedings. 40 A.L.R.2d 961.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am. Jur.

45 Am. Jur. Proof of Facts 2d 699, Amount of Allowance for Attorney Fees in Domestic Relations Action.

CJS.

14 C.J.S., Children-Out-Of-Wedlock §§ 141, 142 et seq.

§ 93-9-47. No explicit reference to illegitimacy to appear in certain records.

In all records, certificates or other papers hereafter made or executed, other than birth records and certificates or records of judicial proceedings in which the question of birth out of wedlock is at issue, requiring a declaration by or notice to the mother of a child born out of wedlock or otherwise requiring a reference to the relation of a mother to such a child, it shall be sufficient for all purposes to refer to the mother as the parent having the sole custody of the child, and no explicit reference shall be made to illegitimacy.

HISTORY:
Codes, 1942, § 383-21; Laws, 1962, ch. 312, § 21, eff from and after July 1, 1962.

JUDICIAL DECISIONS

1. Custody of child.
The natural mother of an illegitimate child, when no father has taken steps to prove or formally assert his paternity, is the custodial parent with the legal authority to make day-to-day decisions concerning the welfare of the child. In re Hemphill-Weathers v. Farrish, 779 So. 2d 167, 2001 Miss. App. LEXIS 25 (Miss. Ct. App. 2001).

§ 93-9-49. Settlement agreements.

An agreement of settlement with the alleged father is binding only when approved by the court.

HISTORY:
Codes, 1942, § 383-22; Laws, 1962, ch. 312, § 22, eff from and after July 1, 1962.

JUDICIAL DECISIONS

1. In general.
Contract between the mother and an alleged father of an illegitimate child could not, without judicial scrutiny and approval, preclude future paternity proceedings for purposes of child support; the prior agreement between the mother and the father regarding child support was not binding and modifiable, and had not been approved by the chancellor, who was within his authority to formulate a child support order, despite the parties' prior mutual agreement, providing for its effectiveness one year prior to the mother's instituting suit against the father for the adjudication of paternity and child support. Kelley v. Day, 965 So. 2d 749, 2007 Miss. App. LEXIS 625 (Miss. Ct. App. 2007).

Claims authorized in the Mississippi Uniform Law on Paternity may be settled pursuant to § 93-13-59 which authorizes guardians to settle doubtful claims of their wards. Atwood v. Hicks, 538 So. 2d 404, 1989 Miss. LEXIS 19 (Miss. 1989).

RESEARCH REFERENCES

ALR.
Lump-sum compromise and settlement, or release, of bastardy claim or of bastardy or paternity proceedings. 84 A.L.R.2d 524.

Avoidance of lump-sum settlement or release of bastardy claim on grounds of fraud, mistake, or duress. 84 A.L.R.2d 593.

Validity and construction of putative father's promise to support or provide for illegitimate child. 20 A.L.R.3d 500.

Am. Jur.
41 Am. Jur. 2d, Illegitimate Children §§ 70, 95, 96- 98.

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Forms 71 et seq. (release or settlement).

10 Am. Jur. Trials 653, Disputed Paternity Cases.

CJS.
14 C.J.S., Children-Out-Of-Wedlock §§ 3, 45–47, 56.

Law Reviews.
1989 Mississippi Supreme Court Review: Paternity Claims. 59 Miss. L. J. 905, Winter, 1989.

DEATH OF MOTHER OR CHILD

Sec.	
93-9-71.	Death of mother; effect on paternity proceeding.
93-9-73.	Dying declarations of mother.
93-9-75.	Death of child; effect on paternity proceeding.

§ 93-9-71. Death of mother; effect on paternity proceeding.

The death of the mother shall not abate the paternity prosecution, if the child be living; but a suggestion of the fact shall be made, and the name of the child substituted in the proceedings for that of the mother, and a guardian ad litem shall be appointed by the court to prosecute the cause, who shall not be liable for costs; and in such case the testimony of the mother, taken in writing before the justice, may be read in evidence, and shall have the same force and effect as if she were living and had testified to the same in court.

HISTORY:

Codes, 1892, § 253; 1906, § 272; Hemingway's 1917, § 221; 1930, § 183; 1942, § 387.

RESEARCH REFERENCES

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children § 61.

19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

CJS.

14 C.J.S., Children-Out-Of-Wedlock § 86.

§ 93-9-73. Dying declarations of mother.

In all proceedings to determine the parentage of a child when the mother is dead, her declarations in her travail, proved to be her dying declarations, may, on the trial of the case, be received in evidence.

HISTORY:

Codes, 1892, § 257; 1906, § 276; Hemingway's 1917, § 225; 1930, § 187; 1942, § 391; Laws, 2011, ch. 376, § 1, eff from and after passage (approved Mar. 14, 2011).

JUDICIAL DECISIONS

1. In general.

Midwife's testimony of statements of mother that defendant was father of child held incompetent in bastardy proceedings. Beeks v. Walker, 146 Miss. 400, 111 So. 567, 1927 Miss. LEXIS 195 (Miss. 1927).

The sole and only object of this section [Code 1942, § 391] was to extend the doctrine of dying declarations to such declarations of the mother in bastardy proceedings, and to place beyond controversy their admissibility, not merely as corroborative, but as original and substantive evidence. Johnson v. Walker, 86 Miss. 757, 39 So. 49, 1905 Miss. LEXIS 94 (Miss. 1905).

RESEARCH REFERENCES

ALR.
Admissibility of dying declaration in civil case. 47 A.L.R.2d 526.

Opinion of doctor or other attendant as to declarant's consciousness of imminent death so as to qualify his statement as dying declaration. 48 A.L.R.2d 733.

Comment Note. – Statements of declarant as sufficiently showing of consciousness of impending death to justify admission of dying declaration. 53 A.L.R.3d 785.

Sufficiency of showing of consciousness of impending death, by circumstances other than statements of declarant, to justify admission of dying declaration. 53 A.L.R.3d 1196.

Am. Jur.
29A Am. Jur. 2d, Evidence §§ 767 et seq.

CJS.
14 C.J.S., Children-Out-Of-Wedlock § 104.
31A C.J.S., Evidence §§ 395 et seq.

§ 93-9-75. Death of child; effect on paternity proceeding.

The death of the child, if the mother be living and unmarried, shall not be cause of abatement or bar to any suit brought under this chapter; but the court trying the same shall, on conviction, give judgment for such sum as shall be deemed just.

HISTORY:
Codes, 1892, § 254; 1906, § 273; Hemingway's 1917, § 222; 1930, § 184; 1942, § 388; Laws, 2011, ch. 376, § 2, eff from and after passage (approved Mar. 14, 2011).

RESEARCH REFERENCES

ALR.
Effect of death of child prior to institution of bastardy proceedings by mother. 7 A.L.R.2d 1397.

Am. Jur.
41 Am. Jur. 2d, Illegitimate Children §§ 67, 68.

19 Am. Jur. Proof of Facts 2d 1, Defense of Paternity Charges.

CJS.
14 C.J.S., Children-Out-Of-Wedlock § 86.

CHAPTER 11.

ENFORCEMENT OF SUPPORT OF DEPENDENTS

In General. 93-11-1
Orders for Withholding. 93-11-101
Suspension of State-Issued Licenses, Permits or Registrations for Noncompliance with Child Support Order. 93-11-151

IN GENERAL

Sec.
93-11-1 through 93-11-63. Repealed.
93-11-64. Use of social security numbers for locating parents.
93-11-65. Custody and support of minor children; additional remedies; determination of emancipation; temporary support awarded pending determination of parentage; effect of military duty on custody and visitation.
93-11-67. Personal jurisdiction over nonresident defendants.
93-11-69. Provision of information to consumer reporting agency as to overdue support.
93-11-71. Judgment for overdue child support; forgiveness of arrears under certain circumstances; credit toward arrearage under certain circumstances.
93-11-73. Repealed.

§§ 93-11-1 through 93-11-63. Repealed.

Repealed by Laws, 1997, ch. 588, § 131, eff from and after July 1, 1997.

§ 93-11-1. [Codes, 1942, § 456-33; Laws, 1954, ch. 211, § 33]

§ 93-11-3. [Codes, 1942, § 456-01; Laws, 1954, ch. 211, § 1]

§ 93-11-5. [Codes, 1942, § 456-02; Laws, 1954, ch. 211, § 2; Laws, 1993, ch. 506, § 1]

§ 93-11-7. [Codes, 1942, § 456-03; Laws, 1954, ch. 211, § 3]

§ 93-11-9. [Codes, 1942, § 456-04; Laws, 1954, ch. 211, § 4; Laws, 1993, ch. 506, § 2]

§ 93-11-11. [Codes, 1942, § 456-05; Laws, 1954, ch. 211, § 5; Laws, 1993, ch. 506, § 3]

§ 93-11-13. [Codes, 1942, § 456-06; Laws, 1954, ch. 211, § 6; Laws, 1993, ch. 506, § 4]

§ 93-11-15. [Codes, 1942, § 456-07; Laws, 1954, ch. 211, § 7; Laws, 1993, ch. 334, § 1; Laws, 1993, ch. 506, § 5]

§ 93-11-17. [Codes, 1942, § 456-08; Laws, 1954, ch. 211, § 8; Laws, 1993, ch. 506, § 6]

§ 93-11-19. [Codes, 1942, § 456-09; Laws, 1954, ch. 211, § 9; Laws, 1989, ch. 370, § 1; Laws, 1993, ch. 506, § 7]

§ 93-11-21. [Codes, 1942, § 456-10; Laws, 1954, ch. 211, § 10; Laws, 1989, ch. 370, § 2]

§ 93-11-23. [Codes, 1942, § 456-11; Laws, 1954, ch. 211, § 11; Laws, 1985, ch. 518, § 20; Laws, 1987, ch. 400; Laws, 1989, ch. 370, § 3]

§ 93-11-25. [Codes, 1942, § 456-12; Laws, 1954, ch. 211, § 12; Laws, 1989, ch. 370, § 4]

§ 93-11-27. [Codes, 1942, § 456-13; Laws, 1954, ch. 211, § 13; Laws, 1989, ch. 370, § 5; Laws, 1993, ch. 506, § 8]

§ 93-11-29. [Codes, 1942, § 456-14; Laws, 1954, ch. 211, § 14; Laws, 1989, ch. 370, § 6]

§ 93-11-31. [Codes, 1942, § 456-15; Laws, 1954, ch. 211, § 15; Laws, 1989, ch. 370, § 7; Laws, 1993, ch. 506, § 9]

§ 93-11-33. [Codes, 1942, § 456-16; Laws, 1954, ch. 211, § 16]

§ 93-11-35. [Codes, 1942, § 456-17; Laws, 1954, ch. 211, § 17; Laws, 1987, ch. 399; Laws, 1993, ch. 506, § 10]

§ 93-11-37. [Codes, 1942, § 456-18; Laws, 1954, ch. 211, § 18; Laws, 1989, ch. 370, § 8; Laws, 1993, ch. 506, § 11]

§ 93-11-39. [Codes, 1942, § 456-19; Laws, 1954, ch. 211, § 19]

§ 93-11-41. [Codes, 1942, § 456-20; Laws, 1954, ch. 211, § 20; Laws, 1989, ch. 370, § 9; Laws, 1993, ch. 506, § 12]

§ 93-11-43. [Codes, 1942, § 456-21; Laws, 1954, ch. 211, § 21]

§ 93-11-45. [Codes, 1942, § 456-22; Laws, 1954, ch. 211, § 22; Laws, 1987, ch. 455, § 6; Laws, 1989, ch. 370, § 10]

§ 93-11-47. [Codes, 1942, § 456-23; Laws, 1954, ch. 211, § 23; Laws, 1989, ch. 370, § 11; Laws, 1993, ch. 506, § 13]

§ 93-11-49. [Codes, 1942, § 456-24; Laws, 1954, ch. 211, § 24; Laws, 1989, ch. 370, § 12; Laws, 1993, ch. 506, § 14]

§ 93-11-51. [Codes, 1942, § 456-25; Laws, 1954, ch. 211, § 25]

§ 93-11-53. [Codes, 1942, § 456-26; Laws, 1954, ch. 211, § 26]

§ 93-11-55. [Codes, 1942, § 456-27; Laws, 1954, ch. 211, § 27]

§ 93-11-57. [Codes, 1942, § 458-28; Laws, 1954, ch. 211, § 28]

§ 93-11-59. [Codes, 1942, § 456-30; Laws, 1954, ch. 211, § 30; Laws, 1989, ch. 370, § 13]

§ 93-11-61. [Codes, 1942, § 456-31; Laws, 1954, ch. 211, § 31; Laws, 1989, ch. 370, § 14]

§ 93-11-63. [Codes, 1942, § 456-32; Laws, 1954, ch. 211, § 32; Laws, 1989, ch. 370, § 15]

Editor's Notes —

For current provisions, see Uniform Interstate Family Support Act, § 93-25-101 et seq.

Former § 93-11-1 was entitled: "Short title".

Former § 93-11-3 was entitled: "Purposes; liberal construction".

Former § 93-11-5 was entitled: "Definitions".

Former § 93-11-7 was entitled: "Remedies additional to those now existing".

Former § 93-11-9 was entitled: "Extent of duties of support".

Former § 93-11-11 was entitled: "Interstate rendition".

Former § 93-11-13 was entitled: "Relief from extradition".

Former § 93-11-15 was entitled: "What duties are enforceable; custody and visitation not contestable".

Former § 93-11-17 was entitled: "Remedies of a state or political subdivision thereof furnishing support".

Former § 93-11-19 was entitled: "How duties of support are enforced; jurisdiction of proceedings".

Former § 93-11-21 was entitled: "Verification of petition for enforcement".

Former § 93-11-23 was entitled: "Officials to represent petitioner".

Former § 93-11-25 was entitled: "Petition on behalf of minor".

Former § 93-11-27 was entitled: "Duty of court of this state as initiating state".

Former § 93-11-29 was entitled: "Costs and fees".

Former § 93-11-31 was entitled: "Jurisdiction by arrest".

Former § 93-11-33 was entitled: "State information agency".

Former § 93-11-35 was entitled: "Duty of court of this state as responding state".

Former § 93-11-37 was entitled: "Further duty of responding court".

Former § 93-11-39 was entitled: "Interrogatories and depositions".

Former § 93-11-41 was entitled: "Order of support".

Former § 93-11-43 was entitled: "Responding state to transmit copies to initiating state".

Former § 93-11-45 was entitled: "Additional powers of responding court".

Former § 93-11-47 was entitled: "Additional duties of court of this state when acting as responding state".

Former § 93-11-49 was entitled: "Additional duty of the court of this state when acting as an initiating state".

Former § 93-11-51 was entitled: "Evidence of husband and wife".

Former § 93-11-53 was entitled: "Rules of evidence".

Former § 93-11-55 was entitled: "Application of payments".

Former § 93-11-57 was entitled: "Effect of participation in proceeding".

Former § 93-11-59 was entitled: "Form for Uniform Reciprocal Enforcement of Support Act action request; uniform support petition; paternity affidavit".

Former § 93-11-61 was entitled: "Form of certificate and order of chancery court".

Former § 93-11-63 was entitled: "Form of general testimony".

§ 93-11-64. Use of social security numbers for locating parents.

(1) The Department of Human Services and its divisions, and any agency, office or registry established by the department, or which works in conjunction with the department, or is authorized to supply information to the department, may use Social Security numbers for the purpose of locating parents or alleged parents, establishing parentage, and establishing the amount of, modifying, or enforcing child support obligations.

(2) This section requires that the Social Security number of:

(a) Any applicant for a state-issued license be recorded on the application;

(b) Any individual who is subject to a divorce decree, support order, or paternity determination or acknowledgment be placed in the records relating to the matter; and

(c) Any individual who has died be placed in the records relating to the death and be recorded on the death certificate.

HISTORY:

Laws, 1997, ch. 588, § 14, eff from and after July 1, 1997.

Editor's Notes —

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Cross References —

State Parent Locator Service, see § 43-19-45.

RESEARCH REFERENCES

Law Reviews.

Bell, Child Support Orders: The Common Law Framework – Part II, 69 Miss. L.J. 1063 (Spring, 2000).

§ 93-11-65. Custody and support of minor children; additional remedies; determination of emancipation; temporary support awarded pending determination of parentage; effect of military duty on custody and visitation.

(1)(a) In addition to the right to proceed under Section 93-5-23, Mississippi Code of 1972, and in addition to the remedy of habeas corpus in proper cases, and other existing remedies, the chancery court of the proper county shall have jurisdiction to entertain suits for the custody, care, support and maintenance of minor children and to hear and determine all such matters, and shall, if need be, require bond, sureties or other guarantee to secure any order for periodic payments for the maintenance or support of a child. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support. Proceedings may be brought by or against a resident or nonresident of the State of Mississippi, whether or not having the actual custody of minor children, for the purpose of judicially determining the legal custody of a child. All actions herein authorized may be brought in the county where the child is actually residing, or in the county of the residence of the party who has actual custody, or of the residence of the defendant. Process shall be had upon the parties as provided by law for process in person or by publication, if they be nonresidents of the state or residents of another jurisdiction or are not found therein after diligent search and inquiry or are unknown after diligent search and inquiry; provided that the court or chancellor in vacation may fix a date in termtime or in vacation to which process may be returnable and shall have power to proceed in termtime or vacation. Provided, however, that if the court shall find that both parties are fit and proper persons to have custody of the children, and that either party is able to adequately provide for the care and maintenance of the children, the chancellor may consider the preference of a child of twelve (12) years of age or older as to the parent with whom the child would prefer to live in determining what would be in the best interest and welfare of the child. The chancellor shall place on the record the reason or reasons for which the award of custody was made and explain in detail why the wishes of any child were or were not honored.

(b) An order of child support shall specify the sum to be paid weekly or otherwise. In addition to providing for support and education, the order shall also provide for the support of the child prior to the making of the order for child support, and such other expenses as the court may deem proper.

(c) The court may require the payment to be made to the custodial parent, or to some person or corporation to be designated by the court as trustee, but if the child or custodial parent is receiving public assistance, the Department of Human Services shall be made the trustee.

(d) The noncustodial parent's liabilities for past education and necessary support and maintenance and other expenses are limited to a period of one (1) year next preceding the commencement of an action.

(2) Provided further, that where the proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children in proportion to the relative financial ability of each.

(3) Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other guarantee

has been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

(4) When a charge of abuse or neglect of a child first arises in the course of a custody or maintenance action pending in the chancery court pursuant to this section, the chancery court may proceed with the investigation, hearing and determination of such abuse or neglect charge as a part of its hearing and determination of the custody or maintenance issue as between the parents, as provided in Section 43-21-151, notwithstanding the other provisions of the Youth Court Law. The proceedings in chancery court on the abuse or neglect charge shall be confidential in the same manner as provided in youth court proceedings, and the chancery court shall appoint a guardian ad litem in such cases, as provided under Section 43-21-121 for youth court proceedings, who shall be an attorney. In determining whether any portion of a guardian ad litem's fee shall be assessed against any party or parties as a cost of court for reimbursement to the county, the court shall consider each party's individual ability to pay. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or the public.

(5) Each party to a paternity or child support proceeding shall notify the other within five (5) days after any change of address. In addition, the noncustodial and custodial parent shall file and update, with the court and with the state case registry, information on that party's location and identity, including social security number, residential and mailing addresses, telephone numbers, photograph, driver's license number, and name, address and telephone number of the party's employer. This information shall be required upon entry of an order or within five (5) days of a change of address.

(6) In any case subsequently enforced by the Department of Human Services pursuant to Title IV-D of the Social Security Act, the court shall have continuing jurisdiction.

(7) In any subsequent child support enforcement action between the parties, upon sufficient showing that diligent effort has been made to ascertain the location of a party, due process requirements for notice and service of process shall be deemed to be met with respect to the party upon delivery of written notice to the most recent residential or employer address filed with the state case registry.

(8)(a) The duty of support of a child terminates upon the emancipation of the child. Unless otherwise provided for in the underlying child support judgment, emancipation shall occur when the child:

(i) Attains the age of twenty-one (21) years, or

(ii) Marries, or

(iii) Joins the military and serves on a full-time basis, or

(iv) Is convicted of a felony and is sentenced to incarceration of two (2) or more years for committing such felony; or

(b) Unless otherwise provided for in the underlying child support judgment, the court may determine that emancipation has occurred and no other support obligation exists when the child:

(i) Discontinues full-time enrollment in school having attained the age of eighteen (18) years, unless the child is disabled, or

(ii) Voluntarily moves from the home of the custodial parent or guardian, establishes independent living arrangements, obtains full-time employment and discontinues educational endeavors prior to attaining the age of twenty-one (21) years, or

(iii) Cohabits with another person without the approval of the parent obligated to pay support; and

(c) The duty of support of a child who is incarcerated but not emancipated shall be suspended for the period of the child's incarceration.

(9) A determination of emancipation does not terminate any obligation of the noncustodial parent to satisfy arrearage existing as of the date of emancipation; the total amount of periodic support due prior to the emancipation plus any periodic amounts ordered paid toward the arrearage shall continue to be owed until satisfaction of the arrearage in full, in addition to the right of the person for whom the obligation is owed to execute for collection as may be provided by law.

(10) Upon motion of a party requesting temporary child support pending a determination of parentage, temporary support shall be ordered if there is clear and convincing evidence of paternity on the basis of genetic tests or other evidence, unless the court makes written findings of fact on the record that the award of temporary support would be unjust or inappropriate in a particular case.

(11) Custody and visitation upon military temporary duty, deployment or mobilization shall be governed by Section 93-5-34.

HISTORY:

Codes, 1942, § 1263.5; Laws, 1960, ch. 268; Laws, 1984, ch. 367; Laws, 1985, ch. 518, § 16; Laws, 1993, ch. 506, § 15; Laws, 1994, ch. 591, § 7; Laws, 1996, ch. 345, § 2; Laws, 1999, ch. 512, § 15; Laws, 2000, ch. 530, § 6; Laws, 2006, ch. 431, § 1; Laws, 2006, ch. 565, § 2; Laws, 2008, ch. 389, § 3; Laws, 2008, ch. 540, § 1, eff from and after July 1, 2008.

Joint Legislative Committee Note —

Section 1 of ch. 431, Laws of 2006, effective from and after July 1, 2006 (approved March 20, 2006), amended this section. Section 2 of ch. 565, Laws of 2006, effective from and after July 1, 2006 (approved March 20, 2006), also amended this section. As set out above, this section reflects the language of Section 2 of ch. 565, Laws of 2006, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 3 of ch. 389, Laws of 2008, effective from and after July 1, 2008 (approved March 31, 2008), amended this section. Section 1 of ch. 540, Laws of 2008, effective from and after July 1, 2008 (approved May 9, 2008), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 540, Laws of 2008, which contains language that specifically provides that it supersedes § 93-11-65 as amended by Laws of 2008, ch. 389.

Cross References —

Custody of children in divorce proceedings, see § 93-5-23.

Provisions relative to orders for withholding amounts of overdue child support payments from income of obligors, see §§ 93-11-101 through 93-11-119.

Authority of courts to impose fee for any court-ordered home study relating to child custody matters, see § 93-17-12.

Federal Aspects—

Title IV-D of the Social Security Act, see 42 USCS §§ 651 et seq.

JUDICIAL DECISIONS

ANALYSIS

I. CUSTODY OF CHILDREN.

1. Generally.
2. Factors in determining custody—extramarital conduct.
3. —Treatment of child or spouse.
4. —Choice of child.
5. —Miscellaneous.
6. Third party custody.
7. Visitation.
8. Modification.
9. Jurisdiction.
10. Appointment of guardian ad litem.

II. SUPPORT OF CHILDREN.

11. Generally.
12. Amount of support—excessive.
13. —Not excessive.
14. —Miscellaneous.
15. Education or medical expenses.
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19. Taxation.
20. Life insurance.
21. Contempt.
22. Emancipation.

I. CUSTODY OF CHILDREN.

1. Generally.

In wife's action for delinquent child support and delinquent spousal support, there were two judgments, an interim judgment, which did not mention the husband's motion for modification, and the final judgment which stated that the motion for modification was denied; applying Brennan v. Brennan, the appellate court held the entry of the latter judgment, effective retroactively to the former judgment, cleansed the husband's hands, since it was the first judgment that was entered after the trial court specifically refused to hear the husband's motion for modification due to the fact that the husband came into court with unclean hands. Cook v. Whiddon, 866 So. 2d 494, 2004 Miss. App. LEXIS 130 (Miss. Ct. App. 2004).

In simultaneous divorce and paternity actions, the biological father sought to have parental rights terminated, and the husband, who believed for years that the husband was the child's father, sought to be declared the child's legal father, but joinder of claims was not allowed, and with regard to the separate paternity action, the biological father was ordered to pay child support until some further order in the divorce proceedings supplanted that obligation. Griffith v. Pell, 881 So. 2d 227, 2003 Miss. App. LEXIS 786 (Miss. Ct. App. 2003), aff'd, 881 So. 2d 184, 2004 Miss. LEXIS 975 (Miss. 2004).

Where there was no indication that the chancellor considered the Albright factors or the requirements set forth in the statute before rendering her decision that the child should be placed in her father's custody, the court reversed and remanded the issue of the child's custody and instructed the chancellor to support her findings that the father was better suited to be the custodial parent. Formigoni v. Formigoni, 733 So. 2d 868, 1999 Miss. App. LEXIS 17 (Miss. Ct. App. 1999).

In matters concerning child custody, reviewing court will not reverse Chancery Court's factual findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence in the record supporting these findings of fact. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Chancellor's findings regarding child custody will not be disturbed when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

In all child custody cases, polestar consideration is the best interest of the child. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

In all child custody cases, polestar consideration is best interest of child. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

The presumption in favor of awarding custody of a child to a natural parent should prevail over any imperative regarding the separating of siblings. Sellers v. Sellers, 638 So. 2d 481, 1994 Miss. LEXIS 311 (Miss. 1994).

In a proceeding to determine custody of a minor child, the chancellor erred in rendering his opinion based on the summarized testimony of what the attorneys believed vital witnesses would have said; in utilizing the summarized testimony, the chancellor was not in a position to view the demeanor and judge the credibility of the witnesses, and therefore failed to fully assess and consider the fitness of the parties to care for the child. Murphy v. Murphy, 631 So. 2d 812, 1994 Miss. LEXIS 76 (Miss. 1994).

In a hearing on a motion for a new trial in a proceeding to determine custody of a minor child, the chancellor erred in rendering the issue of the parties' fitness res judicata and refusing to hear additional testimony and consider expert reports submitted by social workers; chancellors in child custody cases should consider any and all evidence which aids them in reaching the ultimate custody decision, and the ability to hear and consider additional evidence is at all times within a chancellor's authority in matters concerning child custody. Murphy v. Murphy, 631 So. 2d 812, 1994 Miss. LEXIS 76 (Miss. 1994).

A child custody order awarding the father custody of the parties' 2 children would be vacated where the mother did not have sufficient time to prepare for 2 adverse witnesses and the custody question was extremely close, so that the mother's lack of an opportunity to prepare for the witnesses could have affected the evidence presented and, necessarily, the chancellor's decision. Schepens v. Schepens, 592 So. 2d 108, 1991 Miss. LEXIS 983 (Miss. 1991).

The evidence was sufficient to support a finding that a father had discharged his obligation to support his daughter where the parents modified the custody and child support provisions of their divorce decree by an agreement under which the father took custody of the daughter and the child support payment made by the father to the mother for their three children was proportionately reduced, and the father subsequently made substantial direct payments to the daughter for her support. Although court-ordered child support payments vest in the child as they accrue and may not thereafter be modified or forgiven, this does not mean that equity may not at times suggest ex post facto approval of extra-judicial adjustments in the manner and form in which support payments have been made. Varner v. Varner, 588 So. 2d 428, 1991 Miss. LEXIS 719 (Miss. 1991).

A child custody agreement which provides that the child or children must until majority reside in a particular community, is contrary to the best interests of the children and should not be approved by the court. Such agreements that have been approved are unenforceable. It is presumptuous for anyone, court or otherwise, to declare as an absolute that it is in the best interest of a young child that he or she spend his or her entire minority in a single community. Thus, courts may not require that children be reared in a single community come what may, and divorcing parents may not make such agreements which courts are obligated to enforce. Chancery courts must refuse to approve any child custody agreement presented under § 93-5-2 or otherwise which mandates, without exception, that children be raised in a given community. Such agreements do not make "adequate and sufficient" provisions for the care and maintenance of children. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

A custody agreement which called for a change in custody of the children from the mother to the father on relocation by the mother was void and contrary to public policy. The court cannot surrender or subordinate its jurisdiction and authority as to the circumstances and conditions which will cause a change in custody. McManus v. Howard, 569 So. 2d 1213, 1990 Miss. LEXIS 669 (Miss. 1990).

When employing escalation clauses for child support, the bench and bar are urged to: (a) specify with certainty the specific cost of living or consumer price index which is to be utilized; (b) show the applicable ratio (present CPI is to ascertainable CPI as present award is to future award); (c) calculate the base figure as of the date of judgment; (d) establish frequency of adjustment (nothing less than yearly is suggested); and (e) establish an effective date for each adjustment (e.g. anniversary of date of judgment.) Caution should be exercised in applying a consumer price index that comports with Mississippi's economic picture, as well as the parent's job status. Wing v. Wing, 549 So. 2d 944, 1989 Miss. LEXIS 443 (Miss. 1989).

Escalation clauses should be included in child support decrees since strong public policy calls for provision for increased financial needs of children without additional litigation, incurring attorney's fees, court congestion and delay, and emotional trauma. Wing v. Wing, 549 So. 2d 944, 1989 Miss. LEXIS 443 (Miss. 1989).

A father was not in contempt for failure to pay child support under an automatic adjustment clause of a property settlement agreement where the agreement was uncertain in that a genuine dispute existed over the amount owed, over the commencement year of the escalation clause, and over which consumer price index was to be utilized. Wing v. Wing, 549 So. 2d 944, 1989 Miss. LEXIS 443 (Miss. 1989).

A chancellor erred in declining to award attorney's fees to a child's maternal grandparents for defending a custody action brought by the child's father, who had killed the child's mother. Veselits v. Cruthirds, 548 So. 2d 1312, 1989 Miss. LEXIS 430 (Miss. 1989).

Trial courts have the authority to allocate income tax dependency exemptions by ordering the custodial parent to sign the required release where the equities of the case favor such action. A trial court's authority to allocate the exemption to the non-custodial parent reduces the amount of income tax to be paid to the federal government, and produces a tax saving to the non-custodial parent which exceeds the moderate increase in the tax liability of the custodial parent. This result will almost always prevail where, as is often the case, the custodial parent's adjusted gross income is less than the adjusted gross income of the non-custodial parent. In such a situation, the after-tax spendable income of the non-custodial parent is increased. This savings in tax liability could easily be channeled into increased child support or other payments thereby rendering the custodial parent's after-tax spendable income, including child support or other payments, the same or better than if he or she had claimed the dependency exemption. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

In a divorce suit to which the maternal grandmother of children, whose custody was awarded to their mother, was not a party, the decree was not res judicata in the grandmother's subsequent custody suit, which she filed after the mother was killed in an automobile accident, on the question whether the father of the children was an unfit parent, and in such custody suit testimony relating to the father's character and conduct prior to the divorce decree was admissible. Lundy v. Lundy, 259 So. 2d 710, 1972 Miss. LEXIS 1547 (Miss. 1972).

A decree in a custody proceeding, adjudicating that a father had abandoned his child and awarding custody to the maternal grandmother, was not res judicata with respect to the father's petition in which he sought a modification of the decree on the ground of a change in circumstances, since such rule would be too rigid and inflexible for such a sensitive area of the law as the custody of a child, the most important consideration in such case being what is for the best interest of the child. Thompson v. Foster, 244 So. 2d 395, 1971 Miss. LEXIS 1328 (Miss. 1971).

2. Factors in determining custody—extramarital conduct.

Court properly granted custody to a husband because he had a more stable employment history, the wife disregarded court orders, she cohabited with her fiance who had issues with domestic abuse toward his previous wives and children, and the fiance was accused of molestation of one of his children and corporal punishment of the wife's children. Mayfield v. Mayfield, 956 So. 2d 337, 2007 Miss. App. LEXIS 300 (Miss. Ct. App. 2007).

An award of custody to the father based on the finding that the father was more morally fit than the mother to care for the child was erroneous to the extent that it was based on a finding of adultery by the wife where the evidence of adultery was neither clear nor convincing and did not rise above mere conjecture. McAdory v. McAdory, 608 So. 2d 695, 1992 Miss. LEXIS 600 (Miss. 1992).

An extramarital relationship is not, per se, an adverse circumstance warranting modification of a custody decree. Thus, a chancellor's modification of a joint child custody decree by forbidding the mother to continue conducting her "illicit" relationship with her male friend while her daughter resided with her was sufficient where there was no substantial credible evidence showing an adverse change affecting the child of such proportions that the child's best interest would be served by further modifying the custody decree. Morrow v. Morrow, 591 So. 2d 829, 1991 Miss. LEXIS 868 (Miss. 1991).

A custody agreement which called for a change in custody of the children from the mother to the father on relocation by the mother was void and contrary to public policy. The court cannot surrender or subordinate its jurisdiction and authority as to the circumstances and conditions which will cause a change in custody. McManus v. Howard, 569 So. 2d 1213, 1990 Miss. LEXIS 669 (Miss. 1990).

A custodial parent's sexual relations with a third person outside of marriage does not, by itself, warrant modification of the child custody order. Phillips v. Phillips, 555 So. 2d 698, 1989 Miss. LEXIS 510 (Miss. 1989).

3. —Treatment of child or spouse.

A trial court did not abuse its discretion in awarding custody of 2 minor children to their father, though both parents were suitable choices for custody, where the mother had previously "secreted the children" for approximately three weeks, and the father had possession of the parties' house which would give the children stability of the home environment and place them in familiar surroundings. Faries v. Faries, 607 So. 2d 1204, 1992 Miss. LEXIS 599 (Miss. 1992).

In a father's action seeking a change in child custody from the mother to the father, evidence of the father's treatment of the mother and the child prior to the parties' divorce was manifestly material to the issue of the fitness of the father to have custody of the child, where the divorce decree indicated that the court had found merit to the mother's charges of habitual cruel and inhuman treatment. Herring v. Herring, 571 So. 2d 239, 1990 Miss. LEXIS 703 (Miss. 1990).

A mother was unfit to have custody of her children where she had used marijuana in the children's presence, she sometimes slept until 11:00 a.m. and the children would already be outside, unsupervised, by that time, and there was testimony that the children had not been adequately fed or clothed and that there had been a resulting deleterious effect on their health. White v. Thompson, 569 So. 2d 1181, 1990 Miss. LEXIS 631 (Miss. 1990).

An award of child custody to the mother was not manifestly wrong, even though there was testimony that the children at times went unsupervised, where the court did not find that the mother was unfit to have the care and custody of the children. Martin v. Martin, 566 So. 2d 704, 1990 Miss. LEXIS 466 (Miss. 1990).

A chancellor did not err in his determination that a material change in circumstances adverse to the welfare and best interests of the children warranted a change in custody from the mother to the father where the mother had moved and changed employment several times during the year after the parties' divorce, daycare arrangements were similarly changed, the mother had subjected the children to numerous unwarranted physical and psychological examinations, not for treatment, but for investigation and interrogation as to alleged sexual abuse, and the daughter had exhibited distress and disturbance when being returned to the mother at the end of a visitation period with the father, while the father held a stable position and maintained a stable home, with his parents providing alternative care. Newsom v. Newsom, 557 So. 2d 511, 1990 Miss. LEXIS 43 (Miss. 1990).

Although the chancellor found that a father who had killed his child's mother was mentally and morally unfit to have the child's custody, and granted complete custody to the maternal grandparents, it was not error for the chancellor to grant liberal visitation rights to the father. Veselits v. Cruthirds, 548 So. 2d 1312, 1989 Miss. LEXIS 430 (Miss. 1989).

4. —Choice of child.

Chancery court did not err in declining to honor an eldest child's stated preference to live with the child's mother, when the mother sought to relocate to another state, because it was within the chancellor's discretion to adopt the family master's recommendation to award custody to the father. The family master found that stability of the home environment, with which the parties' children were familiar, favored the father primarily because the father had been with the children and with the mother until recently. Bennett v. Bennett, — So. 3d —, 2018 Miss. App. LEXIS 176 (Miss. Ct. App. Apr. 10, 2018).

While the chancellor found that a child's preference was to live with her grandmother, the appellate court did not consider this factor because the child was not of the legal age for her preference to be considered. Wilson v. Davis, 181 So. 3d 1011, 2014 Miss. App. LEXIS 648 (Miss. Ct. App. 2014), aff'd in part and rev'd in part, 181 So. 3d 991, 2016 Miss. LEXIS 4 (Miss. 2016).

Chancellor, who referenced the mother's immature and criminal actions after she separated from the children's father, and her sleeping with her boyfriend and allowing his 17-year-old daughter to sleep with her oldest daughter, appropriately explained his reasons for awarding custody to the father, even though the oldest children expressed a preference to reside with their mother. Rolison v. Rolison, 105 So. 3d 1136, 2012 Miss. App. LEXIS 799 (Miss. Ct. App. 2012).

Even if the judgment was interpreted as not honoring the child's preference because the husband was not awarded primary custody, the chancellor explained his reasoning when he stated this appeared to be a classic case in which the court should consider – and did consider – an award of joint physical custody of these children. Phillips v. Phillips, 45 So. 3d 684, 2010 Miss. App. LEXIS 171 (Miss. Ct. App.), cert. denied, 49 So. 3d 636, 2010 Miss. LEXIS 546 (Miss. 2010).

Although the daughters of a mother and father expressed desire to live with the father, the chancellor was correct not to consider the children's preference because there was no evidence to support a material or substantial change in circumstances; the children's preference alone could not constitute a material or substantial change in circumstances. Lewis v. Lewis, 974 So. 2d 265, 2008 Miss. App. LEXIS 82 (Miss. Ct. App. 2008).

Preference of the child factor did not apply to a child custody decision where the son was less than 12 years of age. Sumrall v. Sumrall, 970 So. 2d 254, 2007 Miss. App. LEXIS 824 (Miss. Ct. App. 2007).

Because two minor children were old enough to express their preference under Miss. Code Ann. § 93-11-65, a chancery court erred by dismissing a mother's custody modification request prior to hearing from the children; this would have been a main source of evidence regarding whether or not there was a substantial change of circumstances. Anderson v. Anderson, 961 So. 2d 55, 2007 Miss. App. LEXIS 438 (Miss. Ct. App. 2007).

Minor child's preference under Miss. Code Ann. § 93-11-65 was not the only factor considered by a chancery court when it modified custody to allow the oldest of two children to live with his father; a change of circumstances was shown because the mother had slapped the child, she spied on the father with the children, and she was diagnosed with a borderline personality disorder. Holmes v. Holmes, 958 So. 2d 844, 2007 Miss. App. LEXIS 443 (Miss. Ct. App. 2007).

Reversal of a trial court's denial of a mother's request for modification of a child custody order based on changed circumstances was required because, although a guardian ad litem was properly appointed under Miss. Code Ann. § 93-5-23 based on allegations of abuse, the chancellor rejected the guardian's recommendations but did not state the reasons for doing so in the order, nor did he summarize those recommendations as required; in addition, the chancellor did not explain his reasons for declining to follow the child's preference to live with his mother as required by Miss. Code Ann. § 93-11-65. Floyd v. Floyd, 949 So. 2d 26, 2007 Miss. LEXIS 32 (Miss. 2007).

Mother's argument that her 14-year-old daughter's preference for living with her mother should have been given significant weight, if not directly followed, was rejected because an expert testified that because of the symbiotic relationship between mother and daughter, and the effect that relationship had on her, the daughter may not have had another option other than to claim that she preferred to live with her mother; the expert also testified that the daughter was excessively dependent on her mother, which could lead to psychological problems in the daughter's future. Ellis v. Ellis, 952 So. 2d 982, 2006 Miss. App. LEXIS 833 (Miss. Ct. App. 2006).

Court rejected the father's claim that the trial court erred in failing to consider his daughter's preference to live with him because although Miss. Code Ann. § 93-11-65 allows a child who has attained the age of 12 to state her preference to the court as to whether she would rather live with her mother or father, the trial court is not bound to follow the child's preference. Furthermore, there is no authority to support a conclusion that a child's statement, in and of itself, of his or her preference to live with the non-custodial parent would rise to the level of a material or substantial change of circumstances to justify modification of custody. D.A.P. v. C.A.P.R. (In re E. C. P.), 918 So. 2d 809, 2005 Miss. App. LEXIS 439 (Miss. Ct. App. 2005).

When considering a petition to change child custody, the chancellor properly acknowledged the daughter's preference to live with her father to the extent that it related to the girl's education. Glissen v. Glissen, 910 So. 2d 603, 2005 Miss. App. LEXIS 160 (Miss. Ct. App. 2005).

Chancellor properly declined to consider the preferences of the parties' two minor children in determining custody of the children upon their parents' divorce because the children were under the age of 12. Gable v. Gable, 846 So. 2d 296, 2003 Miss. App. LEXIS 461 (Miss. Ct. App. 2003).

Section 93-11-65, which allows a child over the age of 12 the privilege of choosing the parent with whom the child shall live, does not provide any authority which would allow a child to choose a third party, such as a grandparent, over a natural parent. Westbrook v. Oglesbee, 606 So. 2d 1142, 1992 Miss. LEXIS 567 (Miss. 1992).

When a chancellor denies a child his or her choice of custodial parent under § 93-11-65, then the chancellor must make on-the-record findings as to why the best interest of the child is not served. Polk v. Polk, 589 So. 2d 123, 1991 Miss. LEXIS 820 (Miss. 1991).

In determining whether there was a substantial and material change in circumstances to warrant a modification of child custody, the lower court would be required to consider the fact that the child had chosen to live with his mother, as well as the fact that the child had passed 12 years of age and could qualify under § 93-11-65 to choose his custodial parent, as factors to be considered on remand along with any other evidence the parties wished to produce. Polk v. Polk, 589 So. 2d 123, 1991 Miss. LEXIS 820 (Miss. 1991).

Although the rules regulating provisions for custody of minor children do not reflect a policy of encouraging separation of siblings, a chancery court did not commit error when it provided that the parties' older child would reside with his father while the younger child would continue to reside with the mother, where the judge conferred with the older child in chambers and found that he wished to live with his father, the child was over 15 years of age, and the court made elaborate provision for assuring that the children were together as much as was reasonably practicable given their residence in separate communities and their attendance at different schools. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

Assuming that this section [Code 1942, § 1263.5] is applicable in a habeas corpus hearing, it is not mandatory that the court accede to the desires of a 13-year-old boy as to which parent he preferred to live with, despite the fact that both parents were equally fit to be awarded custody of him. Mixon v. Bullard, 217 So. 2d 28, 1968 Miss. LEXIS 1256 (Miss. 1968).

5. —Miscellaneous.

Polestar consideration in child custody cases was the best interest and welfare of the child; the Albright case provided Mississippi courts with guidelines for determining the best placement of the child when adjudicating custody disputes, such that where the trial court did not recite any of the Albright factors or specifically mention the Albright case or its factors in its ruling, the trial court erred as a matter of law by failing to analyze and make proper findings as to each factor under Albright. Lowery v. Mardis, 867 So. 2d 1053, 2004 Miss. App. LEXIS 207 (Miss. Ct. App. 2004).

A chancellor did not err in awarding permanent primary child custody to the mother, even though she had committed adultery and temporary custody had been awarded to the father, where the chancellor found that the mother had greater willingness and capacity to learn proper parenting skills, the father's psychological profile was potentially detrimental to the children, and "coaching" of the children had occurred while they were in the father's custody. Williams v. Williams, 656 So. 2d 325, 1995 Miss. LEXIS 280 (Miss. 1995).

The doctrine of unclean hands cannot override a chancellor's duty to award custody in the best interests of the child. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

A chancellor did not abuse his discretion in awarding custody of a 14-year-old boy to his mother on the ground that the father was unfit to be a parent, even though the child testified that he preferred to live with his father, where the child's testimony indicated that his relationship with his mother would seriously deteriorate if he were allowed to live with his father, and the father had encouraged the child to ignore and disobey his mother, allowed him to chew tobacco and dip snuff, allowed him to ride a 4-wheeler without adult supervision, allowed him to carry and shoot a .357 magnum pistol without adult supervision, kept his supply of pornographic movies in the child's bedroom, told him he would buy the child a truck if he stayed with him after the divorce, and belittled his wife in the child's presence and encouraged the child to do the same. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

A chancellor erred in awarding custody of a child to her maternal aunt rather than her father where there was no finding that the father was unfit to have custody of the child, and the main foundation for the ruling was the chancellor's concern about separating the child from her half-brother; while the separation of siblings may be an important consideration, it may not be used as a basis to deprive a parent of his or her child in favor of a third party unless the parent has been found to be unfit. Sellers v. Sellers, 638 So. 2d 481, 1994 Miss. LEXIS 311 (Miss. 1994).

A chancellor did not err in awarding custody of a child to his father, even though the mother "may have presented enough evidence at trial to let one conclude that custody should have been awarded to her," where the weight of the evidence in favor of the mother was not so great as to make an award of custody to the father erroneous, the wife stated that the father was a good parent and that he and the child were close, and the only evidence of the father's alleged physical abuse of the child was the mother's uncorroborated testimony. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

A chancellor did not err in awarding physical custody of 2 minor children to their mother where the chancellor awarded the parents joint legal custody, both parents were found to be fit and proper parents, the mother was the primary caregiver though both parents played active parenting roles, the father had a work schedule based on 12-hour shifts and the only option he had considered for child care while he was at work was his elderly mother who had suffered a stroke, the father did not dispute the mother's ability to care for the children, and the father was given liberal visitation rights. Moak v. Moak, 631 So. 2d 196, 1994 Miss. LEXIS 44 (Miss. 1994).

A father's act of signing a routine waiver of process incident to a proceeding for the appointment of a guardian for his son did not constitute "abandonment" and he did not thereby relinquish his custody rights to the child; the mere appointment of a guardian of the person and/or estate of a minor does not of itself strip a parent of all of his or her rights in the child, nor is there anything in the nature of a guardianship that requires it to last until adulthood. Ethredge v. Yawn, 605 So. 2d 761, 1992 Miss. LEXIS 440 (Miss. 1992).

The evidence was not sufficient to support a change in child custody from the mother to the father where the only evidence of the mother's instability was her frequent moves within a short period of time, along with the psychological condition of the children which was questioned at trial. Cooley v. Cooley, 574 So. 2d 694, 1991 Miss. LEXIS 15 (Miss. 1991), overruled, Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

A court order requiring a custodial mother to obtain court approval before she could move her residence was erroneous and unenforceable. It is an incident of custody that the parent having physical custody provide a residence for the child where he or she thinks is appropriate; the location of this residence is a matter committed to the discretion of the custodial parent in the first instance. A court may only intervene where there has been a material change in circumstances which adversely affect the child and it is shown that the best interests of the child require a modification of custody; a change of residence is not per se a change of circumstance. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

Although the rules regulating provisions for custody of minor children do not reflect a policy of encouraging separation of siblings, a chancery court did not commit error when it provided that the parties' older child would reside with his father while the younger child would continue to reside with the mother, where the judge conferred with the older child in chambers and found that he wished to live with his father, the child was over 15 years of age, and the court made elaborate provision for assuring that the children were together as much as was reasonably practicable given their residence in separate communities and their attendance at different schools. Bell v. Bell, 572 So. 2d 841, 1990 Miss. LEXIS 582 (Miss. 1990), modified, 1990 Miss. LEXIS 869 (Miss. Dec. 12, 1990).

A chancellor was not "manifestly wrong" in changing custody of a daughter from the mother to the father where the mother's move to Alaska had an "adverse effect" on the daughter, the parties' original divorce decree provided custody of the parties' son in the father and custody of their daughter in the mother, the daughter visited with her brother every day prior to the move to Alaska, and the mother had a poor relationship with her son. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

6. Third party custody.

Grandparents have no right to custody of a grandchild as against a natural parent; thus, a chancellor erred in awarding custody of a child to his grandmother based on the finding that the child's father was "unprepared" where the chancellor did not make a specific finding as to whether the father was an unfit parent. Carter v. Taylor, 611 So. 2d 874, 1992 Miss. LEXIS 790 (Miss. 1992).

Section 93-11-65, which allows a child over the age of 12 the privilege of choosing the parent with whom the child shall live, does not provide any authority which would allow a child to choose a third party, such as a grandparent, over a natural parent. Westbrook v. Oglesbee, 606 So. 2d 1142, 1992 Miss. LEXIS 567 (Miss. 1992).

Chancellor erred in granting custody of children to grandmother in absence of showing that natural father had abandoned children or was immoral or unfit. Rutland v. Pridgen, 493 So. 2d 952, 1986 Miss. LEXIS 2594 (Miss. 1986).

It was error to award custody of a minor child to her paternal grandparents rather than to her mother where, although the child had lived with the grandparents for approximately three-and-one-half years before the custody dispute and for briefer periods before then, the mother had visited frequently and sent gifts and there was no finding that she had abandoned her child or that she was unfit for her custody. Clifford v. Bank of Morton, 331 So. 2d 903, 1976 Miss. LEXIS 1881 (Miss. 1976).

A father was entitled to regain custody of his minor son from the child's maternal grandmother, who had been awarded the custody previously, where a change in circumstances was shown in that, since his discharge from military service, the father had obtained a job as a barber earning approximately $80 per week, had additional income from the G. I. bill, was attending college, had remarried and was living in a good neighborhood, and, further, that he had visited the child often in the home of the grandmother and had contributed regularly to the child's support. Thompson v. Foster, 244 So. 2d 395, 1971 Miss. LEXIS 1328 (Miss. 1971).

7. Visitation.

Substantial basis for Chancellor's finding of viable relationship between minor child and his paternal grandparents, supporting grandparents' petition for visitation rights following parents' divorce, was provided by evidence that grandparents gave financial support to parents before parents' separation through use of grandparents' gas credit card and monetary support, and that grandparents regularly visited child both before and after parents' separation. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Substantial basis for Chancellor's finding that granting visitation rights to minor child's paternal grandparents was in child's best interest, supporting grandparents' petition for visitation rights following parents' divorce, was provided by evidence that child would have little exposure to his father, who was stationed away from home as member of United States Navy, but for child's contact with grandparents, who exchanged videotapes with father. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Granting paternal grandparents right to every-other-weekend visitation with their grandchild was not excessive, where primary basis was father's inability to exercise his parental visitation rights due to his being stationed away from home as member of United States Navy, and where the right was to be concurrent with any visitation exercised by father. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Natural grandparents have no common-law right of visitation with their grandchildren; such right must come from legislative enactment. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Natural grandparents' statutory right to visit their grandchildren is not as comprehensive as parents' visitation rights. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

A chancellor erred in amending a visitation order to restrict a father's visitation with his two daughters to daytime hours on the basis that he taught his children Christian principles while living with a woman to whom he was not married where there was not substantial evidence in the record supporting the chancellor's finding that the children were confused by the father's alleged hypocrisy; moreover, even if the children were confused or did not like their father's living arrangements, that is not the type of harm that rises to the level necessary to overcome the presumption that a non-custodial parent is entitled to overnight visitation. Harrington v. Harrington, 648 So. 2d 543, 1994 Miss. LEXIS 632 (Miss. 1994).

A chancellor erred in suspending all visitation rights of a father, even though there was ample evidence that the child had been sexually abused, where there was not substantial credible evidence that the father was the abuser; however, the evidence warranted restriction of visitation, since there was conflicting evidence as to the identity of the abuser. Doe v. Doe, 644 So. 2d 1199, 1994 Miss. LEXIS 528 (Miss. 1994).

A chancellor abused his discretion in requiring that during a mother's visitation with her minor child the child could not be in the presence of "any male companion not related to her by blood or marriage," since such a sweeping restriction was clearly overbroad; the fact that a parent is having an affair is not enough to create the danger requisite to limit visitation with a child. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

A chancellor erred in determining that a father was not entitled to regular overnight visitation with his minor son, where there was no substantial evidence in the record tending to show that such visitation would be detrimental to the son in any way, since non-custodial parents are presumptively entitled to regular overnight visitation with their children. Wood v. Wood, 579 So. 2d 1271, 1991 Miss. LEXIS 308 (Miss. 1991).

There was no abuse of discretion in visitation provisions which granted a father visitation with his 15-year-old son 7 days at Christmas and 2 weeks during the summer, "and such other visitation as could be worked out" between the father and son, where the father had voluntarily moved to another state which made regular visitation more difficult, the father chose to live in a home which was several levels below what he could actually afford and provided little or no testimony of features of the home which might be conducive to visitation, and the son testified that he disliked the father. Caldwell v. Caldwell, 579 So. 2d 543, 1991 Miss. LEXIS 236 (Miss. 1991).

When a non-custodial parent has unsupervised visitation rights, the custodial parent has no right to interfere with the non-custodial parent's visitation with his or her children. Thus, a mother's wishes that her children not fly in a private plane was not sufficient to deny the father the right to provide flying lessons or to fly his children in his private airplane during his visitation hours, where there was no evidence that flying would endanger the children's lives or that the children were opposed to flying or taking flying lessons. Mord v. Peters, 571 So. 2d 981, 1990 Miss. LEXIS 716 (Miss. 1990).

A chancellor did not abuse his discretion in ordering that a mother's visitation with her children was to be exercised outside the presence of the mother's lesbian partner. White v. Thompson, 569 So. 2d 1181, 1990 Miss. LEXIS 631 (Miss. 1990).

Visitation privileges should be reasonable and appropriate, fostering a positive and harmonious relationship between the children and parent. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

A chancellor did not err in severely restricting a mother's visitation with her children to not more than once per week, for no more than one and ½ hours, in the father's home, where the mother had secreted the children and refused to deliver them in defiance of a court order changing custody from the mother to the father; the safety and welfare of the minor children compelled the chancellor to act in their best interest, protecting them from abduction by the mother. Newsom v. Newsom, 557 So. 2d 511, 1990 Miss. LEXIS 43 (Miss. 1990).

Although the chancellor found that a father who had killed his child's mother was mentally and morally unfit to have the child's custody, and granted complete custody to the maternal grandparents, it was not error for the chancellor to grant liberal visitation rights to the father. Veselits v. Cruthirds, 548 So. 2d 1312, 1989 Miss. LEXIS 430 (Miss. 1989).

The Mississippi court had continuing jurisdiction to enforce its prior order awarding custody of a child to his father, visitation to his mother, and requiring the father to post a ne exeat bond, even though the father and child had moved to Illinois and had filed a petition for modification of visitation rights in Illinois, where the father was still subject to the ne exeat bond to comply with the prior order and the Mississippi court exercised continuous and ongoing jurisdiction of the matter with full notice and appearance by all parties. Roberts v. Fuhr, 523 So. 2d 20, 1987 Miss. LEXIS 2891 (Miss. 1987).

8. Modification.

Chancellor erred in finding a material change in circumstances warranting modification, as the mother failed to present any proof that the father's living situation had changed at all since the modified divorce decree was entered, that it had adversely affected the child, or that the child was in danger. Campbell v. Watts, 192 So. 3d 317, 2015 Miss. App. LEXIS 538 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 208, 2016 Miss. LEXIS 209 (Miss. 2016).

Child's election alone was not sufficient to support a finding of a change in circumstances. Campbell v. Watts, 192 So. 3d 317, 2015 Miss. App. LEXIS 538 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 208, 2016 Miss. LEXIS 209 (Miss. 2016).

Chancery court properly denied a mother's petition for modification of child custody because the chancellor was in the best position to assess the witnesses, did not believe a mother's assertions of sexual abuse, and did believe a father's explanations with regard to the allegations. The father explained that their daughter had a diaper rash requiring him to put Desitin on the affected area and that the daughter was bitten while playing at school with other children. Lorenz v. Strait, 987 So. 2d 427, 2008 Miss. LEXIS 359 (Miss. 2008).

Mother was not entitled to an increase in child support because, based on the evidence, including the parties' Miss. Unif. Ch. Ct. R. 8.05 financial statements, she failed to show a material change in circumstances; the fact that the parties' children had aged was not determinative absent a showing that a corresponding increase in expenses was not foreseeable when the parties' first stipulated to child support, and there was no showing of a material change based on one child's medical issues as it was not shown that those issues would persist. McNair v. Clark, 961 So. 2d 73, 2007 Miss. App. LEXIS 473 (Miss. Ct. App. 2007).

Transfer of paramount physical custody from the mother to the father was proper where the mother's relocation out of state with the children created a material change in circumstances adversely affecting the welfare of the children. In addition, one of the children, the 13-year-old, expressed a legally relevant desire to live with her father pursuant to Miss. Code Ann. § 93-11-65. Marter v. Marter, 914 So. 2d 743, 2005 Miss. App. LEXIS 477 (Miss. Ct. App. 2005).

Termination of the father's future duty to provide child support was awarded by the trial court where it found that there was a breakdown in the parent-child relationship; however, it was to be expected that there would be some unpleasantness coming from a child who had had no relationship with his father and when the father had been behind in his child support payments, and that such conduct was not sufficiently clear and extreme to forfeit his right to support from his father. Dep't of Human Servs. v. Marshall, 859 So. 2d 387, 2003 Miss. LEXIS 658 (Miss. 2003).

Although the 12-year-old son expressed a preference to live with his father, there was not any change of circumstances warranting modification of custody from the mother to the father, as there was no declaration by the child of sound, reasonable, and compelling reasons why he thought the change of custody was in his best interests, and the father had presented no convincing evidence that the custodial situation with the mother had deteriorated to adversely affect the child's welfare. Best v. Hinton, 838 So. 2d 306, 2002 Miss. App. LEXIS 494 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. App. LEXIS 176 (Miss. Ct. App. 2003).

It was harmless error to extend psychotherapist-patient privilege to exclude licensed clinical social worker's testimony, in action to modify custody provisions of divorce decree, regarding mother's interference with and "coaching" of child while he was being examined, where mother freely acknowledged her participation in the examination session. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Custody may be modified where environment provided by the custodial parent is found to be adverse to the child's best interest and circumstances of the noncustodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Neither nasty exchanges between former spouses when picking up or dropping off child for visitation, nor former wife's implication that former husband had sexually abused child warranted change in custody; although child was subjected to some gross unpleasantries between his parents, record did not remotely suggest that these episodes were characteristic of the overall circumstances in which he lived. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Isolated incident, e.g., an unwarranted striking of a child, does not in and of itself justify a change of custody; rather, it must be the overall circumstances in which a child lives, likely to remain unchanged in the foreseeable future and adversely impacting a child, to warrant change of custody. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Trial court did not abuse its discretion by excluding, in custody modification proceeding, arguably repetitive testimony concerning incident in which mother bit another woman on the arm. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Unsubstantiated request for attorney fees would be denied, given that there were no "good guys" in child custody modification action at issue and that former husband's appeal raised issue of first impression with regard to scope of psychotherapist-patient privilege. Touchstone v. Touchstone, 682 So. 2d 374, 1996 Miss. LEXIS 534 (Miss. 1996).

Change in circumstances warranting modification of custody is one in overall living conditions in which child is found. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Totality of circumstances must be considered in determining whether to modify child custody. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Change of circumstances in noncustodial parent is not in and of itself sufficient to warrant a modification of custody. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

When environment provided by custodial parent is found to be adverse to child's best interest, and circumstances of noncustodial parent have changed such that he or she is able to provide an environment more suitable than that of custodial parent, Chancellor may modify custody accordingly. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Where a child living in a custodial environment clearly adverse to child's best interest somehow appears to remain unscarred by his or her surroundings, Chancellor is not precluded from removing child for placement in a healthier environment. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Evidence that home of custodial parent is site of dangerous and illegal behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that environment has adversely affected child's welfare. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Once Chancellor determined that mother's home was site of illegal drug use, as well as other behavior adverse to child's welfare, and determined that father's circumstances had improved such that he was able to provide a good home for child, it was within his discretion to transfer custody from mother to father, despite fact that Chancellor could not discern any negative effect on child caused by mother's home environment. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Chancellor is never obliged to ignore a child's best interest in weighing a custody change; in fact, a Chancellor is bound to consider child's best interest above all else. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

Test for custody modification need not be applied so rigidly, nor in such a formalistic manner, so as to preclude Chancellor from rendering a decision appropriate to facts of individual case. Riley v. Doerner, 677 So. 2d 740, 1996 Miss. LEXIS 287 (Miss. 1996).

A chancellor erred in changing custody of a 6-year-old girl from her mother to her father based solely on the child's unusual knowledge of sexual conduct allegedly gained from her accidental exposure to sexual relations between her mother and stepfather where the totality of the facts and circumstances failed to support a finding that the child's best interest would be served by a change in custody. Smith v. Jones, 654 So. 2d 480, 1995 Miss. LEXIS 151 (Miss. 1995).

A chancellor erred in failing to grant a father's request for modification of custody of his 18-year old daughter where both parents and the daughter agreed that she should be in the father's custody, she had been living with the father, and the chancellor had reduced the father's child support obligation to reflect this living arrangement. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

An extramarital relationship is not, per se, an adverse circumstance warranting modification of a custody decree. Thus, a chancellor's modification of a joint child custody decree by forbidding the mother to continue conducting her "illicit" relationship with her male friend while her daughter resided with her was sufficient where there was no substantial credible evidence showing an adverse change affecting the child of such proportions that the child's best interest would be served by further modifying the custody decree. Morrow v. Morrow, 591 So. 2d 829, 1991 Miss. LEXIS 868 (Miss. 1991).

In determining whether there was a substantial and material change in circumstances to warrant a modification of child custody, the lower court would be required to consider the fact that the child had chosen to live with his mother, as well as the fact that the child had passed 12 years of age and could qualify under § 93-11-65 to choose his custodial parent, as factors to be considered on remand along with any other evidence the parties wished to produce. Polk v. Polk, 589 So. 2d 123, 1991 Miss. LEXIS 820 (Miss. 1991).

The evidence did not reflect a material change in the circumstances of a child and his parents, which adversely affected the child, to the extent that a change of custody from the mother to the father was warranted, where the mother called upon the father for help when she fell upon hard times, the father had custody of the child for 16 months while the mother had liberal visitation, and the mother asked the father to restore custody to her when her situation stabilized, but the father declined; the parties' act, in temporarily modifying the custody decree, was not binding upon the court. Arnold v. Conwill, 562 So. 2d 97, 1990 Miss. LEXIS 227 (Miss. 1990).

A chancellor was not "manifestly in error" in refusing to modify the custody of 2 children from their father to their mother, even though the father's activities in attempting to exclude the mother from the children's lives were very iniquitous and hurtful to the children, where the mother failed to show a material change in circumstances that adversely affected the children. Stevison v. Woods, 560 So. 2d 176, 1990 Miss. LEXIS 205 (Miss. 1990).

A chancellor did not err in his determination that a material change in circumstances adverse to the welfare and best interests of the children warranted a change in custody from the mother to the father where the mother had moved and changed employment several times during the year after the parties' divorce, daycare arrangements were similarly changed, the mother had subjected the children to numerous unwarranted physical and psychological examinations, not for treatment, but for investigation and interrogation as to alleged sexual abuse, and the daughter had exhibited distress and disturbance when being returned to the mother at the end of a visitation period with the father, while the father held a stable position and maintained a stable home, with his parents providing alternative care. Newsom v. Newsom, 557 So. 2d 511, 1990 Miss. LEXIS 43 (Miss. 1990).

There are 2 prerequisites to a modification of child custody. First, the moving party must prove by a preponderance of the evidence that, after the entry of the judgment sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child. Second, if such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody. Phillips v. Phillips, 555 So. 2d 698, 1989 Miss. LEXIS 510 (Miss. 1989).

A father was entitled to regain custody of his minor son from the child's maternal grandmother, who had been awarded the custody previously, where a change in circumstances was shown in that, since his discharge from military service, the father had obtained a job as a barber earning approximately $80 per week, had additional income from the G. I. bill, was attending college, had remarried and was living in a good neighborhood, and, further, that he had visited the child often in the home of the grandmother and had contributed regularly to the child's support. Thompson v. Foster, 244 So. 2d 395, 1971 Miss. LEXIS 1328 (Miss. 1971).

A decree in a custody proceeding, adjudicating that a father had abandoned his child and awarding custody to the maternal grandmother, was not res judicata with respect to the father's petition in which he sought a modification of the decree on the ground of a change in circumstances, since such rule would be too rigid and inflexible for such a sensitive area of the law as the custody of a child, the most important consideration in such case being what is for the best interest of the child. Thompson v. Foster, 244 So. 2d 395, 1971 Miss. LEXIS 1328 (Miss. 1971).

9. Jurisdiction.

Because there was a pending divorce action and Miss. Code Ann. § 93-11-65 did not allow assumption of jurisdiction over a contested divorce, the trial court had no jurisdiction in the custody matter and could not proceed; thus, the trial court erred by failing to grant the husband's motion to dismiss in toto. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

Reading Miss. Code Ann. §§ 93-5-23 and 93-11-65 together, Miss. Code Ann. § 93-5-23 concerns divorce actions and a court's ability to make orders touching child custody, whereas, Miss. Code Ann. § 93-11-65 is in addition to the remedies already available in Miss. Code Ann. § 93-5-23. The key to those statutes is that Miss. Code Ann. § 93-5-23 provides for the child's care and custody in a divorce situation and Miss. Code Ann. § 93-11-65 states that it is an alternative, in addition to Miss. Code Ann. § 93-5-23. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

A proper reading of all the three statutes, Miss. Code Ann. §§ 93-5-11, 93-5-23 and 93-11-65, does not provide for a custody matter to proceed under Miss. Code Ann. § 93-11-65 when a divorce is pending. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

The mandatory filing provisions for contested and irreconcilable differences divorces are clearly stated in Miss. Code Ann. § 93-5-11. The statutory requirements for proper filing of a divorce action are straightforward and clear and may not be circumvented by an attempt to expand § 93-5-11 through the use of Miss. Code Ann. § 93-11-65, nor indirectly through Miss. Code Ann. § 93-5-23; to find otherwise would negate the need for Miss. Code Ann. § 93-5-11 and create judicial conflict. Slaughter v. Slaughter, 869 So. 2d 386, 2004 Miss. LEXIS 317 (Miss. 2004).

Pursuant to Miss. Code Ann. § 93-11-65, exclusive and continuing jurisdiction over the issues of enforcement of child support lay in the first chancery court, which granted the judgment of divorce and ordered the payment of child support; thus, the second chancery court erred in asserting jurisdiction as it did not have jurisdiction to adjudicate contempt matters relating to the child support issue and the Lauderdale court erred in denying the father's writ of habeas corpus. The appellate court ordered that the father should be immediately released. Harry v. Harry, 856 So. 2d 748, 2003 Miss. App. LEXIS 947 (Miss. Ct. App. 2003).

The Mississippi court had continuing jurisdiction to enforce its prior order awarding custody of a child to his father, visitation to his mother, and requiring the father to post a ne exeat bond, even though the father and child had moved to Illinois and had filed a petition for modification of visitation rights in Illinois, where the father was still subject to the ne exeat bond to comply with the prior order and the Mississippi court exercised continuous and ongoing jurisdiction of the matter with full notice and appearance by all parties. Roberts v. Fuhr, 523 So. 2d 20, 1987 Miss. LEXIS 2891 (Miss. 1987).

The provisions of the Uniform Child Custody Jurisdiction Act governed a child custody action even though the complaint stated that custody was sought pursuant to § 93-11-65, which provides for chancery jurisdiction in child custody cases. Walters v. Walters, 519 So. 2d 427, 1988 Miss. LEXIS 43 (Miss. 1988).

A suit to establish paternity and child support brought by the Department of Public Welfare would be remanded for the chancellor to determine whether to hear all the issues, including a cross bill against the natural mother for custody and a motion to make her a party, in which case he would have authority to hear the case under § 93-11-65 in that one of the issues would be child custody, or to transfer venue to the county of the natural father's residence pursuant to § 93-9-17. McCollum v. State Dep't of Public Welfare, 447 So. 2d 650, 1984 Miss. LEXIS 1686 (Miss. 1984).

A person charged with being the natural father in a paternity action under both Miss. Code Ann. § 43-19-31 and Miss. Code Ann. § 93-9-9 is entitled to be sued in the county of his residence, in that the venue provision of Miss. Code Ann. § 93-9-17 would control; however, if the chancellor could have sustained the requested motion to make the mother a party and also entertained the submitted cross-bill praying for custody, the Chancery Court of the First Judicial District of Hinds County would have authority to hear the case, because one of the issues would have been child custody, and Miss. Code Ann. § 93-11-65 would have been applicable. McCollum v. State Dep't of Public Welfare, 447 So. 2d 650, 1984 Miss. LEXIS 1686 (Miss. 1984).

In a proceeding under § 93-11-65 instituted in the Chancery Court of Coahoma County for the custody and support of a minor child, the chancellor properly overruled the defendant's motion to dismiss for lack of jurisdiction where the court would have jurisdiction over the case if it were determined that a 1978 Oklahoma divorce between the parties was valid. The Chancery Court of Rankin County did not possess continuing jurisdiction over the child as the result of a 1978 habeas corpus proceeding which awarded custody of the child to its father since a habeas corpus court is a special court convened to try a single cause, and when a final judgment is rendered, its functions and powers cease; the holding in Leggett v. Leggett (1947) 202 Miss 435, 32 So. 2d 189, which held that the chancery court in a habeas corpus proceeding retains continuing jurisdiction over minor children is hereby overruled. Roach v. Lang, 396 So. 2d 11, 1981 Miss. LEXIS 1976 (Miss. 1981).

In a child custody proceeding brought by the mother pursuant to this section, the trial court's error in dismissing the mother's action was harmless where the court immediately held a full hearing on the father's petition for a writ of habeas corpus, which hearing was the same as would have been held under the mother's original suit; the trial court had jurisdiction to hear the mother's suit alleging a change of circumstances, where the Alabama court that had granted custody to the father had the right to modify the terms of the decree. Further, the trial court had complete jurisdiction to hear a child custody matter in a habeas corpus proceeding under § 11-43-1. Brashers v. Green, 377 So. 2d 597, 1979 Miss. LEXIS 2523 (Miss. 1979).

The authority of the court mentioned in Code 1942, § 1263.5, does not act to deprive the original chancery court of jurisdiction of child custody cases where custody has been awarded in a divorce proceeding previously filed, and this is true although the child is later removed to another county. Dubois v. Dubois, 275 So. 2d 100, 1973 Miss. LEXIS 1348 (Miss. 1973).

The rule being well established that a chancery court which grants the custody of children in a divorce proceeding has, as between the same parties, continuing exclusive jurisdiction to modify the decree upon subsequent changed circumstances, the chancery court in the county in which the children and divorced parents resided was without jurisdiction to modify the decree of custody entered by the chancery court of another county, notwithstanding the statute providing that an action to determine the legal custody of a child may be brought in the county where the child is actually residing, in the county of residence of a party who has actual custody, or in the county of the residence of the defendant. Reynolds v. Riddell, 253 So. 2d 834, 1971 Miss. LEXIS 1231 (Miss. 1971).

Assuming that the chancery court did not have jurisdiction to render a divorce decree, the court did have jurisdiction to entertain the proceeding with respect to the custody, care, support, and maintenance of the minor children of the parties where the husband to whom custody was awarded and the children were physically present within the county in which the action was brought at the time the decree was entered. Neal v. Neal, 217 So. 2d 639, 1969 Miss. LEXIS 1578 (Miss. 1969).

This section [Code 1942, § 1263.5] was intended to give the chancery court independent jurisdiction of suits for the custody of minor children and implements its constitutional power in this respect, and a custody proceeding brought to modify an agreed judgment entered in a prior habeas corpus proceeding will be treated as if brought under this section. Mitchell v. Powell, 253 Miss. 867, 179 So. 2d 811, 1965 Miss. LEXIS 1064 (Miss. 1965).

10. Appointment of guardian ad litem.

Chancery court did not err in failing to appoint a guardian ad litem, sua sponte, to investigate a father's allegations of neglect because the allegations were either not severe enough to require investigation or were adequately investigated by an agent of the court who acted as a guardian ad litem in all but name, the agent, the parties, and the court all seemed to have understood the agent to have been assigned to act as a neutral, investigative agent for the court, and, while the mother's home environment could have had some harmful effects on the child and the father was more attendant to her care, a pediatric endocrinologist found no evidence that the child was abused or neglected. Carter v. Carter, 204 So. 3d 803, 2015 Miss. App. LEXIS 687 (Miss. Ct. App. 2015), aff'd on other grounds, 204 So. 3d 747, 2016 Miss. LEXIS 489 (Miss. 2016).

II. SUPPORT OF CHILDREN.

11. Generally.

Plaintiff's tort action based on events that occurred when he was 19 years old was timely as it was filed less than three years after his 21st birthday; removal of the disability of minority did not arise automatically upon the occurrence of specified events except for reaching the age of 21, and thus, plaintiff's emancipation did not trigger the automatic removal of disability of minority. Baker v. RR Brink Locking Sys., 721 F.3d 716, 2013 U.S. App. LEXIS 13884 (5th Cir. Miss. 2013).

Chancellor did not abuse his discretion in requiring the father to pay three months' child support for the time the mother took the parties' minor child to California and deprived the father from his visitation. The mother did not waive her right to demand child support. Balius v. Gaines, 95 So. 3d 730, 2012 Miss. App. LEXIS 488 (Miss. Ct. App. 2012).

Husband was required to pay back child support for the twelve months preceding the temporary child support order, Miss. Code Ann. § 93-11-65(1)(b), as the parties brought the matter before the chancellor with the agreed order signed by both parties and by the evidence presented during the hearing, which addressed child support payments prior to the issuance of a temporary support order. Strong v. Strong, 981 So. 2d 1052, 2008 Miss. App. LEXIS 266 (Miss. Ct. App. 2008).

Trial court did not err in requiring that the father continue to make child support payments to the mother according to Miss. Code Ann. § 93-11-65(1)(c), as the child lived with her mother until she attended college and the mother maintained a room and bathroom for the child when she came home on weekends. Wallace v. Wallace, 965 So. 2d 737, 2007 Miss. App. LEXIS 611 (Miss. Ct. App. 2007).

Chancery court did not err by ordering the payment of some child support from the veteran's benefits of a father because there was no indication that his benefits were being garnished; moreover, he failed to show that he had waived a portion or all of his retirement benefits in order to receive greater disability benefits. Edmond v. Townes, 949 So. 2d 99, 2007 Miss. App. LEXIS 40 (Miss. Ct. App. 2007).

Father's request to terminate child support for his eldest son was properly denied because the facts did not show that their relationship had deteriorated to the necessary point merely based on the fact that the two did not communicate after the father filed a legal action against the mother alleging abuse; the relationship could have been salvaged, and the father had not done everything possible to try and repair it. Dykes v. McMurry, 938 So. 2d 330, 2006 Miss. App. LEXIS 683 (Miss. Ct. App. 2006).

When an action for contempt was started by a former wife, the child of the parties was well into adulthood, so that the obligation to pay child support had ended, and, although the former husband should have sought to have had the divorce decree modified prior to changing his former wife as a beneficiary on his life insurance policy, a finding of contempt was a seemingly harsh result because their child was an adult and to have required him to have complied with the decree would have resulted in the former wife being unjustly enriched. Patterson v. Patterson, 915 So. 2d 496, 2005 Miss. App. LEXIS 919 (Miss. Ct. App. 2005).

Although the majority of states exempted SSI benefits from inclusion in calculating gross income for child support purposes, the trial court's award was not based solely on the SSI benefits; the father did have the ability to pay some child support and was not as destitute as he claimed or that he was as incapacitated as he claimed, or that he was precluded from earning some income for his child. Lee v. Lee, 859 So. 2d 408, 2003 Miss. App. LEXIS 911 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in determining that the former husband was entitled to a credit for the amount he paid as child support past the time his oldest child turned 21-years-old as the former husband's duty of support terminated by operation of law at the time the older child turned 21-years-old. Houck v. Houck, 812 So. 2d 1139, 2002 Miss. App. LEXIS 111 (Miss. Ct. App. 2002).

The chancellor was well within his discretion in ordering the non- custodial parent to pay child support to the custodial parent, even though it was a mother paying to her ex-husband, where the mother earned about $15,000 per year and the father earned about $40,000 per year. McGehee v. Upchurch, 733 So. 2d 364, 1999 Miss. App. LEXIS 53 (Miss. Ct. App. 1999).

A chancellor erred in dismissing a father's petition for abatement of child support where the father was in compliance with the court's previous decree at the time he filed for modification, preventing a finding of unclean hands, and he showed a material change in his financial circumstances which arose subsequent to entry of the previous decree; however, the modification could not relate back to the time of filing, and therefore the chancellor's award for child support payments which accrued during litigation of the father's motion would be affirmed. Setser v. Piazza, 644 So. 2d 1211, 1994 Miss. LEXIS 526 (Miss. 1994).

A chancellor erred in finding a father in willful contempt for failure to make child support payments and jailing him after allowing only one week to purge himself of such contempt, since the father should have been given a more reasonable, limited amount of time to make the payment where he had been unemployed for approximately 6 months due to a fire that destroyed his office building and had reopened his medical practice and was again earning income at the time of the hearing. Gambrell v. Gambrell, 644 So. 2d 435, 1994 Miss. LEXIS 494 (Miss. 1994).

A chancellor erred in ordering a father to pay child support without taking into consideration all the relevant factors, including the father's ability to pay and the mother's income. Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

A disabled child's receipt of Supplemental Security Income from the Social Security Administration does not reduce parental support obligations. Hammett v. Woods, 602 So. 2d 825, 1992 Miss. LEXIS 299 (Miss. 1992).

In a proceeding to modify child support provisions, the burden of proof is on the petitioner to show a material change of circumstances of one or more of the interested parties-the father, mother, or child-arising subsequent to the original decree. However, the material change which must be proved in support modification proceedings does not have to be a change which "adversely affects the minor child," as is required in custody modification proceedings. Adams v. Adams, 591 So. 2d 431, 1991 Miss. LEXIS 843 (Miss. 1991).

The fact that a child has been emancipated does not pretermit recovery of vested but unpaid child support. Either the child or the former custodial parent may bring an action against the defaulting parent, though the latter receives any recovery in his or her continuing fiduciary capacity subject to all of the duties and strictures thereof. If by reason of the supporting parent's default, the custodial parent is forced to dip into his or her own resources beyond what would otherwise be expected of him or her, he or she may recover and retain amounts so proved, subject to equitable adjustment should the child's prior needs so suggest. Varner v. Varner, 588 So. 2d 428, 1991 Miss. LEXIS 719 (Miss. 1991).

A father would be required to continue to pay support for his 15-year-old son, in spite of the father's argument that his son had totally abandoned the father-son relationship and the son's admission that he felt a great deal of hostility toward his father, where the son had sought professional counseling and advice to deal with his feelings toward his father and openly talked of trying to improve the relationship. While it is possible that there could be a situation where a minor child as young as 15 might by his or her actions forfeit support from a non-custodial parent, those actions would have to be clear and extreme. Caldwell v. Caldwell, 579 So. 2d 543, 1991 Miss. LEXIS 236 (Miss. 1991).

The effective date of a modification of child support payments should be the date of the petition to modify or thereafter, within the sound discretion of the trial court. Lawrence v. Lawrence, 574 So. 2d 1376, 1991 Miss. LEXIS 17 (Miss. 1991).

A child support agreement, submitted to the court pursuant to § 93-5-2, which ends support for a child before that child reaches the age of 21 or is otherwise emancipated, is unenforceable as to the rights of the child. Lawrence v. Lawrence, 574 So. 2d 1376, 1991 Miss. LEXIS 17 (Miss. 1991).

A mother was not automatically entitled to reasonable attorney's fees merely because she successfully defeated the father's efforts to reduce his child support obligation. The general rule that a father who seeks alteration of his child support liability to the mother without justification should pay for the mother's attorney's fees does not hold where the equities are otherwise. Thus, a court was within its authority when it held that the mother was not entitled to an award of attorney's fees where there had been a large volume of claims and counterclaims and intervening discovery disputes, so that the equities differed and were relatively balanced. Additionally, the mother possessed the ability to earn sufficient income to pay reasonable attorney's fees, and much of the expense that the mother's attorneys incurred in litigating the case was unreasonable. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

Social Security benefits received by a mother for the benefit of a minor child under the Social Security Act are considered an alternative source of payment that satisfies child support and should be credited toward that obligation. Moreover, child support obligations are to be off-set, not only to the extent of payments actually received under the Social Security Act, but also for payments that the child was entitled to receive, based on the parent's retirement. Thus, a father's child support obligations would be credited for social security benefits that the minor child was entitled to receive based on the father's retirement, even though social security benefits were elected based on the child's step-father's retirement. Bradley v. Holmes, 561 So. 2d 1034, 1990 Miss. LEXIS 238 (Miss. 1990).

The guidelines for child support awards set forth in § 43-19-101 must not control a chancellor's award of child support. The national guideline must not dictate the amount of food, the need of clothing, the requirement of education or the standard of living of the children. Rather, this should be done by a chancellor who hears all the facts, views the witnesses, and is informed at trial of the circumstances of the parties and particularly the circumstances of the children. The guidelines may be received and considered in all support matters as relevant, but the guidelines may not determine the specific need or the specific support required; this is to be done by a chancellor at a time real, on a scene certain, and with a knowledge special to the actual circumstances and to the individual child or children. Thurman v. Thurman, 559 So. 2d 1014, 1990 Miss. LEXIS 185 (Miss. 1990).

A father was not in contempt for failure to pay child support under an automatic adjustment clause of a property settlement agreement where the agreement was uncertain in that a genuine dispute existed over the amount owed, over the commencement year of the escalation clause, and over which consumer price index was to be utilized. Wing v. Wing, 549 So. 2d 944, 1989 Miss. LEXIS 443 (Miss. 1989).

The age of majority for purposes of child care and maintenance orders issued pursuant to § 93-5-23 and § 93-11-65 is 21 years. Thus, the courts have no authority under these statutes to require parents to provide for the care and maintenance of their child after the child becomes emancipated, by reaching the age of 21, or otherwise, whichever occurs first. This does not foreclose the enforceability of agreements by the parties providing for the post-emancipation care and maintenance of their children, whether those agreements are separate contracts, or have been incorporated into the divorce decree. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

The fact that one child became emancipated and the other child moved into the father's home did not automatically grant the father the right to receive a credit for child support payments made after that point in time. However, the father was allowed the opportunity to prove before a trial judge that he should receive such a credit. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

Trial courts have the authority to allocate income tax dependency exemptions by ordering the custodial parent to sign the required release where the equities of the case favor such action. A trial court's authority to allocate the exemption to the non-custodial parent reduces the amount of income tax to be paid to the federal government, and produces a tax saving to the non-custodial parent which exceeds the moderate increase in the tax liability of the custodial parent. This result will almost always prevail where, as is often the case, the custodial parent's adjusted gross income is less than the adjusted gross income of the non-custodial parent. In such a situation, the after-tax spendable income of the non-custodial parent is increased. This savings in tax liability could easily be channeled into increased child support or other payments thereby rendering the custodial parent's after-tax spendable income, including child support or other payments, the same or better than if he or she had claimed the dependency exemption. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

Any child legitimized by Code 1972, § 91-1-15 is a child of the marriage within the meaning of Code § 1972, § 93-11-65. Harper v. Harper, 300 So. 2d 132, 1974 Miss. LEXIS 1602 (Miss. 1974).

Assuming that the chancery court did not have jurisdiction to render a divorce decree, the court did have jurisdiction to entertain the proceeding with respect to the custody, care, support, and maintenance of the minor children of the parties where the husband to whom custody was awarded and the children were physically present within the county in which the action was brought at the time the decree was entered. Neal v. Neal, 217 So. 2d 639, 1969 Miss. LEXIS 1578 (Miss. 1969).

12. Amount of support—excessive.

Trial court erred in ordering a divorced father to reimburse the mother's expenses for attorney fees to defend their child in a murder trial; the supreme court found no provisions within Miss. Code Ann. § 93-5-23 or Miss. Code Ann. § 93-11-65 that could be extended to payment of criminal defense expenses, which in the supreme court's view, did not fit under the general provisions of maintenance, support, or education for a child. Edmonds v. Edmonds, 935 So. 2d 980, 2006 Miss. LEXIS 383 (Miss. 2006).

A $350 per month award to be paid by a father for the support of his 3 children was manifestly erroneous where the father's adjusted gross income based on his salary, which was his only significant and reliable source of income, was approximately $2,350 per month, the guidelines set forth in § 99-19-101 suggested that he should pay $495 per month in child support, and the chancellor failed to make a specific finding on the record that application of the statutory guidelines would be unjust or inappropriate. Draper v. Draper, 658 So. 2d 866, 1995 Miss. LEXIS 362 (Miss. 1995).

A child support award would be reversed and remanded where the award was greater than the amount recommended by the guidelines in § 43-19-101, the chancellor did not make a specific finding as to the father's income or make any reference to the statutory child support guidelines, and the final decree did not indicate the basis for the child support award. Dufour v. Dufour, 631 So. 2d 192, 1994 Miss. LEXIS 41 (Miss. 1994).

Although a chancellor's award of child support to be paid by a father was not, standing alone, an abuse of discretion, the amount awarded for child support was an abuse of discretion when considered in conjunction with the alimony award and the income of the father. McEachern v. McEachern, 605 So. 2d 809, 1992 Miss. LEXIS 479 (Miss. 1992).

A chancellor's departure from the guidelines set forth in § 43-19-101 in determining an appropriate amount of child support was not error where the chancellor followed the statutory method of rebutting the presumption that 26 percent of the father's adjusted gross income was the appropriate amount of child support, and the record included a written finding, as required by § 43-19-103, that the guidelines were inappropriate in that particular case. McEachern v. McEachern, 605 So. 2d 809, 1992 Miss. LEXIS 479 (Miss. 1992).

An increase in a father's child support obligation from $300 to $750 per month was excessive and unsupported by the evidence in the record, even though the father's income and resources had increased over time, where the mother's income had also steadily increased, the child had not required any extraordinary or unexpected care or treatment, there was no evidence that any of the child's needs had gone unmet, the child's actual expenses averaged approximately $260 per month, and utilization of the child support guidelines set forth in § 43-19-101 produced a monthly figure of approximately $583. Hammett v. Woods, 602 So. 2d 825, 1992 Miss. LEXIS 299 (Miss. 1992).

A provision in a child support decree ordering an automatic $50 per month increase in child support when the child started kindergarten was improper where there was no evidence that kindergarten would cost more than what was previously being spent; if the automatic increase was a modification, it was improper since a modification can result only from substantial and material changes that follow the decree to be modified, and the automatic increase lacked the specificity required for an escalation clause since the specific basis for the calculation of the increase was not provided. Gillespie v. Gillespie, 594 So. 2d 620, 1992 Miss. LEXIS 67 (Miss. 1992).

A child support award of $400 per month for one 6-year-old child was excessive where the father, who had custody of the child, only asked for $100 per month in child support, the chancellor recognized that $400 per month was not required at the time for child support, and both parents had approximately the same earnings. The chancellor should have considered the amount of money which reasonably should have been required in child support from each parent, but apparently considered only the guidelines developed by the Governor's Commission on Child Support. Jellenc v. Jellenc, 567 So. 2d 847, 1990 Miss. LEXIS 561 (Miss. 1990).

A chancery court's order reducing a father's child support obligation, predicated on its finding that there was a material change in circumstances, could not relate back to the date that the father first filed and sought a reduction in child support; such a rule provides sharp incentives for one who would have his or her support obligation reduced to bring the matter to trial as expeditiously as possible. Accordingly, the father's reduction in child support obligations became effective on the date of the court judgment. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

There was a material change in circumstances which warranted modification of a child support order requiring the father to pay $400 per month per child for the parties' 2 children who were in the mother's custody, where the oldest child went to live with his father while the matter was pending, and the father had experienced a substantial reduction in his income while the mother had experienced an increase in hers, so that "both parties receive approximately the same amount of money," and therefore the court was within its authority in terminating all child support. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

13. —Not excessive.

Chancellor's award of $ 824 a month in child support to the wife in a divorce action was exactly the 20 percent of the husband's income called for by the child support guidelines set forth in Miss. Code Ann. § 43-19-101, and was not excessive; as the award was in accordance with the guidelines, the chancellor was not required to make specific findings justifying the award. Gable v. Gable, 846 So. 2d 296, 2003 Miss. App. LEXIS 461 (Miss. Ct. App. 2003).

A chancellor did not abuse her discretion in ordering a father to pay $600 per month for the support of 2 children, in spite of the father's argument that $600 per month constituted 27.5 percent of his adjusted gross income which was 7.5 percent greater than the percentage suggested by the statutory guidelines, where the mother's monthly net income was $1,168, her monthly expenses were $2,225, the chancellor was skeptical as to the father's true earnings, and the evidence suggested that the father had some alternative source of support that he had not disclosed. Grogan v. Grogan, 641 So. 2d 734, 1994 Miss. LEXIS 315 (Miss. 1994).

A chancellor did not abuse his discretion in ordering a father to pay $300 in child support for his 14-year-old son, in spite of the father's argument that the amount was excessive because it exceeded 14 percent of his adjusted gross income which was above the statutory guidelines for one child set forth in § 43-19-101, where the record indicated that the father would be able to support himself as well as pay child support in the amount awarded. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

A child support award to be paid by a mother for the support of one child was not excessive where the mother's income was almost triple that of the father's, and the chancellor followed the guidelines set out in § 43-19-101 and awarded the 14 percent of adjusted gross income suggested by the statute for the support of a single child. Chamblee v. Chamblee, 637 So. 2d 850, 1994 Miss. LEXIS 285 (Miss. 1994).

The enactment of the child support award guidelines in § 43-19-101, which provides that child support payments for 2 children should be 20 percent of the parent's adjusted gross income, did not constitute a "material change in circumstances" warranting a modification of a father's child support obligation, even though the father's child support payments for 2 children were more than 20 percent of his adjusted gross income. Gregg v. Montgomery, 587 So. 2d 928, 1991 Miss. LEXIS 712 (Miss. 1991).

A child support award of $325 per month was not so high as to constitute reversible error where the mother's adjusted monthly gross income was between $2100 and $2265, the father, who had custody of the child, performed many in-kind services for the child, and the mother had paid no direct support for the child for a minimum of 5 years. Smith v. Smith, 585 So. 2d 750, 1991 Miss. LEXIS 582 (Miss. 1991).

There was no error in a chancellor's decision to leave a father's child support obligation at $250 per month where the father argued that his salary had declined drastically from that earned in previous years but there was an indication that this was a voluntary choice of the father's, the father argued that his monthly support burden should be at least $80 less in accordance with the guidelines of § 43-19-101, and the wife argued that her monthly expenses outstripped her income by approximately $600 each month but she had received an increase in monthly income since the final decree. Caldwell v. Caldwell, 579 So. 2d 543, 1991 Miss. LEXIS 236 (Miss. 1991).

A father did not sustain a material change in circumstances warranting a reduction in child support when he voluntarily left his employment and enrolled in college, where he sought to modify his child support obligation within 6 months of the original divorce decree awarding child support, and his testimony indicated that he anticipated that he would be furthering his education long before the original divorce decree was entered. Tingle v. Tingle, 573 So. 2d 1389, 1990 Miss. LEXIS 838 (Miss. 1990).

This section [Code 1942, § 1263.5] was intended to give the chancery court independent jurisdiction of suits for the custody of minor children and implements its constitutional power in this respect, and a custody proceeding brought to modify an agreed judgment entered in a prior habeas corpus proceeding will be treated as if brought under this section. Mitchell v. Powell, 253 Miss. 867, 179 So. 2d 811, 1965 Miss. LEXIS 1064 (Miss. 1965).

14. —Miscellaneous.

Chancery court's determination that a father was in contempt for failing to pay child support was supported by substantial evidence where the record showed that the father had been denied disability, he had worked for several years after a childhood accident that allegedly caused seizures, he left his last employment for a nonmedical reason, and he was well enough to frequent a relative's pool hall almost every day and perform pseudo-employment functions there. Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912, 2006 Miss. App. LEXIS 716 (Miss. Ct. App. 2006).

Ex-husband was not entitled to a credit for child support paid directly to one of the parties' children because the evidence was sufficient to support the chancellor's finding that the amount each parent had already paid for the support and education of the minor children had already worked equity. Brennan v. Ebel, 880 So. 2d 1058, 2004 Miss. App. LEXIS 233 (Miss. Ct. App.), cert. denied, 882 So. 2d 234, 2004 Miss. LEXIS 1084 (Miss. 2004).

Emancipation occurred when the child of the former husband and the former wife turned 21 and meant that the former husband had no further obligation to provide child support for that child; moreover, the trial court in its discretion, had the right to grant the former husband a credit for child support he paid on behalf of that child past the time she was emancipated and did not abuse its discretion in granting him such a credit. Houck v. Houck, 2001 Miss. App. LEXIS 517 (Miss. Ct. App. Dec. 11, 2001), op. withdrawn, sub. op., 812 So. 2d 1139, 2002 Miss. App. LEXIS 111 (Miss. Ct. App. 2002).

The burden was on the father to make out a clear case of inability to pay child support to prevent a finding of contempt, even though he sought a modification of his child support obligations prior to the mother's counterclaim for contempt, where he did not follow this course of action promptly, he paid the full amount of child support only one month during the first year following the divorce, and he "adjusted" his support payments without the consent of any court when one of his children moved in with him. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

A chancellor did not err in finding a father in contempt of court for failure to pay child support where he did not file for a reduction of support promptly, when he finally sought such a reduction the mother counterclaimed with an action for contempt, and he failed to carry his burden of proving a clear case of inability to pay. Shelton v. Shelton, 653 So. 2d 283, 1995 Miss. LEXIS 150 (Miss. 1995).

A trial court did not abuse its discretion in modifying a child support decree based on the father's loss of income due to involuntary termination of employment for alleged intentional wrongful acts where there was no allegation that the father was terminated or caused himself to be terminated to avoid paying child support. Parker v. Parker, 645 So. 2d 1327, 1994 Miss. LEXIS 571 (Miss. 1994).

A chancellor did not abuse her discretion in refusing to reduce the amount of child support a father was required to pay, even though the father had stopped working at his private medical practice for a period of time due to a fire which destroyed his office building, where he waited until he was $20,000 in arrears and was brought into court a second time on contempt charges before he sought modification of the child support decree, it appeared that the reason for the modification request was temporary in nature and no longer existed at the time he finally submitted it to the chancellor, and the chancellor determined that he had personal assets from which to satisfy the amount owed. Gambrell v. Gambrell, 644 So. 2d 435, 1994 Miss. LEXIS 494 (Miss. 1994).

A chancellor erred in ordering a father to pay future additional child support in the amount of 10 percent of his adjusted gross income exceeding $50,000 where the chancellor relied solely upon the father's possible future income and did not include other factors such as the mother's separate income, the inflation rate, and the needs and expenses of the children. Morris v. Stacy, 641 So. 2d 1194, 1994 Miss. LEXIS 368 (Miss. 1994).

A chancellor did not err in deviating from the child support guidelines set forth in § 43-19-101 when determining the amount of support to be paid by a father where she stated her reasons for departing from the guidelines, including the fact that there was "considerable question as to the actual earnings" of the father.

Grogan v. Grogan, 641 So. 2d 734, 1994 Miss. LEXIS 315 (Miss. 1994).

A chancellor erred in awarding child support to be paid by the father in the amount of $1,000 per month where the father earned approximately $8,000 per month, and it appeared that the chancellor had used $4,155 as the figure for the father's. Brennan v. Brennan, 638 So. 2d 1320, 1994 Miss. LEXIS 331 (Miss. 1994).

There was not a material change in circumstances sufficient to warrant a modification of a father's child support obligation where all of the changes asserted by the father either occurred prior to his signing of the initial child support agreement or were changes which should have been reasonably anticipated by him at the time he signed the agreement. Shipley v. Ferguson, 638 So. 2d 1295, 1994 Miss. LEXIS 337 (Miss. 1994).

In a proceeding for modification of a father's child support obligation, the chancellor erred in refusing to award attorney's fees to the mother, since the father had no basis on which to bring a claim that he was entitled to a reduction of his monthly child support obligation where all of the changes asserted by the father either occurred prior to his signing of the initial child support agreement or were changes which should have been reasonably anticipated by him at the time he signed the agreement. Shipley v. Ferguson, 638 So. 2d 1295, 1994 Miss. LEXIS 337 (Miss. 1994).

It was manifest error and an abuse of discretion for a chancellor to find that there had been no material or substantial change in circumstances warranting a modification of a father's child support payments where the father suffered a heart attack approximately one year after the original decree was entered which resulted in a precipitous decline in his income, the father would be required to pay over ½ of his income in child support payments if the original decree were not modified, and the statutory child support guidelines' suggestion and the actual child support ordered constituted a difference of nearly $500.00 a month. McEwen v. McEwen, 631 So. 2d 821, 1994 Miss. LEXIS 77 (Miss. 1994).

It was not error for a trial court to consider a father's overtime pay in measuring his earning capacity to determine an appropriate child support award where the trial court considered overtime in determining both parents' earning capacity, the father had worked overtime consistently for two years and had practically doubled his base salary, and the award was not of such an amount as to create the belief that the trial court gave undue weight to the father's overtime income. Gillespie v. Gillespie, 594 So. 2d 620, 1992 Miss. LEXIS 67 (Miss. 1992).

Section 43-19-101, which sets forth child support award guidelines, is only a guideline and may not determine the specific need or the specific support required; the determination of the amount of support needed must be made by a chancellor who hears all the facts, views the witnesses, and is informed at trial of the circumstances of the parties and particularly the circumstances of the child. Gillespie v. Gillespie, 594 So. 2d 620, 1992 Miss. LEXIS 67 (Miss. 1992).

The 25 percent restriction on wage garnishment set forth in § 85-3-4(2)(a) applied to the garnishment of a father's wages in satisfaction of a judgment for past due child support, even though the 25 percent restriction does not apply in cases where the judgment is for the support of another person, where the mother no longer had custody of the children because custody had been placed in the father. Sorrell v. Borner, 593 So. 2d 986, 1991 Miss. LEXIS 593 (Miss. 1991).

A chancery court had the authority to modify an original divorce judgment requiring the husband to pay ½ of his net salary to his former wife in child support payments for one child where, subsequent to the divorce decree making this requirement, the husband's monthly salary almost doubled. In the absence of some extraordinary circumstances, a chancery court could not validly render a decree that, regardless of a parent's future salary, he or she would have to pay ½ of it for child support for one child; requiring a parent to pay ½ of his or her net salary for support of one child, without examining the child's needs, is not the escalation clause recommended to take care of inflation in the cost of living. Brown v. Brown, 566 So. 2d 718, 1990 Miss. LEXIS 450 (Miss. 1990).

A trial court did not err in declining to order a father to pay child support where the mother and the father each had custody of one child, the court's decision was based on the fact that each party would have the responsibility for the child in his or her custody, and the parties' respective incomes were almost the same. Polk v. Polk, 559 So. 2d 1048, 1990 Miss. LEXIS 198 (Miss. 1990).

A trial court's finding that a daughter was not emancipated despite the fact that she was 22 years old and a fifth-year college student was error; the father's obligation to support his daughter, absent a contract, terminated after her majority. However, the father's 18-year-old daughter was not emancipated where she did not work full time and her earnings were insufficient to support the necessities for her continued education, she was enrolled as a student at Mississippi State University, and her record as a student was acceptable; the father was therefore required to continue to support the daughter at the rate of $300 per month. Duncan v. Duncan, 556 So. 2d 346, 1990 Miss. LEXIS 15 (Miss. 1990).

A denial by the Internal Revenue Service of a non-custodial parent's claim of an income tax dependency exemption which that parent acquired pursuant to court order, constitutes a change in circumstances justifying the parent in seeking relief by way of modification of support obligations. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

In proceeding to enforce past due child support, court must assess interest at legal rate on each past due payment from date that payment became due; sums paid by supporting spouse at time spouse is in arrears is applied first to interest obligations, then to extinguish principal amount of oldest outstanding support payment, then next oldest unpaid payment, and so forth. Brand v. Brand, 482 So. 2d 236, 1986 Miss. LEXIS 2347 (Miss. 1986).

Under § 93-11-65, both separated or divorced parents who have separate incomes or estates may be required to support their children according to their relative financial ability. Hailey v. Holden, 457 So. 2d 947, 1984 Miss. LEXIS 1950 (Miss. 1984).

15. Education or medical expenses.

Chancellor did not err in finding that a father was no longer required to pay for his son's college expenses because the child would be rendered emancipated, and the son desired not to have any relationship with the father; however, the chancellor erred in requiring the son to maintain a "C" average to continue receiving child support. Finch v. Finch, 137 So. 3d 227, 2014 Miss. LEXIS 33 (Miss. 2014).

Chancellor abused the chancellor's discretion by requiring a parent to pay a lump sum toward the purchase of a vehicle for the parent's child as an educational expense to attend college because there was no evidence that the parent was financially able to pay the cost of the vehicle and the costs of the child's other college expenses. Brooks v. Fields, 134 So. 3d 786, 2013 Miss. App. LEXIS 693 (Miss. Ct. App. 2013).

Because the chancellor found that the children were emancipated, as they were 24 and 22 years old at the time of the 2012 order, the chancellor erred in requiring the father to pay child support, college expenses, and life and health insurance for the benefit of the children. Archie v. Archie, 126 So. 3d 937, 2013 Miss. App. LEXIS 684 (Miss. Ct. App. 2013).

Chancery court did not abuse its discretion when it relieved an ex-husband of his daughters' college expenses after their first semester since the girls failed to show the responsibility and aptitude to succeed at college by making at least a 2.0 grade point average; the divorce judgment required him to pay one-half of all reasonable and necessary costs of college provided that each child maintain full-time status and a 2.0 grade point average, and it was a reasonable interpretation of the provision to use a semester as the appropriate time period in which the girls could maintain a 2.0 grade point average. Cossitt v. Cossitt, 975 So. 2d 274, 2008 Miss. App. LEXIS 109 (Miss. Ct. App. 2008).

In a paternity suit, the county court ordered the father to pay the child's tuition expenses for college and one-full year of graduate school but did not make his obligation to pay college expenses conditional upon the child's age. Under Miss. Code Ann. § 93-11-65(8), the county court erred by extending the father's obligations beyond the point at which the child could become emancipated. Daniels v. Bains, 967 So. 2d 77, 2007 Miss. App. LEXIS 714 (Miss. Ct. App. 2007).

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to offset the ex-husband's child support obligation by his payments for his oldest child's college education because, inter alia: (1) although the child lived at college, he frequently came home on the weekend and for holidays; (2) the child received financial support from both parents as the ex-wife gave him money to pay for his car insurance; (3) the wife used a portion of the child's support payment to provide for the child when he came home for visits and to maintain the household for the rest of the family; and (4) the child support agreement contained no provision for reducing child support payments to the wife once the children left home. Dix v. Dix, 941 So. 2d 913, 2006 Miss. App. LEXIS 812 (Miss. Ct. App. 2006).

According to the judgment of divorce, the father was obligated to pay one-half of all of the son's educational expenses, which included his private school tuition payments; as a result, the tuition payments became a judgment against the father each month he failed to make the payments. The father's obligation to make those payments could not be excused by the mother's tardiness in seeking enforcement of the father's obligation to pay. Durr v. Durr, 912 So. 2d 1033, 2005 Miss. App. LEXIS 244 (Miss. Ct. App. 2005).

Substantial evidence existed in the record to support the chancellor's finding of contempt due to the father's failure to pay his share of the son's private school tuition because (1) the mother showed that the judgment of divorce obligated the father to make the tuition payments; (2) she presented evidence that the father had failed to comply with the decree by not making the tuition payments; and (3) the father failed to present sufficient evidence to rebut the mothers prima facie case of contempt. Durr v. Durr, 912 So. 2d 1033, 2005 Miss. App. LEXIS 244 (Miss. Ct. App. 2005).

Although the father claimed that he paid all medical, optical, and drug bills submitted to him by the mother, during the hearing he could only provide proof that he had paid one bill. As a result, the chancellor did not err in finding the father in contempt for failing to pay his share of the son's medical expenses as ordered in the judgment of divorce. Durr v. Durr, 912 So. 2d 1033, 2005 Miss. App. LEXIS 244 (Miss. Ct. App. 2005).

Chancellor considered the wife financially able to pay a portion of the children's college expenses, and this finding was supported by the evidence; in addition to the money the wife made from her job, her father purchased a house for her and gave her a vehicle to drive, thus lowering her monthly expenses; when the chancellor divided the marital property, he ordered the husband to pay all marital debts and awarded alimony to the wife. Baier v. Baier, 897 So. 2d 202, 2005 Miss. App. LEXIS 209 (Miss. Ct. App. 2005).

A father was not entitled to credit against past due child support payments for the sum of $1,301.24, which he had deposited in his daughter's bank account from which she paid her educational expenses at college, where the original divorce decree provided for child support payments to be made in addition to any educational expenses. Adams v. Adams, 591 So. 2d 431, 1991 Miss. LEXIS 843 (Miss. 1991).

A finding that a son was emancipated and that his father had no further duty to support him would be reversed, and the father would be required to abide by the terms of a court order requiring him to pay for his son's college expenses, even though the son worked full-time, where the father had ignored the court order to pay his son's college expenses, in effect forcing his son to abandon his schooling and become a full-time worker. Caldwell v. Caldwell, 579 So. 2d 543, 1991 Miss. LEXIS 236 (Miss. 1991).

In determining whether there had been a substantial change in circumstances necessary to modify child support, the trial court should have considered an increase in expenses as a result of the children's attendance at college; this was not something that should have been anticipated at the time of the entry of the original decree since few parents can anticipate with certainty, 5 years ahead of time, that their children will attend college. Lawrence v. Lawrence, 574 So. 2d 1376, 1991 Miss. LEXIS 17 (Miss. 1991).

A trial court's finding that a daughter was not emancipated despite the fact that she was 22 years old and a fifth-year college student was error; the father's obligation to support his daughter, absent a contract, terminated after her majority. However, the father's 18-year-old daughter was not emancipated where she did not work full time and her earnings were insufficient to support the necessities for her continued education, she was enrolled as a student at Mississippi State University, and her record as a student was acceptable; the father was therefore required to continue to support the daughter at the rate of $300 per month. Duncan v. Duncan, 556 So. 2d 346, 1990 Miss. LEXIS 15 (Miss. 1990).

Under § 93-5-23 and § 93-11-65, regular child support is but one type of expense which the court may award for the care and maintenance of children. Regular child support refers to the sums of money which the particular parent is ordered to pay for the child's basic, necessary living expenses, namely food, clothing and shelter. Other sums which a parent may be ordered to pay for the care and maintenance of the child are the expenses of a college or other advanced education. Other items which may properly be awarded pursuant to a valid child care and maintenance order are health related expenses such as reasonable and necessary medical, dental, optical, and psychiatric/psychological expenses. A parent can also be required to absorb insurance expenses such as maintaining medical and hospitalization insurance on the child, and maintaining a life insurance policy on his or her own life with the child named as beneficiary. Additionally, a trial court may require a parent to furnish an automobile and make mortgage payments as part of an award for the care and maintenance of children. The foregoing items are not an exclusive listing, but are merely examples of the real distinction between regular child support and other types of payments for which the parent may become obligated under the terms of a valid child care and maintenance order under §§ 93-5-23 and 93-11-65. Nichols v. Tedder, 547 So. 2d 766, 1989 Miss. LEXIS 328 (Miss. 1989).

Psychological expenses incurred as a result of treatment of a minor child for drug and alcohol abuse under the direction of an accredited medical facility were "medical expenses" to be paid by the child's father in accordance with the divorce decree. Martin v. Martin, 538 So. 2d 765, 1989 Miss. LEXIS 68 (Miss. 1989).

16. Arrearage.

Father was entitled to credit on an arrearage judgment for child support obligations that vested after his 21-year-old son's emancipation because the father's duty to pay child support for the son ceased upon the son's emancipation, and the father's child support obligation then became solely for his daughter. Andres v. Andres, 22 So. 3d 314, 2009 Miss. App. LEXIS 682 (Miss. Ct. App. 2009).

On a mother's counterclaim against a father for contempt concerning child support, medical insurance, and medical bills, a chancellor erred in giving the father credit for the payment of private school tuition because the private school tuition payments were based on an agreement between the parties; the voluntary payments could not be used to offset the father's obligations. Farrior v. Kittrell, 12 So. 3d 20, 2009 Miss. App. LEXIS 189 (Miss. Ct. App. 2009).

Amount of past-due child support awarded to a mother was proper where the chancery court properly credited the father for the time that the mother and child lived in his home; during that time, the father provided shelter for both the mother and child, as well as basic necessities. Holliday v. Stockman, 969 So. 2d 136, 2007 Miss. App. LEXIS 758 (Miss. Ct. App. 2007).

Chancery court erred by finding that a husband had an arrearage of one payment of child support because the husband entered into evidence a spreadsheet showing the dates and payments, and he also introduced his bank statements showing all of the corresponding checks from his spreadsheet and when they were presented for payment. Stuart v. Stuart, 956 So. 2d 295, 2006 Miss. App. LEXIS 759 (Miss. Ct. App. 2006).

Chancellor erred in forgiving the husband's child support arrearages where although the husband paid child support directly to the children, he did not present the receipt book into evidence, nor did he present the cancelled checks, corroborating witnesses, or evidence of any kind other than his own testimony; the husband did not present clear and convincing evidence in order to allow him to receive child support credit for expenses he paid directly; therefore, his obligations could not be discharged. Baier v. Baier, 897 So. 2d 202, 2005 Miss. App. LEXIS 209 (Miss. Ct. App. 2005).

Trial court did not err in failing to recognize and apply the waiver, joinder and assignment documents signed by a mother's children regarding her claims for child support arrearages on their behalves because although Miss. Code Ann. § 11-7-3 allowed for the assignment of choses in action, the child support benefits belonged to the children with the mother serving only in a fiduciary capacity. Ladner v. Logan, 857 So. 2d 764, 2003 Miss. LEXIS 551 (Miss. 2003).

Where a trial court awarded a child support arrearage against a father and in favor of an adult child on the mother's action to recover arrearages, the trial court erred in failing to award interest on the amount owed. Ladner v. Logan, 857 So. 2d 764, 2003 Miss. LEXIS 551 (Miss. 2003).

Trial court did not err in ordering the father to pay child support because the father was in arrears on his payments to the mother. Hill v. Brinkley, 840 So. 2d 778, 2003 Miss. App. LEXIS 192 (Miss. Ct. App. 2003).

A chancellor properly refused to have an arrearage of approximately $4300 in child support payments placed in a trust fund that would begin to generate a monthly income for a hearing-impaired child when he reached the arbitrarily-designated age of 36, since past due child support payments become vested as of the date they were due and cannot be modified; furthermore, the chancellor would have abused his discretion by allowing the funds to be placed in a trust that was not established and maintained in accordance with applicable regulations and guidelines governing governmental assistance programs for the disabled. Hammett v. Woods, 602 So. 2d 825, 1992 Miss. LEXIS 299 (Miss. 1992).

A chancellor erred in determining that the matter of a child support arrearage was previously settled by a court-approved modification of child support, which effectively amounted to a forgiveness of vested but unpaid child support obligations, since this is contrary to the well-established rule that "a court cannot relieve the civil liability for support payments that have already accrued." Tanner v. Roland, 598 So. 2d 783, 1992 Miss. LEXIS 222 (Miss. 1992).

The 25 percent restriction on wage garnishment set forth in § 85-3-4(2)(a) applied to the garnishment of a father's wages in satisfaction of a judgment for past due child support, even though the 25 percent restriction does not apply in cases where the judgment is for the support of another person, where the mother no longer had custody of the children because custody had been placed in the father. Sorrell v. Borner, 593 So. 2d 986, 1991 Miss. LEXIS 593 (Miss. 1991).

A former husband failed to show that he was financially unable to comply with the divorce decree so as to avoid paying child support arrearage, where he failed to offer substantial evidence which was "particular and not general" to support his contention, and he had failed to pay medical expenses and school expenses at a time when he held a well paying job, which indicated that financial hardship was not the sole factor in his failure to make payments. Additionally, the husband's argument that he had to pay other bills before making support payments was meritless, since such payments are paramount. Gregg v. Montgomery, 587 So. 2d 928, 1991 Miss. LEXIS 712 (Miss. 1991).

A trial court properly dismissed a former wife's fraudulent conveyance claim against her former husband, based upon the former husband's conveyance of 15.2 acres of farm property to his father for inadequate consideration, where the husband had tendered the amount of the child support judgment owed to the former wife. However, since the matter was to be remanded for a determination of an additional amount of child support owed by the former husband, the judgments would be vacated to the extent necessary to provide the lower court with the opportunity to consider the need for security with regard to the child support arrearage or any of the father's further obligations to and for the benefit of his children. McPhail v. McPhail, 564 So. 2d 839, 1990 Miss. LEXIS 163 (Miss. 1990).

A chancellor's reduction of past due child support payments was manifest error since child support payments become vested and cannot be modified once they become past due. Thurman v. Thurman, 559 So. 2d 1014, 1990 Miss. LEXIS 185 (Miss. 1990).

In proceeding to enforce past due child support, court must assess interest at legal rate on each past due payment from date that payment became due; sums paid by supporting spouse at time spouse is in arrears is applied first to interest obligations, then to extinguish principal amount of oldest outstanding support payment, then next oldest unpaid payment, and so forth. Brand v. Brand, 482 So. 2d 236, 1986 Miss. LEXIS 2347 (Miss. 1986).

17. Modification.

Trial court erred in terminating a father's college-expense obligation to his daughter, as he did not request that relief, and the daughter was a child with the aptitude and desire to attend college, for whom the parties agreed to provide at least a four year college education. A.M.L. v. J.W.L., 98 So. 3d 1001, 2012 Miss. LEXIS 398 (Miss. 2012).

Father who ceased making child support payments for his son without permission from a court came into court with unclean hands. However, when the chancellor entered an arrearage judgment, the father's hands were cleansed and the chancellor could fairly consider the father's child support modification petition. Andres v. Andres, 22 So. 3d 314, 2009 Miss. App. LEXIS 682 (Miss. Ct. App. 2009).

Father was entitled to a modification of his child support obligation because his child support obligation legally terminated upon his son becoming emancipated after reaching age 21 and the parties' separation agreement provided that the support obligation would terminate upon the emancipation of the children. There was no evidence presented that the agreement was not entered into freely, and the clause was unambiguous. Andres v. Andres, 22 So. 3d 314, 2009 Miss. App. LEXIS 682 (Miss. Ct. App. 2009).

Where the former husband voluntarily ceased work as a truck-shop foreman, moved in with his girlfriend, and began paying some of her expenses, the chancellor did not err by finding that the former husband failed to show a material change in circumstances to warrant a reduction in his child support payments even though his expenses had increased. Sessums v. Vance, 12 So. 3d 1146, 2009 Miss. App. LEXIS 131 (Miss. Ct. App. 2009).

A father was not entitled to a downward modification of his child-support obligation because the fact that a daughter, who had become emancipated, no longer needed private-school tuition was not an unanticipated change in circumstances and the fact that a son resided with the father half of the time was foreseeable when support was negotiated. Evans v. Evans, 994 So. 2d 765, 2008 Miss. LEXIS 582 (Miss. 2008).

In a father's modification of child support case, the court properly found the father to be in contempt for non payment because he continued his standard of living without providing his children with the court-ordered funds. The chancellor noted that the father had continued to buy houses while claiming inability to pay, he bought a house located on a golf course, and the father had contravened a court order requiring him to have a life insurance policy in favor of his children in the amount of $ 750,000. Howard v. Howard, 968 So. 2d 961, 2007 Miss. App. LEXIS 760 (Miss. Ct. App. 2007).

Court erred by dismissing a father's petition for modification of child support on the basis of unclean hands because the court's May 19, 2003, order adjudicating the amount of the father's total arrearage effectively cleansed the father's hands and revived the issue of modification of the father's child support obligations. No new modification petition was before the court and the proceedings on remand simply were a continuation of the April 2003 proceedings instigated by the father's January 16, 2003, petition for modification. Howard v. Howard, 968 So. 2d 961, 2007 Miss. App. LEXIS 760 (Miss. Ct. App. 2007).

Court erred by dismissing a father's petition for modification of child support on the basis of res judicata because the first modification proceeding did not foreclose the father from demonstrating that his physician's new assessment of his hand condition was a material change in circumstances justifying a reduction in child support. The father had moderate nerve damage to the right hand when the physician last saw the father in March 2003, he still had problems with holding objects and performing fine manipulation, and the physician opined to a reasonable degree of medical certainty that the father was disabled from performing surgery due to those conditions. Howard v. Howard, 968 So. 2d 961, 2007 Miss. App. LEXIS 760 (Miss. Ct. App. 2007).

In a child support modification case, attorney's fees were properly awarded to the mother because she earned $ 11 per hour at a retail job, a vocational report showed that her income for the year 2004 was $ 16,005, with a $ 6,000 mileage reimbursement, and there was no evidence that she had any other assets from which to pay her attorney. Howard v. Howard, 968 So. 2d 961, 2007 Miss. App. LEXIS 760 (Miss. Ct. App. 2007).

Change in a visitation schedule alone is not enough for an appellate court to find that a chancellor's decision to deny a reduction in child support was manifestly wrong or an abuse of discretion; therefore, father's request for a reduction in child support was properly denied by a chancery court where the record did not demonstrate that any of the 10 factors used to show a material change in circumstances were discussed. Allen v. Allen, 953 So. 2d 279, 2007 Miss. App. LEXIS 186 (Miss. Ct. App. 2007).

Father's request to modify his child support and medical expense obligations was granted because he showed a material change in circumstances where the father lost his job through no fault of his own, and his decision to open his own business to support the family was not made in bad faith; moreover, there was no improper retroactive reduction, the father requested a reduction in his obligation to provide medical insurance, and the reduction was appropriate where an arrearage was owed. Grissom v. Grissom, 952 So. 2d 1023, 2007 Miss. App. LEXIS 171 (Miss. Ct. App. 2007).

Chancery court erred by granting the ex-husband modification of child support; while a decrease in his monthly income from $2,866 to $1,644 qualified as a material and subsustantial change, his changed financial situation upon leaving the Marine Corps was both anticipated and foreseeable. The chancery court erred by granting the modification without considering his inability to perform the original decree or whether he had clean hands. Dill v. Dill, 908 So. 2d 198, 2005 Miss. App. LEXIS 521 (Miss. Ct. App. 2005).

Chancellor erred in giving no explanation for denying a husband's request for child support from his former wife other than simply citing the couple's previous property settlement agreement; the chancellor made no apparent determinations as to the best interests of the child or the possibility of a material change in circumstances due to the award of permanent physical custody to the husband. Chroniger v. Chroniger, 914 So. 2d 311, 2005 Miss. App. LEXIS 788 (Miss. Ct. App. 2005).

Where the father was severely in arrears in his child support payments and had voluntarily left his employment for early retirement, he came into court with unclean hands. Thus, the chancellor properly denied his motion for modification of child support. Leiden v. Leiden, 902 So. 2d 582, 2004 Miss. App. LEXIS 879 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 331 (Miss. 2005).

Trial court properly granted a father summary judgment under Miss. R. Civ. P. 56 in the father's action seeking to terminate his child support obligation on the ground that the children had attained the age of majority; where, absent an agreement to the contrary, the father was not required to provide child support under Miss. Code Ann. §§ 93-5-23 and 93-11-65 after the children reached age 21, the father's obligation had ceased, as the children were at least 21, and there was no written agreement providing for post-emancipation child support payments. Little v. Little, 878 So. 2d 1086, 2004 Miss. App. LEXIS 713 (Miss. Ct. App. 2004).

Modification of child support was improper where the father's general characterization that the costs associated with his sons had increased was unsubstantiated and did not rise to the level of a material change in circumstances warranting modification of child support. Brawdy v. Howell, 841 So. 2d 1175, 2003 Miss. App. LEXIS 252 (Miss. Ct. App. 2003).

18. Medical bills.

In a paternity suit, the county court did not err in ordering the father to pay one-hundred percent of the child's health coverage pursuant to Miss. Code Ann. § 93-11-65(2). The evidence indicated that the father was a doctor and had a monthly income roughly ten times that of the mother. Daniels v. Bains, 967 So. 2d 77, 2007 Miss. App. LEXIS 714 (Miss. Ct. App. 2007).

Chancery court did not err by failing to order that a father pay half of a child's medical bills that were not covered by Medicaid instead of ordering the payment of those expenses by veterans' insurance, because there was no showing that the child was eligible for that insurance. Edmond v. Townes, 949 So. 2d 99, 2007 Miss. App. LEXIS 40 (Miss. Ct. App. 2007).

Order requiring the father to reimburse the mother for the child's medical bills was affirmed because the father had not provided a shred of evidence that the child was covered by his insurance policy at the time the medical expenses were incurred. The father had been ordered to pay child support and provide insurance coverage for the child, and if he failed to provide the child with insurance coverage, he would be responsible for all health care expenses. Holloway v. Mills, 872 So. 2d 754, 2004 Miss. App. LEXIS 427 (Miss. Ct. App. 2004).

19. Taxation.

Upon the parties' divorce, the mother was granted paramount physical custody of the parties, minor child; the chancellor did not err in ordering the father to pay $ 1,030 per month in child support and granting the income tax child dependency exemption to the father until such time as that the mother could show an income of over $ 50,000 per year. A chancellor has the authority to require that a custodial parent waive the income tax child dependency exemption in favor of the non-custodial parent. Fitzgerald v. Fitzgerald, 914 So. 2d 193, 2005 Miss. App. LEXIS 240 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 749 (Miss. 2005).

20. Life insurance.

Where the mother established the father's paternity of her three-year-old daughter, the county court did not err by ordering the father to maintain a $ 500,000 term life insurance policy on himself for the benefit of the child. The father maintained a life insurance policy in the names of his two children from a previous marriage. Daniels v. Bains, 967 So. 2d 77, 2007 Miss. App. LEXIS 714 (Miss. Ct. App. 2007).

21. Contempt.

In a case where a mother sought to hold a father in contempt for failing to pay child support allegedly owed from a temporary order entered in 1988, the issue was procedurally barred because the mother failed to cite to any authority; she was held to the same pleading standards that applied to represented parties. Despite the procedural bar, the mother was precluded from raising this issue because she failed to appeal the denial of her request for back child support in another case brought against the father. Forrest v. McCoy, 996 So. 2d 158, 2008 Miss. App. LEXIS 635 (Miss. Ct. App. 2008).

22. Emancipation.

Chancery court did not abuse its discretion by failing to find that a child was emancipated because the child was a full time student, did not have a job, still relied on the mother's support, and her need for support would increase once she transferred from a junior college to a university; subsection (8)(b)(iii) applied but did not require the chancery court to declare the child emancipated or terminate child support, but rather that provision merely gave the chancery court discretion. Dixon v. Dixon, — So. 3d —, 2018 Miss. App. LEXIS 57 (Miss. Ct. App. Feb. 6, 2018).

Chancellor's determination that both the mother and the mother's teenage child contributed to the erosion of the parent child relationship was supported by substantial credible evidence, and, despite the mother's assertion, the chancellor's judgment reflected that the chancellor possessed an awareness of the child's extensive mental-health issues and history. As a result, there was no error in the chancellor's judgment ordering the mother to pay child support. Collins v. Miss. Dep't of Human Servs., — So. 3d —, 2017 Miss. App. LEXIS 351 (Miss. Ct. App. June 13, 2017).

The chancery court did not err in finding that children's move into a shared apartment did not result in their emancipation because the children were both full-time students during the entire time that they lived in the apartment, they had not established independent living arrangements, and the father assisted the children financially. Oster v. Ratliff, 205 So. 3d 1149, 2016 Miss. App. LEXIS 229 (Miss. Ct. App.), cert. denied, 205 So. 3d 1086, 2016 Miss. LEXIS 528 (Miss. 2016).

Although a chancery court erred in granting the parties a divorce based on irreconcilable differences without addressing custody or support of their seventeen-year-old child, who was residing with his older sister, the error was harmless and the issue was moot because the child was no longer a minor and the parties were no longer obligated to pay child support for him. Gordon v. Gordon, 126 So. 3d 922, 2013 Miss. App. LEXIS 273 (Miss. Ct. App.), cert. denied, 127 So. 3d 1115, 2013 Miss. LEXIS 631 (Miss. 2013).

OPINIONS OF THE ATTORNEY GENERAL

For purposes of verification of the expenditures for Maintenance of Effort as part of the audit of the Department of Human Services' (DHS) Temporary Assistance to Needy Families program, it is within the discretion of DHS to define "child" as anyone who has not yet attained their 24th birthday. 2002 Miss. Op. Att'y Gen. 541.

RESEARCH REFERENCES

ALR.

Jurisdiction to award custody of child having legal domicil in another state. 4 A.L.R.2d 7.

Support provisions of judicial decree or order as limit of father's liability for expenses of child. 7 A.L.R.2d 491.

Jurisdiction of court to award custody of child domiciled in state but physically outside it. 9 A.L.R.2d 434.

Material facts existing at time of rendition of decree of divorce but not presented to court, as ground for modification of provision as to custody of child. 9 A.L.R.2d 623.

Nonresidence as affecting one's right to custody of child. 15 A.L.R.2d 432.

Consideration of investigation by welfare agency or the like in making or modifying award as between parents of custody of children. 35 A.L.R.2d 629.

Right to custody of child as affected by death of custodian appointed by divorce decree. 39 A.L.R.2d 258.

Service of notice to modify divorce decree or other judgment as to child's custody upon attorney who represented opposing party. 42 A.L.R.2d 1115.

Religion as factor in awarding custody of child. 66 A.L.R.2d 1410.

Father's liability for support of child furnished after entry of absolute divorce not providing for support. 69 A.L.R.2d 203.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child. 7 A.L.R.3d 1096.

Right of putative father to custody of illegitimate child. 45 A.L.R.3d 216.

Right to credit on accrued support payments for time child is in father's custody or for other voluntary expenditures. 47 A.L.R.3d 1031.

Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Determination of paternity of child as within scope of proceeding under Uniform Reciprocal Enforcement of Support Act. 81 A.L.R.3d 1175.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support. 91 A.L.R.3d 530.

Parent's physical disability or handicap as factor in custody award or proceedings. 3 A.L.R.4th 1044.

Initial award or denial of child custody to homosexual or lesbian parent. 6 A.L.R.4th 1297.

Race as factor in custody award or proceeding. 10 A.L.R.4th 796.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country. 20 A.L.R.4th 677.

Religion as factor in child custody and visitation cases. 22 A.L.R.4th 971.

Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born. 84 A.L.R.4th 655.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments. 11 A.L.R.5th 259.

Death of obligor parent as affecting decree for support of child. 14 A.L.R.5th 557.

Validity and construction of provisions for arbitration of disputes as to alimony or support payments or child visitation or custody matters. 38 A.L.R.5th 69.

Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children. 51 A.L.R.5th 241.

Right to credit against child support arrearages for time child lived in custody of noncustodial parent, other than for visitation, where custodial parent's approval was not in issue or was disputed by parties. 112 A.L.R.5th 185.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation §§ 720, 721, 817, 840.

42 Am. Jur. 2d, Infants §§ 12 et seq.

CJS.

27B C.J.S., Divorce §§ 303 et seq.

43 C.J.S., Infants §§ 3 et seq.

Law Reviews.

1989 Mississippi Supreme Court Review: Child Support. 59 Miss. L. J. 891, Winter, 1989.

Practice References.

Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-11-67. Personal jurisdiction over nonresident defendants.

(1) In an action for child support, a court may exercise personal jurisdiction over and enter a judgment in personam against a defendant if personal service of process is made as provided below and if the parties had resided in a marital relationship with each other in this state for thirty (30) days and if

the complainant has continuously resided in this state after the defendant has become a nonresident.

(2) The defendant shall be personally served with a summons and a copy of the petition in the manner prescribed by the law of the state or jurisdiction in which service is made or by any form of mail addressed to the defendant with a receipt showing personal delivery or by personal service outside this state or jurisdiction in the manner prescribed for service within this state.

(3) Proof of service outside this state or jurisdiction may be by affidavit of the individual who made service or in the manner prescribed by the law of this state or in the manner prescribed by the law of the state or jurisdiction in which service is made. If service is by mail, proof may be a receipt signed by the defendant or other evidence of personal delivery to the defendant.

HISTORY:

Laws, 1978, ch. 453, § 1; Laws, 1993, ch. 506, § 16, eff from and after July 2, 1993.

JUDICIAL DECISIONS

1. In general.

A court did not lack personal jurisdiction over a nonresident defendant in a child support action pursuant to § 93-11-67, even though the complaint did not specifically state that the marital residence was in Mississippi for 30 days and that the complainant wife had continuously resided in Mississippi after the defendant husband became a nonresident, where the complaint and a stipulation of facts stated that the wife had been a Mississippi resident for 6 months prior to the filing of the suit, the parties were married in Mississippi, the family home in Mississippi was owned jointly by the husband and the wife, and the parties separated in Mississippi and thereafter the husband moved to California; it could be inferred from the allegations in the complaint and the stipulation that the marital residence was in Mississippi and that the wife continued her residence in Mississippi after the husband departed for California. Penton v. Penton, 539 So. 2d 1036, 1989 Miss. LEXIS 149 (Miss. 1989).

Although it was proper under this section for a wife to join together in one action petitions for divorce and for child support, she did not obtain in personam jurisdiction over her nonresident husband, so as to support a decree of child support, where the required allegations that the parties had resided in the marital relationship with each other in this state for 30 days and that the wife had continuously resided in the state after the husband became a nonresident were not included in the bill of complaint. Fliter v. Fliter, 383 So. 2d 1084, 1980 Miss. LEXIS 1992 (Miss. 1980).

RESEARCH REFERENCES

Am. Jur.

37 Am. Jur. Trials 639, Interstate Enforcement of Child Support Orders.

§ 93-11-69. Provision of information to consumer reporting agency as to overdue support.

(1) As used in this section:

(a) "Noncustodial parent" means a parent from whom the Department of Human Services is collecting support payments, and shall have the same meaning as "absent parent."

(b) "Consumer reporting agency" means any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and who uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(c) "Department" means the Department of Human Services.

(d) "Overdue support" means any payments that are ordered by any court to be paid by an absent parent for the support of a child that have remained unpaid for at least thirty (30) days after payment is due. Overdue support shall also include payments that are ordered by any court to be paid for maintenance of a spouse in cases in which the department is collecting such support in conjunction with child support.

(2) The department shall make available to any consumer reporting agency a report of the amount of overdue support owed by an absent parent.

(3) Before any information regarding an absent parent's overdue support may be made available pursuant to subsection (2) of this section, a copy of the report shall be mailed to the absent parent at such parent's last known address and the absent parent shall be given the opportunity to contest the information contained in the report as follows:

(a) The absent parent may, within fifteen (15) days after such notice is mailed, contest the accuracy of the information contained in the report by filing with the department a brief written statement concerning the nature of the alleged inaccuracies.

(b) Upon receipt of such statement the department shall, within a reasonable amount of time, reexamine the information contained in the report.

(c) If upon such reexamination the information in the report is found to be inaccurate, the department shall correct the information and send a copy of such corrected information to the absent parent.

(d) If upon such reexamination the information contained in the report is found to be accurate, the department shall notify the absent parent of this fact.

(e) Within ten (10) days after a copy of the reexamined information contained in the report is mailed to the absent parent, such absent parent may again contest the accuracy of such information by filing a brief written statement concerning the alleged inaccuracies and the department shall clearly note in any report to the consumer reporting agency the fact that the information is disputed unless there are reasonable grounds to believe that the statement filed by the absent parent is frivolous or irrelevant.

(4) The fee charged by the department for furnishing a report pursuant to this section shall not exceed the actual cost of furnishing such report.

(5) The Child Support Unit of the department may provide overdue support information to consumer reporting agencies through an automated computer system free of charge and with notice to the defendant as required by Title IV-D of the Social Security Act and the implementing regulations.

HISTORY:

Laws, 1985, ch. 518, § 12; Laws, 1993, ch. 449, § 1; Laws, 1997, ch. 588, § 140, eff from and after July 1, 1997.

Editor's Notes —

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Cross References —

Department of Public Welfare generally, see §§ 43-1-1 et seq.

JUDICIAL DECISIONS

1. In general.

The fact that a delinquency is in the process of being corrected through a "payment plan" does not alter the existence of the underlying delinquency until such time as it is paid, and, therefore, such a delinquency may be properly reported to a consumer reporting agency. Mississippi State Dep't of Human Servs. v. St. Peter, 708 So. 2d 83, 1998 Miss. LEXIS 95 (Miss. 1998).

RESEARCH REFERENCES

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation §§ 969-987.

CJS.

27B C.J.S., Divorce §§ 513–520.

67A C.J.S., Parent §§ 156 et seq.

§ 93-11-71. Judgment for overdue child support; forgiveness of arrears under certain circumstances; credit toward arrearage under certain circumstances.

(1) Whenever a court orders any person to make periodic payments of a sum certain for the maintenance or support of a child, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, a judgment by operation of law shall arise against the obligor in an amount equal to all payments that are then due and owing.

(a) A judgment arising under this section shall have the same effect and be fully enforceable as any other judgment entered in this state. A judicial or administrative action to enforce the judgment may be begun at any time; and

(b) Such judgments arising in other states by operation of law shall be given full faith and credit in this state.

(2) Any judgment arising under the provisions of this section shall operate as a lien upon all the property of the judgment debtor, both real and personal, which lien shall be perfected as to third parties without actual notice thereof only upon enrollment on the judgment roll. The department or attorney representing the party to whom support is owed shall furnish an abstract of the judgment for periodic payments for the maintenance and support of a child, along with sworn documentation of the delinquent child support, to the circuit clerk of the county where the judgment is rendered, and it shall be the duty of the circuit clerk to enroll the judgment on the judgment roll. Liens arising under the provisions of this section may be executed upon and enforced in the same manner and to the same extent as any other judgment.

(3) Notwithstanding the provisions in subsection (2) of this section, any judgment arising under the provisions of this section shall subject the

following assets to interception or seizure without regard to the entry of the judgment on the judgment roll of the situs district or jurisdiction and such assets shall apply to all child support owed including all arrears:

(a) Periodic or lump-sum payments from a federal, state or local agency, including unemployment compensation, workers' compensation and other benefits;

(b) Winnings from lotteries and gaming winnings that are received in periodic payments made over a period in excess of thirty (30) days;

(c) Assets held in financial institutions;

(d) Settlements and awards resulting from civil actions;

(e) Public and private retirement funds, only to the extent that the obligor is qualified to receive and receives a lump-sum or periodic distribution from the funds; and

(f) Lump-sum payments as defined in Section 93-11-101.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, upon disestablishment of paternity granted pursuant to Section 93-9-10 and a finding of clear and convincing evidence including negative DNA testing that the obligor is not the biological father of the child or children for whom support has been ordered, the court shall disestablish paternity and may forgive any child support arrears of the obligor for the child or children determined by the court not to be the biological child or children of the obligor, if the court makes a written finding that, based on the totality of the circumstances, the forgiveness of the arrears is equitable under the circumstances.

(5) In any case in which a child receives assistance from block grants for Temporary Assistance for Needy Families (TANF), and the obligor owes past-due child support, the obligor, if not incapacitated, may be required by the court to participate in any work programs offered by any state agency.

(6) A parent who receives social security disability insurance payments who is liable for a child support arrearage and whose disability insurance benefits provide for the payment of past due disability insurance benefits for the support of the minor child or children for whom the parent owes a child support arrearage shall receive credit toward the arrearage for the payment or payments for the benefit of the minor child or children if the arrearage accrued after the date of disability onset as determined by the Social Security Administration.

HISTORY:

Laws, 1985, ch. 518, § 13; Laws, 1997, ch. 588, § 134; Laws, 1999, ch. 512, § 16; Laws, 2007, ch. 548, § 2; Laws, 2009, ch. 564, § 6; Laws, 2010, ch. 465, § 1; Laws, 2011, ch. 530, § 2, eff from and after July 1, 2011.

Editor's Notes —

Laws of 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Cross References —

Provisions relative to access by consumer reporting agencies to information concerning overdue support payments, see § 93-11-69.

JUDICIAL DECISIONS

1. Claims to forfeiture funds.

Although Miss. Code Ann. § 93-11-71(3) provides an expedited execution process for judgments for child support arrearages, if the judgment is not executed, it creates no legal right or interest superior to competing claims or interests in funds forfeited by the government under 21 USCS § 853(n); thus, defendant's former wife and a department of human services had no claim to the forfeited bank accounts of defendant because they had no legal interest to the funds superior to defendant at the time of the commission of his drug crimes which gave rise to the government's forfeiture; even if the judgment lien had been enrolled, it did not attach to intangible property, such as the bank accounts, as defined under Miss. Code Ann. § 13-3-133. United States v. Butera, 2006 U.S. Dist. LEXIS 65729 (S.D. Miss. Sept. 13, 2006).

RESEARCH REFERENCES

ALR.

Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child. 77 A.L.R.3d 1315.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments. 11 A.L.R.5th 259.

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions. 52 A.L.R.5th 221.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation §§ 969-987.

37 Am. Jur. Trials 639, Interstate Enforcement of Child Support Orders.

CJS.

27B C.J.S., Divorce §§ 513–520.

67A C.J.S., Parent §§ 156 et seq.

§ 93-11-73. Repealed.

Repealed by Laws, 2002, ch. 348, § 1, eff from and after July 1, 2002. [Laws, 1993, ch. 506, § 18, eff from and after July 2, 1993.]

Editor's Notes —

Former § 93-11-73 provided that the age of emancipation of a child under the Uniform Reciprocal Enforcement of Support Act (URESA) shall be determined by the initiating state.

ORDERS FOR WITHHOLDING

Sec.

93-11-101. Definitions.

93-11-103. Entry of order for withholding; content; copies; duration; withholding from lump-sum payment made by employer to employee who owes child support arrearage.

93-11-105. Administrative orders.

93-11-107 and 93-11-109. Repealed.

93-11-111. Duties of payor; payments to obligee; fees.

93-11-113. Modification, suspension, or termination of orders.

93-11-115. Additional notice requirements; records, legal forms, and information.

93-11-116. Order for withholding based upon support order from foreign jurisdiction; procedural requirements.

93-11-117. Penalties.

93-11-118. Fraudulent conveyance of assets by obligor.

93-11-119. Relation to other rights, remedies, duties, and penalties.

§ 93-11-101. Definitions.

As used in Sections 93-11-101 through 93-11-119, the following words shall have the meaning ascribed to them herein unless the context clearly requires otherwise:

(a) "Order for support" means any order of the chancery, circuit, county or family court, which provides for periodic payment of funds for the support of a child, whether temporary or final, and includes any such order which provides for:

(i) Modification or resumption of, or payment of arrearage accrued under, a previously existing order; or

(ii) Reimbursement of support.

"Order for support" shall also mean:

(i) An order for support and maintenance of a spouse if a minor child is living with such spouse; or

(ii) In actions to which the Department of Human Services is a party, an order for support and maintenance of a spouse if a minor child is living with such spouse and such maintenance is collected in conjunction with child support.

(b) "Court" means the court that enters an order for withholding pursuant to Section 93-11-103(1).

(c) "Clerk of the court" means the clerk of the court that enters an order for withholding pursuant to Section 93-11-103(1).

(d) "Arrearage" means the total amount of unpaid support obligations.

(e) "Delinquency" means any payments that are ordered by any court to be paid by a noncustodial parent for the support of a child that have remained unpaid for at least thirty (30) days after payment is due. Delinquency shall also include payments that are ordered by any court to be paid for maintenance of a spouse in cases in which the department is collecting such support in conjunction with child support. "Delinquency" shall be synonymous with "overdue support."

(f) "Department" means the Mississippi Department of Human Services.

(g) "Employer" means a person who has control of the payment of income to an individual.

(h) "Income" means any form of periodic payment to an individual, regardless of source, including, but not limited to: wages, salary, commission, compensation as an independent contractor, workers' compensation, disability, annuity and retirement benefits, and any other payments made by any person, private entity, federal or state government or any unit of local government, notwithstanding any other provisions of state or local law which limit or exempt income or the amount or percentage of income that can be withheld; provided, however, that income excludes:

(i) Any amounts required by law to be withheld, other than creditor claims, including, but not limited to, federal, state and local taxes, social security and other retirement and disability contributions;

(ii) Any amounts exempted by federal law;

(iii) Public assistance payments; and

(iv) Unemployment insurance benefits except as provided by law.

(i) "Obligor" means the individual who owes a duty to make payments under an order for support.

(j) "Obligee" means:

(i) An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered;

(ii) A state or political subdivision to which the rights under a duty of support or support order have been assigned or which independent claims based on financial assistance provided to an individual obligee; or

(iii) An individual seeking a judgment determining parentage of the individual's child.

(k) "Payor" means any payor of income to an obligor.

(*l*) "Lump-sum payment" means any form of income paid to an individual at other than regular intervals or a payment made upon a particular occasion regardless of frequency that is dependent upon meeting a condition precedent, including, but not limited to, the performance of a contract, commission paid outside of and in addition to a person's regular pay cycle, the satisfaction of a job performance standard or quota, the receipt of a seasonal or occasional bonus or incentive payment, the liquidation of unused sick or vacation pay or leave, the settlement of a claim, an amount paid as severance pay, or an award for length of service. "Lump-sum payment" shall not include liens under Section 71-3-129.

HISTORY:

Laws, 1985, ch. 518, § 1; Laws, 1988, ch. 480, § 11; Laws, 1997, ch. 588, § 5; Laws, 2009, ch. 564, § 7; Laws, 2010, ch. 465, § 2; Laws, 2011, ch. 530, § 3, eff from and after July 1, 2011.

Editor's Notes —

Laws of 1985, ch. 518, § 21, eff from and after July 1, 1985, provides as follows:

"SECTION 21. It is the intent of the Legislature that the Department of Public Welfare shall make all reasonable efforts to utilize the existing staff and personnel of the department for the purposes of administering and implementing the provisions of this act."

Laws of 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Laws of 1999, ch. 432, § 1, provides that:

"SECTION 1. From and after the date Laws, 1999, ch. 432, is effectuated under Section 5 of the Voting Rights Act of 1965, all family courts are abolished. All matters pending in any family court abolished shall be transferred to the county court of the county wherein the family court was located without the necessity for any motion or order of court for such transfer."

Cross References —

Jurisdiction of family masters in chancery with respect to child support orders, see § 9-5-255.

Rights, remedies and duties of obligor under §§ 93-11-101 through 93-11-119 are to be stated in all orders for withholding, see § 93-11-103.

Provision that obligee who seeks to enforce wage withholding order which is based upon an order for support from a foreign jurisdiction must comply with all procedural requirements of §§ 93-11-101 through 93-11-119, see § 93-11-116.

RESEARCH REFERENCES

ALR.

Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child. 77 A.L.R.3d 1315.

Consideration of obligated spouse's earnings from overtime of "second job" held in addition to regular full-time employment in fixing alimony or child support awards. 17 A.L.R.5th 143.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation §§ 969-987.

CJS.

27B C.J.S., Divorce §§ 513–520.

67A C.J.S., Parent §§ 156 et seq.

Law Reviews.

Bell, Child Support Orders: The Common Law Framework – Part II, 69 Miss. L.J. 1063 (Spring, 2000).

Practice References.

Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-11-103. Entry of order for withholding; content; copies; duration; withholding from lump-sum payment made by employer to employee who owes child support arrearage.

(1) Upon entry of any order for support by a court of this state where the custodial parent is a recipient of services under Title IV-D of the federal Social Security Act, issued on or after October 1, 1996, the court entering such order shall enter a separate order for withholding which shall take effect immediately without any requirement that the obligor be delinquent in payment. All such orders for support issued prior to October 1, 1996, shall, by operation of law, be amended to conform with the provisions contained herein. All such orders for support issued shall:

(a) Contain a provision for monthly income withholding procedures to take effect in the event the obligor becomes delinquent in paying the order for support without further amendment to the order or further action by the court; and

(b) Require that the payor withhold any additional amount for delinquency specified in any order if accompanied by an affidavit of accounting, a notarized record of overdue payments, official payment record or an attested judgment for delinquency or contempt. Any person who willfully and knowingly files a false affidavit, record or judgment shall be subject to a fine of not more than One Thousand Dollars ($1,000.00). The Department of Human Services shall be the designated agency to receive payments made by income withholding in child support orders enforced by the department. All withholding orders shall be on a form as prescribed by the department.

(2) Upon entry of any order for support by a court of this state where the custodial parent is not a recipient of services under Title IV-D of the federal Social Security Act, issued or modified or found to be in arrears on or after January 1, 1994, the court entering such order shall enter a separate order for withholding which shall take effect immediately. Such orders shall not be subject to immediate income withholding under this subsection: (a) if one (1) of the parties (i.e., noncustodial or custodial parent) demonstrates, and the court finds, that there is good cause not to require immediate income withholding, or (b) if both parties agree in writing to an alternative arrangement. The Department of Human Services shall be the designated agency to receive

payments made by income withholding in all child support orders. Withholding orders shall be on a form as prescribed by the department.

(3) If a child support order is issued or modified in the state but is not subject to immediate income withholding, it automatically becomes so if the court finds that a support payment is thirty (30) days past due. If the support order was issued or modified in another state but is not subject to immediate income withholding, it becomes subject to immediate income withholding on the date on which child support payments are at least thirty (30) days in arrears, or (a) the date as of which the noncustodial parent requests that withholding begin, (b) the date as of which the custodial parent requests that withholding begin, or (c) an earlier date chosen by the court, whichever is earlier.

(4) The clerk of the court shall submit copies of such orders to the obligor's payor, any additional or subsequent payor, and to the Mississippi Department of Human Services Case Registry. The clerk of the court, the obligee's attorney, or the department may serve such immediate order for withholding by first-class mail or personal delivery on the obligor's payor, superintendent, manager, agent or subsequent payor, as the case may be. There shall be no need for further notice, hearing, order, process or procedure before service of said order on the payor or any additional or subsequent payor. The obligor may contest, if grounds exist, service of the order of withholding on additional or subsequent payors, by filing an action with the issuing court. Such filing shall not stay the obligor's duty to support pending judicial determination of the obligor's claim. Nothing herein shall be construed to restrict the authority of the courts of this state from entering any order it deems appropriate to protect the rights of any parties involved.

(5) The order for withholding shall:

(a) Direct any payor to withhold an amount equal to the order for current support;

(b) Direct any payor to withhold an additional amount, not less than fifteen percent (15%) of the order for support, until payment in full of any delinquency; and

(c) Direct the payor not to withhold in excess of the amounts allowed under Section 303(b) of the Consumer Credit Protection Act, being 15 USCS 1673, as amended.

(6) All orders for withholding may permit the Department of Human Services to withhold through said withholding order additional amounts to recover costs incurred through its efforts to secure the support order, including, but not limited to, all filing fees, court costs, service of process fees, mailing costs, birth certificate certification fee, genetic testing fees, the department's attorney's fees; and, in cases where the state or any of its entities or divisions have provided medical services to the child or the child's mother, all medical costs of prenatal care, birthing, postnatal care and any other medical expenses incurred by the child or by the mother as a consequence of her pregnancy or delivery.

(7) At the time the order for withholding is entered, the clerk of the court shall provide copies of the order for withholding and the order for support to

the obligor, which shall be accompanied by a statement of the rights, remedies and duties of the obligor under Sections 93-11-101 through 93-11-119. The clerk of the court shall make copies available to the obligee and to the department or its local attorney.

(8) The order for withholding shall remain in effect for as long as the order for support upon which it is based.

(9) The failure of an order for withholding to state an arrearage is not conclusive of the issue of whether an arrearage is owing.

(10) Any order for withholding entered pursuant to this section shall not be considered a garnishment.

(11) All existing orders for support shall become subject to additional withholding if arrearages occur, subject to court hearing and order. The Department of Human Services or the obligee or his agent or attorney must send to each delinquent obligor notice that:

(a) The withholding on the delinquency has commenced;

(b) The information along with the required affidavit of accounting, notarized record of overdue payment or attested judgment of delinquency or contempt has been sent to the employer; and

(c) The obligor may file an action with the issuing court on the grounds of mistake of fact. Such filing must be made within thirty (30) days of receipt of the notice and shall not stay the obligor's duty to support pending judicial determination of the obligor's claim.

(12) An employer who complies with an income withholding notice that is regular on its face and which is accompanied by the required accounting affidavit, notarized record of overdue payments or attested judgment of delinquency or contempt shall not be subject to civil liability to any individual or agency for conduct in compliance with the notice.

(13) Any employer who has been served with an order for withholding under this section, which includes a provision for payment of arrears, shall notify the Department of Human Services before making any lump-sum payment of more than Five Hundred Dollars ($500.00) to the obligor.

An employer to whom this section applies shall notify the Department of Human Services of its intention to make a lump-sum payment at least forty-five (45) days before the planned date of the lump-sum payment, or as soon as the decision is made to make the payment, should that be less than forty-five (45) days. The employer shall not release the lump sum to the obligor until thirty (30) days after the intended date of the payment or until authorization is received from the Department of Human Services, whichever is earlier.

Upon receipt of notice to pay a lump sum from an employer, the Department of Human Services shall provide the employer with a Notice of Lien in accordance with Section 93-11-71 specifying the amount of the lump sum to be withheld for payment of child support arrearage. Unless the lump sum is considered severance pay, any amount of the lump sum up to the entire arrearage may be withheld. If the lump sum is for severance pay, the amount withheld for child support arrearages may not exceed an amount equal to the amount the employer would have withheld if the severance pay had been paid as the employee's usual earnings.

HISTORY:

Laws, 1985, ch. 518, § 2; Laws, 1986, ch. 474, § 2; Laws, 1989, ch. 360, § 1; Laws, 1990, ch. 543, § 4; Laws, 1993, ch. 374, § 1; Laws, 1994, ch. 435, § 1; Laws, 1997, ch. 588, § 6; Laws, 1999, ch. 512, § 18; Laws, 2000, ch. 530, § 7; Laws, 2003, ch. 396, § 1; Laws, 2009, ch. 564, § 8; Laws, 2010, ch. 465, § 3; Laws, 2011, ch. 530, § 4; Laws, 2013, ch. 354, § 1, eff from and after July 1, 2013.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (2). A colon was added after the word "subsection" in the second sentence of (2). The Joint Committee ratified the correction at its July 8, 2004, meeting.

Editor's Notes —

Laws of 1985, ch. 518, § 21, eff from and after July 1, 1985, provides as follows:

"SECTION 21. It is the intent of the Legislature that the Department of Public Welfare shall make all reasonable efforts to utilize the existing staff and personnel of the department for the purposes of administering and implementing the provisions of this act."

Laws of 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Sections 93-11-107 and 93-11-109, referred to in this section, were repealed by §§ 8 and 9, Chapter 588, Laws of 1997, effective from and after July 1, 1997.

Cross References —

Provision that obligee who seeks to enforce wage withholding order which is based upon an order for support from a foreign jurisdiction must comply with all procedural requirements of §§ 93-11-101 through 93-11-119, see § 93-11-116.

Enforcement of child support orders from foreign jurisdictions, see § 93-25-101 et seq.

Federal Aspects—

Consumer Credit Protection Act, see 15 USCS § 1673.

Title IV. D. of Social Security Act, see 42 USCS §§ 651 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Withholding order.
2. Failure to enter order.

1. Withholding order.

Trial court correctly complied with Miss. Code Ann. § 93-11-103 when he entered the order for withholding several days after the order for support was entered. The statute applies to all orders issued or modified, not only to those found to be in arrears. McNeese v. McNeese, 119 So. 3d 264, 2013 Miss. LEXIS 172 (Miss. 2013).

The chancellor did not err in failing to enter a withholding order where (1) the child support obligation at issue was created prior to the effective date of the amendment which required such an order, (2) there was no finding by the chancellor that the father was in arrears on his child support, and (3) the chancellor did not modify the support order. Curtiss v. Curtiss, 781 So. 2d 142, 2000 Miss. App. LEXIS 458 (Miss. Ct. App. 2000).

2. Failure to enter order.

In light of the mandatory language of the statute on orders for withholding and the fact that the matter was raised both in pleadings and at the hearing, there was clear error where the trial court failed either to enter such an order or to give reasons as to why it was not justified. Meeks v. Meeks, 757 So. 2d 364, 2000 Miss. App. LEXIS 212 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR.

Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child. 77 A.L.R.3d 1315.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments. 11 A.L.R.5th 259.

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions. 52 A.L.R.5th 221.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation §§ 969-987.

CJS.

27B C.J.S., Divorce §§ 513–520.

67A C.J.S., Parent §§ 156 et seq.

§ 93-11-105. Administrative orders.

(1) Notwithstanding the provisions of Section 93-11-103, the Department of Human Services shall be authorized to implement administrative orders for withholding without the necessity of obtaining an order through judicial proceedings. The administrative order for withholding shall be implemented pursuant to a previously rendered order for support and shall be on a form prescribed by the Department of Human Services. Unless inconsistent with the provisions of this section, the order for withholding shall be subject to the same requirements as provided in Sections 93-11-101 through 93-11-118.

(2) A copy of the administrative order shall be transmitted to the obligor by regular mail to the last-known address of the obligor.

(3) The order for withholding shall:

(a) Direct any payor to withhold an amount equal to the order for the current support obligation;

(b) Direct any payor to withhold an additional amount equal to twenty percent (20%) of the current support obligation, unless a different amount has been previously ordered by the court, until payment in full of any delinquency; and

(c) Direct the payor not to withhold in excess of the amounts allowed under Section 303(b) of the Consumer Credit Protection Act, being 15 USCS 1673, as amended.

HISTORY:

Laws, 1999, ch. 512, § 17; Laws, 2000, ch. 530, § 8; Laws, 2013, ch. 354, § 2, eff from and after July 1, 2013.

Editor's Notes —

The prior § 93-11-105 [Laws, 1985, ch. 518, § 3] was repealed by Laws, 1997, ch. 588, § 7, eff from and after July 1, 1997. That section provided for the service of notice of delinquent child support payments by the Department of Human Services.

Sections 93-11-107 and 93-11-109, referred to in this section, were repealed by §§ 8 and 9, Chapter 588, Laws of 1997, effective from and after July 1, 1997.

Laws, 1999, ch. 432, § 1, provides that:

"SECTION 1. From and after the date Laws, 1999, ch. 432, is effectuated under Section 5 of the Voting Rights Act of 1965, all family courts are abolished. All matters pending in any family court abolished shall be transferred to the county court of the county wherein the family court was located without the necessity for any motion or order of court for such transfer."

§§ 93-11-107 and 93-11-109. Repealed.

Repealed by Laws, 1997, ch. 588, §§ 8 and 9, eff from and after July 1, 1997.

§ 93-11-107. [Laws, 1985, ch. 518, § 4]

§ 93-11-109. [Laws, 1985, ch. 518, § 5; Laws 1992, ch. 527, § 1]

Editor's Notes —

Former § 93-11-107 provided for the filing of a petition to stay service of an order for withholding child support payments.

Former § 93-11-109 provided certain prerequisites for the service of an order for withholding child support payments.

§ 93-11-111. Duties of payor; payments to obligee; fees.

(1) It shall be the duty of any payor who has been served with a copy of the order for withholding and an attached affidavit of accounting, a certified record of payments, or judgment for delinquency to deduct and pay over income as provided in this section. The payor shall deduct the amount designated in the order for withholding beginning with the next payment of income that is payable to the obligor after fourteen (14) days following service of the order and notice. The payor shall pay the amounts withheld to the department within seven (7) days of the date the obligor is paid in accordance with the order for withholding and in accordance with any later notification received redirecting payments. The department shall then forward those amounts to the obligee.

(2) For each intrastate withholding of income, the payor shall be entitled to receive a fee of Two Dollars ($2.00) to be withheld from the income of the obligor in addition to the support payments, regardless of the number of payments the payor makes to the department. However, in all interstate withholding, the rules and laws of the state where the obligor works shall determine the payor's processing fee.

(3) The payor shall, unless otherwise notified by the department, withhold from the income of the obligor and forward to the department each month, an amount specified by the department not to exceed Fifteen Dollars ($15.00) per month to defray the department's administrative costs incurred in receiving and distributing money withheld under Sections 93-11-101 through 93-11-119. The payor may pay such amount to the department in any manner determined by the payor to be convenient and may include that amount in checks to the department for amounts withheld pursuant to the order for withholding.

(4) Regardless of the amount designated in the order for withholding and regardless of other fees imposed or amounts withheld under this section, the payor shall not deduct from the income of the obligor in excess of the amounts allowed under Section 303(b) of the Consumer Credit Protection Act, being 15 USCS 1673, as amended.

(5) A payor may combine all amounts that he is required to withhold and pay to the department in one (1) payment; however, the payor must send to the department a list showing the amount of the payment attributable to each obligor.

(6) Whenever the obligor is no longer receiving income from the payor, the payor shall return a copy of the order for withholding to the department and shall forward the obligor's last known address and name and address of the obligor's new employer, if known, to the department. The payor shall cooperate in providing further information for the purpose of enforcing Sections 93-11-101 through 93-11-119.

(7) Withholding of income under this section shall be made without

regard to any prior or subsequent garnishments, attachments, wage assignments or any other claims of creditors. Payment as required by the order for withholding shall be a complete defense by the payor against any claims of the obligor or his creditors as to the sum so paid.

(8) In cases in which the payor has been served more than one (1) order for withholding for the same obligor, the payor shall honor the orders on a pro rata basis to result in withholding an amount for each order that is in direct proportion to the percentage of the obligor's adjusted gross income that the order represents, and the payor shall honor all those withholdings to the extent that the total amount withheld does not exceed the maximum amount specified in subsection (1) of this section.

(9) No payor shall discharge, discipline, refuse to hire or otherwise penalize any obligor because of the duty to withhold income.

HISTORY:

Laws, 1985, ch. 518, § 6; Laws, 1986, ch. 474, § 3; Laws, 1990, ch. 543, § 5; Laws, 1997, ch. 588, § 10; Laws, 2004, ch. 597, § 1; Laws, 2005, ch. 378, § 1; Laws, 2006, ch. 424, § 1, eff from and after July 1, 2006.

Editor's Notes —

Laws, 1985, ch. 518, § 21, eff from and after July 1, 1985, provides as follows:

"SECTION 21. It is the intent of the Legislature that the Department of Public Welfare shall make all reasonable efforts to utilize the existing staff and personnel of the department for the purposes of administering and implementing the provisions of this act."

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Sections 93-11-107 and 93-11-109, referred to in this section, were repealed by §§ 8 and 9, Chapter 588, Laws of 1997, effective from and after July 1, 1997.

Cross References —

Provision that obligee who seeks to enforce wage withholding order which is based upon an order for support from a foreign jurisdiction must comply with all procedural requirements of §§ 93-11-101 through 93-11-119, see § 93-11-116.

Federal Aspects—

Consumer Credit Protection Act, see 15 USCS § 1673.

§ 93-11-113. Modification, suspension, or termination of orders.

(1) At any time, an obligor, obligee, the department or clerk of the court may petition the court to:

(a) Modify, suspend or terminate the order for withholding because of a modification, suspension or termination of the underlying order for support; or

(b) Modify the amount of income to be withheld to reflect payment in full of the delinquency by income withholding or otherwise; or

(c) Suspend the order for withholding because of inability to deliver income withheld to the obligee due to the obligee's failure to provide a mailing address or other means of delivery.

(2) The clerk shall serve on the payor, by first class mail or personal delivery, a copy of any order entered pursuant to this section that affects the duties of the payor.

(3) The order for withholding shall continue to be binding upon the payor until service of any order of the court entered under this section.

HISTORY:

Laws, 1985, ch. 518, § 7; Laws, 1997, ch. 588, § 11, eff from and after July 1, 1997.

Editor's Notes —

Laws, 1985, ch. 518, § 21, eff from and after July 1, 1985, provides as follows:

"SECTION 21. It is the intent of the Legislature that the Department of Public Welfare shall make all reasonable efforts to utilize the existing staff and personnel of the department for the purposes of administering and implementing the provisions of this act."

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Cross References —

Jurisdiction of family masters in chancery with respect to child support orders, see § 9-5-255.

Provision that obligee who seeks to enforce wage withholding order which is based upon an order for support from a foreign jurisdiction must comply with all procedural requirements of §§ 93-11-101 through 93-11-119, see § 93-11-116.

RESEARCH REFERENCES

ALR.

Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child. 77 A.L.R.3d 1315.

§ 93-11-115. Additional notice requirements; records, legal forms, and information.

(1) An obligee who is receiving income withholding payments under Sections 93-11-101 through 93-11-119 shall notify the department of any change of address within seven (7) days of such change.

(2) An obligee who is a recipient of public aid shall send a copy of any notice filed pursuant to Section 93-11-103 to the department.

(3) An obligor whose income is being withheld pursuant to Sections 93-11-101 through 93-11-119 shall notify the department and the clerk of the court of any new payor, within seven (7) days.

(4) When the department is no longer authorized to receive payments for the obligee, it shall, within seven (7) days, notify the payor and the clerk of the court.

(5) The department shall provide notice to the payor and the clerk of the court of any other support payment made, including, but not limited to, a set-off under federal and state law or partial payment of the delinquency.

(6) The department shall maintain complete, accurate and clear records of all payments and their disbursements. Certified copies of payment records maintained by the department shall, without further proof, be admitted into evidence in any legal proceedings under Sections 93-11-101 through 93-11-119.

(7) The department shall design suggested legal forms for proceeding under Sections 93-11-101 through 93-11-119 and shall make available to the courts such forms and informational materials which describe the procedures and remedies set forth herein for distribution to all parties in support actions.

HISTORY:

Laws, 1985, ch. 518, § 8; Laws, 1997, ch. 588, § 12, eff from and after July 1, 1997.

Editor's Notes —

Laws, 1985, ch. 518, § 21, eff from and after July 1, 1985, provides as follows:

"SECTION 21. It is the intent of the Legislature that the Department of Public Welfare shall make all reasonable efforts to utilize the existing staff and personnel of the department for the purposes of administering and implementing the provisions of this act."

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Sections 93-11-107 and 93-11-109, referred to in this section, were repealed by §§ 8 and 9, Chapter 588, Laws of 1997, effective from and after July 1, 1997.

Cross References —

Provision that obligee who seeks to enforce wage withholding order which is based upon an order for support from a foreign jurisdiction must comply with all procedural requirements of §§ 93-11-101 through 93-11-119, see § 93-11-116.

§ 93-11-116. Order for withholding based upon support order from foreign jurisdiction; procedural requirements.

An obligee who seeks a wage withholding order based upon an order for support from a foreign jurisdiction, must comply with the provisions of Sections 93-12-1 through 93-12-19.

HISTORY:

Laws, 1986, ch. 474, § 4; Laws, 1988, ch. 480, § 12, eff from and after July 1, 1988.

Editor's Notes —

Sections 93-12-1 through 93-12-15 referred to in this section were repealed by Laws, 1997, ch. 588, § 131, eff from and after July 1, 1997. For current provisions, see §§ 93-25-101 et seq.

§ 93-11-117. Penalties.

(1) In cases in which a payor willfully fails to withhold or pay over income pursuant to a valid order for withholding, the following penalties shall apply:

(a) The payor shall be liable for a civil penalty of not more than:

(i) Five Hundred Dollars ($500.00); or

(ii) One Thousand Dollars ($1,000.00) in an instance where the failure to comply is the result of collusion between the payor and the obligor; and

(b) The court, upon due notice and hearing, shall enter judgment and direct the issuance of an execution for the total amount that the payor willfully failed to withhold or pay over.

(2) In cases in which a payor discharges, disciplines, refuses to hire or otherwise penalizes an obligor as prohibited by subsection (9) of Section 93-11-111, the court, upon due notice and hearing, shall fine the payor in an amount not to exceed Fifty Dollars ($50.00).

(3) Any obligee, the department or obligor who willfully initiates a false proceeding under Sections 93-11-101 through 93-11-119 or who willfully fails to comply with the requirements of Sections 93-11-101 through 93-11-119 shall be punished as in cases of contempt of court.

HISTORY:

Laws, 1985, ch. 518, § 9; Laws, 1997, ch. 588, § 141; Laws, 2007, ch. 314, § 1; Laws, 2007, ch. 334, § 1, eff from and after July 1, 2007.

Joint Legislative Committee Note —

Section 1 of ch. 314, Laws of 2007, effective July 1, 2007 (approved March 12, 2007), amended this section. Section 1 of ch. 334, Laws of 2007, effective July 1, 2007 (approved March 14, 2007), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 334, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Editor's Notes —

Laws, 1985, ch. 518, § 21, eff from and after July 1, 1985, provides as follows:

"SECTION 21. It is the intent of the Legislature that the Department of Public Welfare shall make all reasonable efforts to utilize the existing staff and personnel of the department for the purposes of administering and implementing the provisions of this act."

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Sections 93-11-107 and 93-11-109, referred to in this section, were repealed by §§ 8 and 9, Chapter 588, Laws of 1997, effective from and after July 1, 1997.

Cross References —

Provision that obligee who seeks to enforce wage withholding order which is based upon an order for support from a foreign jurisdiction must comply with all procedural requirements of §§ 93-11-101 through 93-11-119, see § 93-11-116.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

§ 93-11-118. Fraudulent conveyance of assets by obligor.

(1) Indicia of fraud which create a prima facie case that an obligor transferred income or property to avoid payment of child support to an obligee or department on behalf of an obligee shall be as stated in Section 15-3-3, Mississippi Code of 1972.

(2) Remedies for such fraudulent conveyance shall include, but not be limited to, the setting aside of such conveyance.

(3) Penalties for such fraudulent conveyance shall be a fine of not more than One Thousand Dollars ($1,000.00).

HISTORY:

Laws, 1997, ch. 588, § 138, eff from and after July 1, 1997.

Editor's Notes —

Laws, 1997, ch. 588, § 150, provides as follows:

"SECTION 150. Any person or entity shall be absolutely immune from any liability arising from compliance with the dictates of this act unless such conduct by the person or entity is willful and intentional."

Section 15-3-3, referred to in (1), was repealed by Laws, 2006, ch. 371, § 13, effective from and after July 1, 2006.

§ 93-11-119. Relation to other rights, remedies, duties, and penalties.

(1) The rights, remedies, duties and penalties created by Sections 93-11-101 through 93-11-119 are in addition to and not in substitution for any other rights, remedies, duties and penalties created by any other law.

(2) Nothing in Sections 93-11-101 through 93-11-119 shall be construed as invalidating any garnishment, attachment or assignment of wages or benefits instituted prior to July 1, 1985; provided, however, any such garnishment, attachment or assignment shall be subject to the priorities established under the provisions of subsection (3) of Section 93-11-111.

HISTORY:

Laws, 1985, ch. 518, § 10, eff from and after July 1, 1985.

Editor's Notes —

In Subsection (2) there is a cross reference to "subsection (3) of Section 93-11-111". In 1990, Chapter 543, § 5, amended Section 93-11-111, and the substance of subsection (3) is now found in subsection (7).

Laws, 1985, ch. 518, § 21, eff from and after July 1, 1985, provides as follows:

"SECTION 21. It is the intent of the Legislature that the Department of Public Welfare shall make all reasonable efforts to utilize the existing staff and personnel of the department for the purposes of administering and implementing the provisions of this act."

Cross References —

Provisions relative to judgments in the amount of overdue child support payments, see § 93-11-71.

Provision that obligee who seeks to enforce wage withholding order which is based upon an order for support from a foreign jurisdiction must comply with all procedural requirements of §§ 93-11-101 through 93-11-119, see § 93-11-116.

RESEARCH REFERENCES

ALR.

Death of putative father as precluding action for determination of paternity or for child support. 58 A.L.R.3d 188.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child. 77 A.L.R.3d 1315.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation §§ 969-987.

CJS.

27B C.J.S., Divorce §§ 513–520.

67A C.J.S., Parent §§ 156 et seq.

SUSPENSION OF STATE-ISSUED LICENSES, PERMITS OR REGISTRATIONS FOR NONCOMPLIANCE WITH CHILD SUPPORT ORDER

Sec.

93-11-151. Intent.
93-11-153. Definitions.
93-11-155. Procedures for the establishment, enforcement and collection of child support obligations.
93-11-157. Review of information.
93-11-159. Interagency agreements.
93-11-161. Adoption of regulations.
93-11-163. Suspension of license.

§ 93-11-151. Intent.

In addition to other requirements necessary for holding a license, an individual who is subject to an order to pay child support also is subject to the provisions of Sections 93-11-151 through 93-11-163.

HISTORY:

Laws, 1996, ch. 507, § 1, eff July 1, 1996.

Cross References —

Suspension of occupational therapy license for failure to comply with an order of support, see § 73-24-25.

RESEARCH REFERENCES

Am. Jur.
59 Am. Jur. 2d, Parent and Child §§ 42-47, 51.
73 Am. Jur. 2d, Statutes § 186.

CJS.
53 C.J.S., Licenses § 84-86.

Law Reviews.
Bell, Child Support Orders: The Common Law Framework – Part II, 69 Miss. L.J. 1063 (Spring, 2000).

§ 93-11-153. Definitions.

As used in Sections 93-11-151 through 93-11-163, the following words and terms shall have the meanings ascribed herein:

(a) "Licensing entity" or "entity" means any entity specified in Title 73, Professions and Vocations, of the Mississippi Code, and includes the Mississippi Department of Public Safety with respect to driver's licenses, the Mississippi State Tax Commission with respect to licenses for the sale of alcoholic beverages and other licenses or registration authorizing a person to engage in a business, the Mississippi Department of Wildlife, Fisheries and Parks with respect to hunting and fishing licenses, and any other state agency that issues a license authorizing a person to engage in a business, occupation or profession. For the purposes of this article, the Supreme Court shall be considered to be the licensing entity for attorneys.

(b) "License" means a license, certificate, permit, credential, registration, or any other authorization issued by a licensing entity that allows a person to engage in a business, occupation or profession, to operate a motor vehicle, to sell alcoholic beverages, or to hunt and fish.

(c) "Licensee" means any person holding a license issued by a licensing entity.

(d) "Order for support" means any judgment or order that provides for payments of a sum certain for the support of a child, whether it is temporary or final, and includes, but is not limited to, an order for reimbursement for public assistance or an order for making periodic payments on a support arrearage, or a sum certain due for a support arrearage.

(e) "Out of compliance with an order for support" means that the obligor is at least thirty (30) days in arrears or delinquent in making payments in full for current support, or in making periodic payments on a support arrearage.

(f) "Department" means the Mississippi Department of Human Services.

(g) "Division" means the division within the department that is charged with the state administration of Title IV-D of the Social Security Act.

(h) "Delinquency" means any payments of a sum certain ordered by any court to be paid by a noncustodial parent for the support of a child that have remained unpaid for at least thirty (30) days after payment is due. Delinquency shall also include payments of a sum certain ordered by any court to be paid for maintenance of a spouse that have remained unpaid for at least thirty (30) days.

HISTORY:

Laws, 1996, ch. 507, § 2, eff July 1, 1996; Laws, 1999, ch. 512, § 4, eff from and after July 1, 1999.

Editor's Notes —

Section 27-3-4 provides that the terms "'Mississippi State Tax Commission,' 'State Tax Commission,' 'Tax Commission' and 'commission' appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

Cross References —

Suspension of hunting, trapping and fishing licenses for being out of compliance with an order of support, see § 49-7-27.

§ 93-11-155. Procedures for the establishment, enforcement and collection of child support obligations.

(1) In the manner and form prescribed by the division, all licensing entities shall provide to the division, on at least a quarterly basis, information on licensees for use in the establishment, enforcement and collection of child support obligations including, but not limited to: name, address, Social Security number, sex, date of birth, employer's name and address, type of license, effective date of the license, expiration date of the license, and active or inactive license status. Whenever technologically feasible, the department and licensing entities shall seek to reach agreements to provide the information required by this section by way of electronic data media, including, but not limited to, on-line access and records on magnetic/optical disk or tape. In lieu of providing the licensing information to the division as outlined above and in the discretion of the licensing entity, the division shall provide the identity of the individual who is delinquent in support payments to the licensing entity who will then match that information with their records and provide the division with all necessary information for those individuals licensed by that entity.

(2) Any licensed attorney representing the party to whom support is due may submit to the division the name and record of accounting showing an arrearage of an individual who is out of compliance with an order for support which is not being enforced by the division under Title IV-D, and the division shall submit the name of such individual to the licensing entities who will match the name with their records in the same manner as provided in subsection (1) to provide the attorney with necessary information regarding licensees. The attorney applying for such information shall pay a fee not to exceed Twenty-five Dollars ($25.00) for such service.

HISTORY:

Laws, 1996, ch. 507, § 3, eff July 1, 1996; Laws, 1999, ch. 512, § 5, eff from and after July 1, 1999.

RESEARCH REFERENCES

ALR.

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions. 52 A.L.R.5th 221.

§ 93-11-157. Review of information.

(1) The division shall review the information received under Section 93-11-155 and any other information available to the division, and shall determine if a licensee is out of compliance with an order for support. If a licensee is out of compliance with the order for support, the division shall notify the licensee by first class mail that ninety (90) days after the licensee receives the notice of being out of compliance with the order, the licensing entity will be notified to immediately suspend the licensee's license unless the licensee pays the arrearage owing, according to the accounting records of the Mississippi Department of Human Services or the attorney representing the party to whom support is due, as the case may be, or enters into a stipulated agreement and agreed judgment establishing a schedule for the payment of the arrearage. The licensee shall be presumed to have received the notice five (5) days after it is deposited in the mail.

(2) Upon receiving the notice provided in subsection (1) of this section the licensee may:

(a) Request a review with the division; however, the issues the licensee may raise at the review are limited to whether the licensee is the person required to pay under the order for support and whether the licensee is out of compliance with the order for support; or

(b) Request to participate in negotiations with the division for the purpose of establishing a payment schedule for the arrearage.

(3) The division director or the designees of the division director may and, upon request of a licensee, shall negotiate with a licensee to establish a payment schedule for the arrearage. Payments made under the payment schedule shall be in addition to the licensee's ongoing obligation under the latest entered periodic order for support.

(4) Should the division and the licensee reach an agreement on a payment schedule for the arrearage, the division director may submit to the court a stipulated agreement and agreed judgment containing the payment schedule which, upon the court's approval, is enforceable as any order of the court. If the court does not approve the stipulated agreement and agreed judgment, the court may require a hearing on a case-by-case basis for the judicial review of the payment schedule agreement.

(5) If the licensee and the division do not reach an agreement on a payment schedule for the arrearage, the licensee may move the court to establish a payment schedule. However, this action does not stay the license suspension.

(6) The notice given to a licensee that the licensee's license will be suspended in ninety (90) days must clearly state the remedies and procedures that are available to a licensee under this section.

(7) If at the end of the ninety (90) days the licensee has an arrearage according to the accounting records of the Mississippi Department of Human Services or the attorney representing the party to whom support is due, as the case may be, and the licensee has not entered into a stipulated agreement and

agreed judgment establishing a payment schedule for the arrearage, the division shall immediately notify all applicable licensing entities in writing to suspend the licensee's license, and the licensing entities shall immediately suspend the license and shall within three (3) business days notify the licensee and the licensee's employer, where known, of the license suspension and the date of such suspension by certified mail return receipt requested. Within forty-eight (48) hours of receipt of a request in writing delivered personally, by mail or by electronic means, the department shall furnish to the licensee, licensee's attorney or other authorized representative a copy of the department's accounting records of the licensee's payment history. A licensing entity shall immediately reinstate the suspended license upon the division's notification of the licensing entities in writing that the licensee no longer has an arrearage or that the licensee has entered into a stipulated agreement and agreed judgment.

(8) Within thirty (30) days after a licensing entity suspends the licensee's license at the direction of the division under subsection (7) of this section, the licensee may appeal the license suspension to the chancery court of the county in which the licensee resides or to the Chancery Court of the First Judicial District of Hinds County, Mississippi, upon giving bond with sufficient sureties in the amount of Two Hundred Dollars ($200.00), approved by the clerk of the chancery court and conditioned to pay any costs that may be adjudged against the licensee. Notice of appeal shall be filed in the office of the clerk of the chancery court. If there is an appeal, the appeal may, in the discretion of and on motion to the chancery court, act as a supersedeas of the license suspension. The department shall be the appellee in the appeal, and the licensing entity shall not be a party in the appeal. The chancery court shall dispose of the appeal and enter its decision within thirty (30) days of the filing of the appeal. The hearing on the appeal may, in the discretion of the chancellor, be tried in vacation. The decision of the chancery court may be appealed to the Supreme Court in the manner provided by the rules of the Supreme Court. In the discretion of and on motion to the chancery court, no person shall be allowed to practice any business, occupation or profession or take any other action under the authority of any license the suspension of which has been affirmed by the chancery court while an appeal to the Supreme Court from the decision of the chancery court is pending.

(9) If a licensee who has entered a stipulated agreement and agreed judgment for the payment of an arrearage under this section subsequently is out of compliance with an order for support, the division shall immediately notify the licensing entity to suspend the licensee's license, and the licensing entity shall immediately suspend the license without a hearing and shall within three (3) business days notify the licensee in writing of the license suspension. In the case of a license suspension under the provisions of this subsection, the procedures provided for under subsections (1) and (2) of this section are not required; however, the appeal provisions of subsection (8) of this section still apply. After suspension of the license, if the licensee subsequently enters into a stipulated agreement and agreed judgment or the licensee

otherwise informs the division of compliance with the order for support, the division shall within seven (7) days notify in writing the licensing entity that the licensee is in compliance. Upon receipt of that notice from the division, a licensing entity shall immediately reinstate the license of the licensee and shall within three (3) business days notify the licensee of the reinstatement.

(10) Nothing in this section prohibits a licensee from filing a motion for the modification of an order for support or for any other applicable relief. However, no such action shall stay the license suspension procedure, except as may be allowed under subsection (8) of this section.

(11) If a license is suspended under the provisions of this section, the licensing entity is not required to refund any fees paid by a licensee in connection with obtaining or renewing a license.

(12) The requirement of a licensing entity to suspend a license under this section does not affect the power of the licensing entity to deny, suspend, revoke or terminate a license for any other reason.

(13) The procedure for suspension of a license for being out of compliance with an order for support, and the procedure for the reissuance or reinstatement of a license suspended for that purpose, shall be governed by this section and not by the general licensing and disciplinary provisions applicable to a licensing entity. Actions taken by a licensing entity in suspending a license when required by this section are not actions from which an appeal may be taken under the general licensing and disciplinary provisions applicable to the licensing entity. Any appeal of a license suspension that is required by this section shall be taken in accordance with the appeal procedure specified in subsection (8) of this section rather than any procedure specified in the general licensing and disciplinary provisions applicable to the licensing entity. If there is any conflict between any provision of this section and any provision of the general licensing and disciplinary provisions applicable to a licensing entity, the provisions of this section shall control.

(14) No license shall be suspended under this section until ninety (90) days after July 1, 1996. This ninety-day period shall be a one-time amnesty period in which any person who may be subject to license suspension under this article may comply with an order of support in order to avoid the suspension of any license.

(15) Any individual who fails to comply with a subpoena or warrant relating to paternity or child support proceedings after receiving appropriate notice may be subject to suspension or withholding of issuance of a license under this section.

HISTORY:

Laws, 1996, ch. 507, § 4, eff July 1, 1996; Laws, 1999, ch. 512, § 6; Laws, 2009, ch. 373, § 1, eff from and after July 1, 2009.

Cross References —

Suspension of hunting, trapping and fishing licenses for being out of compliance with an order of support, see § 49-7-27.

Suspension of commercial driver's license for being out of compliance with an order of support, see § 63-1-215.

Suspension of chiropractor license based on failure to comply with order for support, see § 73-6-19.

§ 93-11-159. Interagency agreements.

The licensing entities subject to Sections 93-11-151 through 93-11-161 may establish an additional administrative fee not to exceed Twenty-five Dollars ($25.00) to be paid by licensees who are out of compliance with an order of support and who are subject to the provisions of Sections 93-11-151 through 93-11-161 for the purpose of recovering costs of the licensing entities associated with the implementation of Sections 93-11-151 through 93-11-161.

HISTORY:

Laws, 1996, ch. 507, § 5, eff July 1, 1996; Laws, 1999, ch. 512, § 7, eff from and after July 1, 1999.

Cross References —

Suspension of chiropractor license based on failure to comply with order for support, see § 73-6-19.

§ 93-11-161. Adoption of regulations.

The department shall adopt regulations as necessary to carry out the provisions of Sections 93-11-151 through 93-11-161 and shall consult with licensing entities in developing these regulations.

HISTORY:

Laws, 1996, ch. 507, § 6, eff July 1, 1996.

Cross References —

Suspension of chiropractor license based on failure to comply with order for support, see § 73-6-19.

§ 93-11-163. Suspension of license.

In addition to the procedures in Section 93-11-157, the court may, upon a finding that a defendant is delinquent for being out of compliance with an order for support, order the licensing entity as defined in Section 93-11-153(a) to suspend the license of the defendant. In its discretion, the court may stay such an order for a reasonable time to allow the defendant to purge himself of the delinquency. If a license is suspended under this section, the court may also order the licensing entity to reinstate the license when it is satisfied that the defendant has purged himself of the delinquency. Licensing entities shall treat a suspension under this section the same as a suspension under Section 93-11-157. Defendants whose license is suspended under this section shall be subject to any administrative fees established for reinstatement under Section 93-11-159.

HISTORY:

Laws, 1996, ch. 507, § 7, eff July 1, 1996; Laws, 1999, ch. 512, § 8, eff from and after July 1, 1999.

Cross References —

Suspension of hunting, trapping and fishing licenses for being out of compliance with an order of support, see § 49-7-27.

Suspension of commercial driver's license for being out of compliance with an order of support, see § 63-1-215.

Suspension of chiropractor license based on failure to comply with order for support, see § 73-6-19.

Suspension of occupational therapy license for failure to comply with an order of support, see § 73-24-25.

RESEARCH REFERENCES

ALR.

Validity, Construction, and Application of State Statutes Providing for Revocation of Driver's License for Failure to Pay Child Support. 30 A.L.R.6th 483.

CHAPTER 12.

ENFORCEMENT OF CHILD SUPPORT ORDERS FROM FOREIGN JURISDICTIONS

Sec.
93-12-1 through 93-12-15. Repealed.
93-12-17. Voluntary order for withholding.
93-12-19. Application of state laws to actions and proceedings.
93-12-21. Repealed.

§§ 93-12-1 through 93-12-15. Repealed.

Repealed by Laws, 1997, ch. 588, § 131, eff from and after July 1, 1997.
§ 93-12-1. [Laws, 1988, ch. 480, § 1; Laws 1993, ch. 506, § 17]
§ 93-12-3. [Laws, 1988, ch. 480, § 2; Laws 1989, ch. 371, § 1]
§ 93-12-5. [Laws, 1988, ch. 480, § 3; Laws 1989, ch. 371, § 2]
§ 93-12-7. [Laws, 1988, ch. 480, § 4]
§ 93-12-9. [Laws, 1988, ch. 480, § 5]
§ 93-12-11. [Laws, 1988, ch. 480, § 6]
§ 93-12-13. [Laws, 1988, ch. 480, § 7]
§ 93-12-15. [Laws, 1988, ch. 480, § 8]

Editor's Notes —

For current provisions, see Uniform Interstate Family Support Act, § 93-25-101 et seq.

Former § 93-12-1 was entitled: "Definitions".

Former § 93-12-3 was entitled: "Documentation required; procedure to enter support order; order for withholding".

Former § 93-12-5 was entitled: "Service of notice of proposed order for withholding; mailing costs; hearing".

Former § 93-12-7 was entitled: "Prima facie proof of valid order; procedure at hearing; testimony of out-of-state witnesses".

Former § 93-12-9 was entitled: "Issuance of order for withholding".

Former § 93-12-11 was entitled: "Application".

Former § 93-12-13 was entitled: "Payments pursuant to order; effect of other support orders".

Former § 93-12-15 was entitled: "Amendments or modifications to support order; notification of new or additional sources of income".

§ 93-12-17. Voluntary order for withholding.

Any person who is the obligor in a support order of another jurisdiction may obtain a voluntary order of withholding by filing with the court a request for such withholding and a certified copy of the support order of a sister state. The court shall issue an order for withholding pursuant to Sections 93-12-1 et seq. Payment shall be made to the department.

HISTORY:

Laws, 1988, ch. 480, § 9, eff from and after July 1, 1988.

Editor's Notes —

Sections 93-12-1 through 93-12-15 referred to in this section were repealed by Laws, 1997, ch. 588, § 131, eff from and after July 1, 1997. For current provisions, see § 93-25-101 et seq.

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§ 93-12-19. Application of state laws to actions and proceedings.

The laws of this state shall apply in all actions and proceedings concerning the issuance, enforcement and duration of an order for withholding issued by a court of this state, which is based upon a support order of another jurisdiction entered pursuant to Sections 93-12-1 et seq. The penalties contained in Section 93-11-117, Mississippi Code of 1972, shall apply to all orders for withholding issued pursuant to Sections 93-12-1 et seq.

HISTORY:

Laws, 1988, ch. 480, § 10, eff from and after July 1, 1988.

Editor's Notes —

Sections 93-12-1 through 93-12-15 referred to in this section were repealed by Laws, 1997, ch. 588, § 131, eff from and after July 1, 1997. For current provisions, see § 93-25-101 et seq.

§ 93-12-21. Repealed.

Repealed by Laws, 1997, ch. 588, § 131, eff from and after July 1, 1997. [Laws, 1988, ch. 480, § 13]

Editor's Notes —

Former § 93-12-21 was entitled: "Remedy provided to be in addition to other remedies".

CHAPTER 13.

GUARDIANS AND CONSERVATORS

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WARDS, GENERALLY

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§ 93-13-1. Parental guardianship of minor children.

The father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates. The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor, or any other matter affecting the minor. If either father or mother die or be incapable of acting, the guardianship devolves upon the surviving parent. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to its custody. But if any father or mother be unsuitable to discharge the duties of guardianship, then the court, or chancellor in vacation, may appoint some suitable person, or having appointed the father or mother, may remove him or her if it appear that such person is unsuitable, and appoint a suitable person.

HISTORY:

Codes, 1930, § 1863; 1942, § 399; Laws, 1922, ch. 266.

Cross References —

Definition of term "infant", see § 1-3-21.

Definition of term "minor", see § 1-3-27.

Custody of children under divorce decree, see § 93-5-23.

Authority of courts to impose fee for any court-ordered home study relating to child custody matters, see § 93-17-12.

Criminal offense of desertion and nonsupport of minor children, see § 97-5-3.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. Custody in general.
2. Rights of father.
3. Rights of mother.
4. Custody in third persons.
5. Religion.
6. Education.
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9. Standard of review.

1. Custody in general.

Divorced parent who had no authority to bind the estate of the parent's teenage child in a settlement could not bind the estate to an attorney's fee contract, particularly when such a contract would have to have been, but was not, approved by the chancery court. In re Wilhite, 121 So. 3d 301, 2013 Miss. App. LEXIS 582 (Miss. Ct. App. 2013).

Chancellor's findings on the factor of stability of the home environment and employment of each parent were supported by substantial evidence; the employment factor favored the mother, who held the same job for over eight years, but the home factor favored the father because he remained in the marital home and accepted the support offered by his family. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Regarding the continuity of care factor, the chancellor found that this favored neither parent and sufficient evidence supported this finding; the testimony indicated that both parents cared for the child while receiving assistance from family members. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Child was four years old at the time of trial, the chancellor found that both parents could and did take care of the child's basic needs, and although the child was female, the father's mother and grandmother were very active in the child's life; the court could not say that the chancellor was without sufficient evidence to find that this factor concerning the age, health, and sex of the child favored neither party. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Mother's argument that the chancellor improperly weighed the Albright v. Albright factors was without merit; the chancellor was in the best position to evaluate the evidence and was not manifestly wrong in finding that child's best interests would be served by awarding custody to the father. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Modification of divorce decree awarding custody of minor children to father, and not maternal grandmother, was proper where, although grandmother met burden of showing that children's mother was unfit to have custody, she had not met that burden as to children's father. Milam v. Milam, 509 So. 2d 864, 1987 Miss. LEXIS 2509 (Miss. 1987).

Award of custody of children to husband is not impermissibly based solely on wife's adultery where chancellor looks to work schedules, life styles, and other criteria and, while finding that no special circumstances exist to justify granting custody to adulterous mother, considers adultery as but one factor in overall consideration. Carr v. Carr, 480 So. 2d 1120, 1985 Miss. LEXIS 2379 (Miss. 1985).

In determining relative fitness of parents to be awarded custody of child, adultery may be unwholesome influence and impairment to child's best interest or may have no effect; this factor should be considered by trial court along with all others when making original custody determinations; marital fault should not be used as sanction in custody award. Carr v. Carr, 480 So. 2d 1120, 1985 Miss. LEXIS 2379 (Miss. 1985).

Under § 93-13-1, the polestar consideration in child custody cases is the best interest and welfare of the child, and the age of the child is subordinated to that rule and is but one factor to be considered; other factors to be considered are health and sex of the child, a determination of which parent had the continuing care of the child prior to the separation, which parent has the best parenting skills, which has the willingness and capacity to provide primary child care, employment responsibilities of the parents, physical and mental health and age of the parents, emotional ties of parent and child, moral fitness of parents, the home, school and community record of the child, the preference of the child at the age sufficient by law to express a preference, the stability of the home environment and employment of each parent, and other factors relevant to the parent-child relationship; on the other hand, marital fault should not be used as a sanction in custody awards, relative financial situations are not controlling, and differences in religion, personal values and lifestyles should not be the sole basis for custody decisions. Albright v. Albright, 437 So. 2d 1003, 1005, 1983 Miss. LEXIS 2906 (Miss. 1983).

In order to overcome the presumption that it is to the best interest of children that they should be put in the custody of their parents, there must be a clear showing that the parent has abandoned the child, or that the conduct of the parent is so immoral as to be detrimental to the child, or that the parent is unfit mentally or otherwise to have the custody of his or her child. Simpson v. Rast, 258 So. 2d 233, 1972 Miss. LEXIS 1488 (Miss. 1972).

The custody of a child may, where the parents are divorced, be awarded to either; as the best interest of the child may indicate. Shoffner v. Shoffner, 244 Miss. 557, 145 So. 2d 149, 1962 Miss. LEXIS 476 (Miss. 1962).

In determining the right to the custody of a minor child, as between parents, the best interest of the child rather than the selfish desires of the parents, is of paramount concern. Davis v. Holland, 239 Miss. 514, 123 So. 2d 850, 1960 Miss. LEXIS 316 (Miss. 1960).

Neither father nor mother has any paramount right over the other concerning the custody of a minor child, unless the child's welfare is involved. Brown v. Brown, 237 Miss. 53, 112 So. 2d 556, 1959 Miss. LEXIS 448 (Miss. 1959).

The chancery court has a broad discretion in determining issue of custody of a child. Scott v. Scott, 219 Miss. 614, 69 So. 2d 489, 1954 Miss. LEXIS 370 (Miss. 1954).

Neither the father nor the mother has any paramount right over the other concerning the custody of a child, where such custody would not adversely affect the child's welfare and the paramount consideration is the welfare of the child and where the child is of such tender age as to require the mother's care for its physical welfare it should be awarded to her custody, at least until it reaches that age and maturity where it can be equally cared for by other persons. Scott v. Scott, 219 Miss. 614, 69 So. 2d 489, 1954 Miss. LEXIS 370 (Miss. 1954); Bland v. Stoudemire, 219 Miss. 526, 69 So. 2d 225, 1954 Miss. LEXIS 359 (Miss. 1954).

Neither the father nor the mother has any paramount right over the other concerning the custody of a minor, where such custody would not adversely affect the child's welfare. Boswell v. Pope, 213 Miss. 31, 56 So. 2d 1, 1952 Miss. LEXIS 328 (Miss. 1952); Kennedy v. Kennedy, 222 Miss. 469, 76 So. 2d 375, 1954 Miss. LEXIS 666 (Miss. 1954).

In determining the custody of a child, the paramount consideration is the welfare of the child. Boswell v. Pope, 213 Miss. 31, 56 So. 2d 1, 1952 Miss. LEXIS 328 (Miss. 1952).

Policy of law is that children of divorced parents shall remain in custody of one of the parents unless they are both clearly unfit, and unfitness may be found in such want of willingness or ability to control and discipline child that child is obviously in serious danger of becoming immoral or delinquent to extent of being, in future, unacceptable member of adult citizenship of state. Mahaffey v. Mahaffey, 176 Miss. 733, 170 So. 289, 1936 Miss. LEXIS 170 (Miss. 1936).

2. Rights of father.

Chancery court did not err in granting custody to the father after finding that he had not deserted his child because there was no legally compelling reason to alter or abandon the established standards for rebuttal of the natural-parent presumption; requiring the maternal grandmother first to demonstrate that the father had relinquished his right to parent his child was not an undue burden. Davis v. Vaughn, 126 So. 3d 33, 2013 Miss. LEXIS 594 (Miss. 2013).

In an action on a maternal grandmother's petition for custody of a minor child, it was error to find that the natural parent presumption had been rebutted because a father agreed to a temporary custody order, as the father did not relinquish custody or abandon the child but allowed the grandmother to retain custody pending a hearing. Vaughn v. Davis, 36 So. 3d 1261, 2010 Miss. LEXIS 303 (Miss. 2010).

Regarding the home, school, and community record of the child, substantial evidence supported the finding of the chancellor that this factor favored the father because he remained in the marital home and his grandmother would continue to spend seven or eight hours a day with the child, five days a week or more, and the grandmother taught the child how to count, write her name, and recite the alphabet; the mother's relationship with the father's family, including the grandmother, had degraded. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Regarding the factor of moral fitness of the parents, the chancellor found that this favored the father because of the mother's adultery; the mother admitted that the child was present on some occasions when the mother was with her paramour and the evidence supported the chancellor's finding in this regard. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Court found no abuse of discretion in the chancellor's decision to grant sole legal and physical custody of the child to the father; although the mother claimed joint custody was better, her assertion was belied by testimony that her relationship with the father had been strained by adultery and the child would soon be in kindergarten and the court had held that the stability of the home was crucial to the beginning stages of a child's education. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Regarding the factor of physical and mental health of the parents, substantial evidence supported the chancellor's finding that this factor favored the father because the mother manifested poor judgment in combining alcohol with the anti-depressants and the child had a generally low energy level and often appeared unusually tired in the afternoons. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Appointment of the father as co-guardian of the person and estate of his children with the children's aunt was inappropriate under Miss. Code Ann. § 93-13-1 and Miss. Code Ann. § 93-19-5 because parental deficiencies not sinking to the level of unfitness were not sufficient to deny a parent the management of his or her minor children's financial affairs. Anderson v. Hoover (In re the Guardianship of Williams), 930 So. 2d 491, 2006 Miss. App. LEXIS 429 (Miss. Ct. App. 2006).

A father's act of signing a routine waiver of process incident to a proceeding for the appointment of a guardian for his son did not constitute "abandonment" and he did not thereby relinquish his custody rights to the child; the mere appointment of a guardian of the person and/or estate of a minor does not of itself strip a parent of all of his or her rights in the child, nor is there anything in the nature of a guardianship that requires it to last until adulthood. Ethredge v. Yawn, 605 So. 2d 761, 1992 Miss. LEXIS 440 (Miss. 1992).

Although the chancellor found that a father who had killed his child's mother was mentally and morally unfit to have the child's custody, and granted complete custody to the maternal grandparents, it was not error for the chancellor to grant liberal visitation rights to the father. Veselits v. Cruthirds, 548 So. 2d 1312, 1989 Miss. LEXIS 430 (Miss. 1989).

Natural father is entitled to custody of his minor children unless it is clearly shown that he has (1) abandoned the children, or (2) his conduct is so immoral as to be detrimental to the children, or (3) he is unfit mentally or otherwise to have custody. Rutland v. Pridgen, 493 So. 2d 952, 1986 Miss. LEXIS 2594 (Miss. 1986).

Chancellor erred in granting custody of children to grandmother in absence of showing that natural father had abandoned children or was immoral or unfit. Rutland v. Pridgen, 493 So. 2d 952, 1986 Miss. LEXIS 2594 (Miss. 1986).

In a custody dispute between the father of a three-year-old child and the child's stepfather that arose after the child's mother had died in a car accident, the trial court erred in awarding custody to the stepfather, even though the court found that the father had failed to make support payments, where it made no finding, required by this section, that the father was an immoral or unfit person, or that he had abandoned his child. Milam v. Milam, 376 So. 2d 1336, 1979 Miss. LEXIS 2476 (Miss. 1979).

In a custody dispute between the father of a three-year-old child and the child's stepfather that arose after the child's mother had died in a car accident, the trial court erred in awarding custody to the stepfather, even though the court found that the father had failed to make support payments, where it made no finding, required by this section that the father was an immoral or unfit person, or that he had abandoned his child. Milam v. Milam, 376 So. 2d 1336, 1979 Miss. LEXIS 2476 (Miss. 1979).

The fact that the natural father of 3 children drank beer on Sunday and did not attend church, was not sufficient to show that the father was unfit to rear his own children so as to prevent him from regaining custody from the husband of his former wife, who was awarded custody in a divorce decree, after the death of the former wife, particularly where failure to allow the father to regain custody would deliver the petitioner's teenage daughter into the care of a man who admitted that the girl's mother had been his mistress and whose amorous proclivities were well documented in the record. Simpson v. Rast, 258 So. 2d 233, 1972 Miss. LEXIS 1488 (Miss. 1972).

Father of child is entitled to custody thereof as against all persons except mother, unless he forfeits right by misconduct showing him unsuitable. Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 1931 Miss. LEXIS 34 (Miss. 1931).

3. Rights of mother.

Mother was not entitled to the natural parent presumption because she had previously consented to the adoption of her child by her parents and relinquished her legal relationship with the child as his parent. An adoption, once entered, acted as an irrevocable surrender of all rights, obligations, and privileges of the natural parent with and to the child. D.M. v. D.R., 62 So. 3d 920, 2011 Miss. LEXIS 172 (Miss. 2011).

Chancellor found that the factor regarding parenting skills favored the father because he showed greater willingness and capacity to provide primary childcare and the mother sacrificed the relationship with her child and marriage to be with her paramour; the court was satisfied that the chancellor's findings on this issue were supported by the evidence and did not amount to a sanction against the mother for her adultery. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Under Miss. Code Ann. § 93-13-1, because the ex-husband died, the ex-wife now had custody of their child and she would be solely responsible for his support. McCardle v. McCardle, 862 So. 2d 1290, 2004 Miss. App. LEXIS 22 (Miss. Ct. App. 2004).

Fact that no guardian ad litem had been appointed for minor in Ohio proceeding did not render Ohio court without jurisdiction to enter order finding that father had not sexually abused the minor, since, it would be presumed that the mother, as actual guardian of the child, had acted in the best interest of the child in the Ohio proceeding and, thus, mother was not entitled to relitigate the abuse issue in Mississippi. In Interest of K.M.G., 500 So. 2d 994, 1987 Miss. LEXIS 2242 (Miss. 1987).

The court which granted divorce decree to wife improperly directed that payment of $200 by husband should be in full settlement of alimony for wife and support for nine-month-old child, and three years later, on showing that wife could earn nothing and that child needed medical attention, court properly directed husband, who was remarried, had another child, and was earning about $80.00 per month, to pay $12.00 per month for child's support, since a father's duty to support his child is absolute when necessity arises. Walters v. Walters, 180 Miss. 268, 177 So. 507, 1937 Miss. LEXIS 122 (Miss. 1937).

4. Custody in third persons.

Chancellor did not abuse its discretion in awarding joint physical custody of a child to the paternal grandparent and to the maternal great-grandparents of the child, after finding both natural parents unfit, because the chancellor considered the statutory and the caselaw factors, and acted within its authority, in determining the best interests of the child. Moreover, the chancellor's award of joint custody was supported by substantial evidence. Darby v. Combs, 229 So. 3d 136, 2016 Miss. App. LEXIS 681 (Miss. Ct. App. 2016), aff'd, 229 So. 3d 108, 2017 Miss. LEXIS 433 (Miss. 2017).

Law does not allow parental rights to supercede the best interests of the child; parental rights, as is true of other fundamental rights, can be forfeited or taken away, and the law does recognize some means by which third parties can overcome the law's preference of natural parents. Davis v. Vaughn, 126 So. 3d 33, 2013 Miss. LEXIS 594 (Miss. 2013).

In evaluating custody, the trial court focused on the father's desire to have custody of the child, but the undisputed record revealed that for two and a half years, the father had no contact with the child; further, the father provided no financial support, nor did he send any birthday or Christmas cards or gifts to the child. As a matter of law the father's actions (or lack thereof) during the two and a half years before the mother's death constituted desertion; because the evidence of desertion was clear, the trial court erred in awarding custody to the natural father without an on-the-record analysis of the child's best interests utilizing the Albright factors. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424, 2009 Miss. LEXIS 599 (Miss. 2009).

Chancellor effectively found that a mother was an unfit parent, while holding out hope that with some assistance, she might be rehabilitated; based upon that belief of possible rehabilitation, the chancellor made a determination that it was in the best interest of the child that her primary custody be placed with her grandmother, but with the mother continuing to have a role in the child's life. The chancellor specifically noted and gave proper consideration to a guardian ad litem's recommendation, and he stated why he felt the best interest of the child required that the child's grandmother have primary custody. McCraw v. Buchanan, 10 So. 3d 979, 2009 Miss. App. LEXIS 242 (Miss. Ct. App. 2009).

Trial court did not err in finding the father to be an unfit parent and awarding custody of his son to custodial parents where the evidence, such as immoral behavior and traits, demonstrated that the father was unfit and the chancellor properly applied the Albright factors to award custody; the decision was supported by the evidence and was not an abuse of discretion. In re Custody of M. A. G., 859 So. 2d 1001, 2003 Miss. LEXIS 451 (Miss. 2003).

Grandparents have no right to custody of a grandchild as against a natural parent; thus, a chancellor erred in awarding custody of a child to his grandmother based on the finding that the child's father was "unprepared" where the chancellor did not make a specific finding as to whether the father was an unfit parent. Carter v. Taylor, 611 So. 2d 874, 1992 Miss. LEXIS 790 (Miss. 1992).

A chancellor erred in declining to award attorney's fees to a child's maternal grandparents for defending a custody action brought by the child's father, who had killed the child's mother. Veselits v. Cruthirds, 548 So. 2d 1312, 1989 Miss. LEXIS 430 (Miss. 1989).

The trial court erred by retaining the paternal grandmother as the guardian of the estate of her two grandchildren where the court had held that the mother was a suitable person to have custody of the children. In re Guardianship of Brown, 402 So. 2d 354, 1981 Miss. LEXIS 2143 (Miss. 1981).

The law presumes that parents will love their children most and will care for them most wisely and that it is to the best interests of children that they should be put in the custody of their parents, and while such presumption may be overcome, children are not to be taken from their parents and given to a third person simply because the third person is more able financially to give the child a greater advantage in life. Simpson v. Rast, 258 So. 2d 233, 1972 Miss. LEXIS 1488 (Miss. 1972).

An adult married sister was entitled to guardianship of minors when their natural father had a history of frenetic and unstable behavior and showed disinterest in supporting the children during the period between the divorce and the mother's death. Hosey v. Myers, 240 So. 2d 252, 1970 Miss. LEXIS 1276 (Miss. 1970).

Where a child over the age of fourteen years, whose mother died in childbirth and whose father left her with her maternal grandparent, was passionately opposed to going with her father, custody was awarded to the maternal grandparents where it was for the best interests of the child, notwithstanding that the father and his second wife were suitable to have custody of such child. Forbes v. Warren, 184 Miss. 526, 186 So. 325 (Miss. 1939).

In divorce proceeding, court has power in proper case to award custody of a child to a third person. Mahaffey v. Mahaffey, 176 Miss. 733, 170 So. 289, 1936 Miss. LEXIS 170 (Miss. 1936).

Where situation is such that it becomes duty of court upon hearing with all parties present that child of divorced parents be placed in custody of a third person, court may do so, although decree in that respect does not conform to prayer presented by pleadings. Mahaffey v. Mahaffey, 176 Miss. 733, 170 So. 289, 1936 Miss. LEXIS 170 (Miss. 1936).

Where father of thirteen-year-old child of divorced parents admittedly was unable or unwilling to control child and child would not stay with or obey her mother whom child thought had abandoned her when she was small, commitment of child to state industrial and training school until further orders of the court held proper. Mahaffey v. Mahaffey, 176 Miss. 733, 170 So. 289, 1936 Miss. LEXIS 170 (Miss. 1936).

Commitment of child of divorced parents to state industrial and training school may be made in proper case without intervention on part of industrial school. Mahaffey v. Mahaffey, 176 Miss. 733, 170 So. 289, 1936 Miss. LEXIS 170 (Miss. 1936).

5. Religion.

This section [Code 1942, § 399] substantially codifies the right of parents to control the religious education of their children. In re Guardianship of Faust, 239 Miss. 299, 123 So. 2d 218, 1960 Miss. LEXIS 286 (Miss. 1960).

6. Education.

Where the minor child is worthy of and qualified for a college education and shows an aptitude therefor it is a primary duty of the father, if financially able to do so, to provide funds for the college education of the minor child in the custody of the mother, where the father and mother are divorced and living apart. Pass v. Pass, 238 Miss. 449, 118 So. 2d 769, 1960 Miss. LEXIS 426 (Miss. 1960).

7. Profession or job requiring parent to be away from home.

Chancellor found that the factor regarding employment favored the mother because the father worked 12 hour days often five days a week and the mother worked fewer hours and could take the child to and from school; substantial evidence supported this finding. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

Offshore oil workers, truck drivers, and other persons whose professions require them to be away from home for extended periods of time are not to be deprived of custody of children on that basis. Smith v. Todd, 464 So. 2d 1155, 1985 Miss. LEXIS 1924 (Miss. 1985).

Due process requires hearing before court on notice to parent, before depriving parent of child's custody. Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 1931 Miss. LEXIS 34 (Miss. 1931).

9. Standard of review.

In a custody case, the appellate court's standard of review requires the appellate court to consider not only the chancellor's findings on each individual factor but also the chancellor's ultimate conclusion as to the child's best interest. Woodham v. Woodham, 17 So. 3d 153, 2009 Miss. App. LEXIS 173 (Miss. Ct. App. 2009).

OPINIONS OF THE ATTORNEY GENERAL

The county identification number may not be utilized for a guardianship or receivership account. 2003 Miss. Op. Att'y Gen. 35.

RESEARCH REFERENCES

ALR.

Maintenance of suit by child, independently of statute, against parent for support. 13 A.L.R.2d 1142.

Nonresidence as affecting one's right to custody of child. 15 A.L.R.2d 432.

Father's duty under divorce or separation decree to support child as affected by latter's induction into military service. 20 A.L.R.2d 1414.

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What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support. 32 A.L.R.3d 1055.

Right of child or parent to recover for alienation of other's affections. 60 A.L.R.3d 931.

Who is minor's next of kin for guardianship purposes. 63 A.L.R.3d 813.

Necessity or propriety of appointment of independent guardian for child who is subject of paternity proceedings. 70 A.L.R.4th 1033.

Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children. 51 A.L.R.5th 241.

Sufficiency of evidence to establish parent's knowledge or allowance of child's sexual abuse by another under statute permitting termination of parental rights for "allowing" or "knowingly allowing" such abuse to occur. 53 A.L.R.5th 499.

Action for intentional infliction of emotional distress against paramours. 99 A.L.R.5th 445.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 5 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 21 et seq. (petition or application for appointment of guardian of minor's person and estate).

22 Am. Jur. Trials, Child Custody Litigation §§ 1 et seq.

CJS.

39 C.J.S., Guardian and Ward §§ 5–7.

Law Reviews.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

Weems and Evans, Mississippi law of intestate succession, wills, and administration and the proposed Mississippi Uniform Probate Code: a comparative analysis. 62 Miss. L. J. 1, Spring, 1992.

Family Law At the Turn of the Century, 71 Miss. L.J. 781, Spring, 2002.

Remembering the Best Interest of the Child in Child Custody Disputes between a Natural Parent and a Third Party: Grant v. Martin, 757 So. 2d 264 (Miss. 2000), 21 Miss. C. L. Rev. 311, Spring, 2002.

Practice References.

Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-13-2. Civil liability of parents for damages resulting from malicious and willful acts of certain minor children.

(1) Any property owner shall be entitled to recover damages in an amount not to exceed Five Thousand Dollars ($5,000.00), plus necessary court costs, from the parents of any minor under the age of eighteen (18) years and over the age of ten (10), who maliciously and willfully damages or destroys property belonging to such owner. However, this section shall not apply to parents whose parental custody and control of such child have been removed by court order or decree.

(2) The action authorized in this section shall be in addition to all other actions which the owner is entitled to maintain and nothing in this section shall preclude recovery in a greater amount from the minor or from any person, including the parents, for damages to which such minor or other person would otherwise be liable.

(3) It is the purpose of this section to authorize recovery from parents in situations where they are not otherwise liable and to limit the amount of recovery. The provisions of this section shall apply only to acts committed on and after July 1, 1978.

HISTORY:

Laws, 1978, ch. 492, § 1; Laws, 1981, ch. 370, § 1; Laws, 1999, ch. 508, § 1, eff from and after July 1, 1999.

RESEARCH REFERENCES

ALR.

Validity and construction of statutes making parents liable for torts committed by their minor children. 8 A.L.R.3d 612.

Am. Jur.

59 Am. Jur. 2d, Parent and Child § 100.

19 Am. Jur. Pl & Pr Forms (Rev), Parent and Child, Forms 121 et seq. (liability of parents for conduct of child).

25 Am. Jur. Pl & Pr Forms (Rev), Weapons and Firearms, Form 6.3 (complaint, petition or declaration, negligence entrustment of firearm to minor, against firearm owner and minor).

45 Am. Jur. Proof of Facts 2d 549, Parental Failure to Control Child.

Law Reviews.

1981 Mississippi Supreme Court Review; Insurance. 52 Miss. L. J. 445, June, 1982.

§ 93-13-3. Award of guardianship where parents are separated; limitation of mother's liability.

In case the father and mother live apart the court may award the guardianship of a minor to either parent, and the state where the parent having the lawful custody resides, shall have jurisdiction to determine questions concerning the minor's guardianship: Provided that the provisions of this section shall not in any manner impose upon the mother any greater liability than is now imposed by law to support, maintain and educate her children.

HISTORY:
Codes, 1930, § 1864; 1942, § 400; Laws, 1922, ch. 266.

Cross References —
General jurisdiction of chancery court, see § 9-5-83.

RESEARCH REFERENCES

ALR.
Nonresidence as affecting one's right to custody of child. 15 A.L.R.2d 432.

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward § 7.

22 Am. Jur. Trials, Child Custody Litigation §§ 1 et seq.

CJS.
39 C.J.S., Guardian and Ward § 18.

§ 93-13-5. When guardian not entitled to custody of ward.

The guardian of a ward whose father or mother is living, and a suitable person to have the custody of the ward, shall not be entitled, as against the parent, to the custody of the ward, but the guardian of a ward who has no parent shall be entitled to the custody of a ward as well as of his estate, or the court or chancellor may appoint one (1) person to be guardian of the person, and another to be guardian of the estate of the ward.

HISTORY:
Codes, 1880, § 2099; 1892, § 2192; 1906, § 2409; Hemingway's 1917, § 1970; 1930, § 1865; 1942, § 401; Laws, 1972, ch. 408, § 1, eff from and after July 1, 1972.

Cross References —
Construction and meaning of term "ward," see § 1-3-58.

JUDICIAL DECISIONS

1. In general.

Appointment of the father as co-guardian of the person and estate of his children with the children's aunt was inappropriate under Miss. Code Ann. § 93-13-1 and Miss. Code Ann. § 93-19-5 because parental deficiencies not sinking to the level of unfitness were not sufficient to deny a parent the management of his or her minor children's financial affairs. Anderson v. Hoover (In re the Guardianship of Williams), 930 So. 2d 491, 2006 Miss. App. LEXIS 429 (Miss. Ct. App. 2006).

A father's act of signing a routine waiver of process incident to a proceeding for the appointment of a guardian for his son did not constitute "abandonment" and he did not thereby relinquish his custody rights to the child; the mere appointment of a guardian of the person and/or estate of a minor does not of itself strip a parent of all of his or her rights in the child, nor is there anything in the nature of a guardianship that requires it to last until adulthood. Ethredge v. Yawn, 605 So. 2d 761, 1992 Miss. LEXIS 440 (Miss. 1992).

Custody of persons and estates of wards can be determined only by chancery court; not by habeas corpus. Herndon v. Bonner, 97 Miss. 328, 52 So. 513, 1910 Miss. LEXIS 246 (Miss. 1910).

Where the guardian is not the parent of the ward, but the latter has a parent living, the guardianship of the estate is distinct from the guardianship of the person of the ward. In granting letters, ordinarily, the court should not award the custody of the infant. McDowell v. Bonner, 62 Miss. 278, 1884 Miss. LEXIS 70 (Miss. 1884).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 10, 90.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 21 et seq. (petition or application for appointment of guardian of minor's person and estate).

CJS.

39 C.J.S., Guardian and Ward §§ 56, 57.

Law Reviews.

Patterson, In "the best interest of the child": a practical guide to child custody litigation. 13 Miss. C. L. Rev. 109, Fall, 1992.

§ 93-13-7. Testamentary guardians; appointment.

Any parent, even though under twenty-one (21) years of age, may, by an instrument to take effect at the parent's death and wholly written and signed by him or her, or attested by two (2) or more credible witnesses, not including the person appointed as guardian, if not so written, appoint some suitable person as guardian of his motherless or her fatherless child that has not been married, though the child be then unborn and though the child be under some legal disability other than or in addition to minority. Such parent may by such an instrument waive the furnishing by the guardian of bond, inventory and accounting, subject to the approval of the court.

HISTORY:

Codes, Hutchinson's 1848, ch 36, art. 1(122); 1857, ch. 60, art. 140; 1871, § 1203; 1880, § 2095; 1892, § 2184; 1906, § 2401; Hemingway's 1917, § 1962; 1930, § 1866; 1942, § 402; Laws, 1972, ch. 408, § 3, eff from and after July 1, 1972.

Cross References —

Provisions for children born after making of will, see § 91-5-5.

Grant of letters testamentary, see §§ 91-7-35 et seq.

Another section derived from same 1942 code section, see § 93-13-11.

JUDICIAL DECISIONS

1. In general.

Parent cannot appoint testamentary guardian of adult child, though an imbecile. Hemphill v. Smith, 128 Miss. 586, 91 So. 337, 1922 Miss. LEXIS 141 (Miss. 1922).

Testator cannot appoint testamentary guardian of children where mother is still living. Campbell v. Mansfield, 104 Miss. 533, 61 So. 593, 1913 Miss. LEXIS 59 (Miss. 1913).

As a rule where mother is dead, father's wish should control in the appointment of a guardian for his minor child. Heard v. Cottrell, 100 Miss. 42, 56 So. 277, 1911 Miss. LEXIS 12 (Miss. 1911).

A provision in the will of a married woman purporting to make her husband the guardian of their child was not aided by Code 1880, § 2095, providing that a father might, by will, give to another the custody of his child during its infancy and thereby invest the custodian with the powers of a guardian, although the will was executed and the testatrix died while said code was operative. Edwards v. Kelly, 83 Miss. 144, 35 So. 418, 1903 Miss. LEXIS 22 (Miss. 1903).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 11 et seq.

9A Am. Jur. Legal Forms 2d, Guardian and Ward, §§ 133:20 et seq. (testamentary provisions as to appointment of guardian).

CJS.

39 C.J.S., Guardian and Ward §§ 21, 22.

§ 93-13-9. Testamentary guardians; appointee to accept and qualify.

The guardian appointed in the manner provided for in Section 93-13-7 shall, before he exercises any authority over the ward or his estate, appear before the chancery court and declare in writing his acceptance of the guardianship, exhibiting and filing therewith the instrument of appointment, which shall be recorded with the acceptance in the records of wills; and he shall qualify according to law. The validity of the instrument may be contested like that of a will. If the guardian fails to qualify for the space of three (3) months after his right to the guardianship shall have accrued, or earlier as the court may direct, he shall be summoned to appear and declare his acceptance or renunciation of the guardianship. If he fails to appear after being summoned, or appearing, renounce or fail to qualify, the court shall appoint some other person guardian of the ward.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(123, 124); 1857, ch. 60, art. 141; 1880, § 2096; 1892, § 2185; 1906, § 2402; Hemingway's 1917, § 1963; 1930, § 1867; 1942, § 403; Laws, 1972, ch. 408, § 4, eff from and after July 1, 1972.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

JUDICIAL DECISIONS

1. In general.

Guardian cannot maintain action in chancery against ward. Davis v. Davis, 135 Miss. 214, 99 So. 673, 1924 Miss. LEXIS 22 (Miss. 1924).

Decree for guardian in suit against ward should be set aside on motion of ward. Davis v. Davis, 135 Miss. 214, 99 So. 673, 1924 Miss. LEXIS 22 (Miss. 1924).

If the guardian appear and accept, he is liable to account in the court, though he did not qualify. Gregory v. Field, 63 Miss. 323, 1885 Miss. LEXIS 70 (Miss. 1885).

RESEARCH REFERENCES

Am. Jur.

13 Am. Jur. Pl &amp; Pr Forms (Rev), Guardian and Ward §§ 71 et seq. (consent to appointment).

§ 93-13-11. Testamentary guardians; rights, duties and liabilities.

Upon qualifying the testamentary guardian shall have the same right to control the person and tuition of the child, to manage the child's estate, real and personal, to receive the profits thereof, to prosecute suits and actions concerning the same, as a guardian appointed by the court would have, and he shall be subject to the same liabilities and duties.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(122); 1857, ch. 60, art. 140; 1871, § 1203; 1880, § 2095; 1892, § 2184; 1906, § 2401; Hemingway's 1917, § 1962; 1930, § 1866; 1942, § 402.

Cross References —

Another section derived from same 1942 code section, see § 93-13-7.

§ 93-13-13. Appointment of guardian by court.

When a testamentary guardian has not been appointed by the parent, or if appointed, has not qualified, the chancery court of the county of the residence of a ward who has an estate, real or personal, shall appoint a general guardian of his estate for him or may appoint a general guardian of his person and estate for him. If a ward have no estate the chancery court of the county of the residence of such ward may appoint a general guardian of his person only for him, giving preference in all cases to the natural guardian, or next of kin, if any apply, unless the applicant be manifestly unsuitable for the discharge of the duties. The court may allow a minor who is over the age of fourteen (14) years and under no legal disability except minority to select a general guardian, by petition to the court, signed and acknowledged before the clerk or a justice of the peace, and duly filed, but if the general guardian so selected by the minor be guardian of the person and estate of the minor or the person only of the minor then such general guardian so selected by said minor shall be a suitable and qualified person who is a resident of this state and the county in which the guardianship proceedings are pending. If the said minor desires to so select a person as general guardian of his person and estate or of his person only who is a resident of this state but who is not a resident of the county in which the guardianship proceedings are pending he may do so but thereupon such guardianship proceedings or cause shall be transferred to the county of the residence of such general guardian so selected and thereupon the minor shall be and become a legal resident of the county of the residence of such general guardian so selected. The said minor may select in the above manner a general guardian of his estate only which may be a corporation but such corporation shall be duly qualified to do business in this state and otherwise suitable. If said minor select a person other than the natural guardian to be either the general guardian of his estate or general guardian of his person and estate or general guardian of his person only the court shall, notwithstanding, have power to appoint the natural guardian, if deemed suitable. And if any such minor over the age of fourteen (14) years fail to appear and select a general guardian of his estate only or of his estate and person or of his person only when summoned, or if the general guardian chosen fail to qualify, and no other be chosen in his stead, the court shall appoint a general guardian to the minor as if he were under fourteen (14) years. When any ward, who is not a resident of the state, owns property, real or personal, in this state, the chancery court of the county in which the property may be, may appoint a general guardian for such ward who shall be the general guardian of his estate only. If the ward be a minor over fourteen (14) years of age and under no legal disability except minority, the selection of guardian may be made before a clerk of a court of record of the state or county of his residence, and a certificate of such clerk, under his seal of office, shall be received as evidence of the selection.

HISTORY:

Codes, Hutchinson's 1848, ch 36, art. 1(125); 1857, ch. 60, art. 142; 1871, § 1202; 1880, § 2097; 1892, § 2186; 1906, § 2403; Hemingway's 1917, § 1964; 1930, § 1868; 1942, § 404; Laws, 1960, ch. 215; Laws, 1972, ch. 408, § 5, eff from and after July 1, 1972.

Editor's Notes —

Laws, 1981, ch. 471, as part of a continuing overall legislative design to replace justice of the peace courts with justice courts and justices of the peace with justice court judges, amended numerous sections of the Mississippi Code of 1972 affecting justices of the peace and justice of the peace courts. Although ch. 471 did not specifically amend this section, attention is directed to Miss. Constn., § 171, amended 1975, which provides, inter alia, that "All reference in the Mississippi Code to justice of the peace shall mean justice court judge."

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Jurisdiction of chancery court in general, see § 9-5-81.

Appointment of guardian ad litem by chancery court, see § 9-5-89.

Appointment by chancery court of receiver for minor's estate, see § 11-5-163.

Appointment of guardian for person entitled to veteran's benefits, see § 35-5-1 et seq.

Banks acting as fiduciaries, see § 81-5-33.

Foreign bank or trust company acting as guardian, see § 81-5-43.

Another section derived from same 1942 code section, see § 93-13-27.

JUDICIAL DECISIONS

ANALYSIS

1. Appointment generally.
2. Persons eligible.
3. Selection by minor.
4. Validity of appointment.
5. Liability of guardian under void or defective appointment.

1. Appointment generally.

Where minors were residents of Webster County at the time of their parents' death and were without an estate in another county, appointment of a guardian or guardians for the minors was governed by this section, and the Chancery Court of Webster County had exclusive jurisdiction. Although the minors had resided with their grandmother in Choctaw County since the death of their parents, the relatively short time since the parents' death refuted the creation of an in loco parentis status carrying with it the exclusive right of custody and upbringing which would prohibit the application of this section. In re Guardianship of Watson, 317 So. 2d 30, 1975 Miss. LEXIS 1723 (Miss. 1975).

The chancery court has the power to appoint a guardian of estates of nonresidents living in Louisiana whose property is in the county. Vaughn v. Vaughn, 226 Miss. 153, 83 So. 2d 821, 1955 Miss. LEXIS 618 (Miss. 1955).

A child's parents cannot, under the due process of law provisions of the state and federal constitutions, be deprived by a judicial proceeding of their parental rights without notice thereof, and an opportunity to be heard in opposition thereto. Britt v. Allred, 199 Miss. 786, 25 So. 2d 711, 1946 Miss. LEXIS 246 (Miss. 1946).

Guardian may be appointed for minor with only right of action for damages. Gunter v. Henderson Molpus Co., 149 Miss. 603, 115 So. 720, 1928 Miss. LEXIS 62 (Miss. 1928).

As a rule, where mother is dead, father's wish should control in appointment. Heard v. Cottrell, 100 Miss. 42, 56 So. 277, 1911 Miss. LEXIS 12 (Miss. 1911).

Where father seeks possession of boy between 2 and 3 years of age left to grandmother by will of mother, custody is to be determined solely by interest of child. Glidewell v. Morris, 89 Miss. 82, 42 So. 537, 1906 Miss. LEXIS 46 (Miss. 1906).

The power of appointment of a guardian is confided to the discretion of the court. Allen v. Peete, 25 Miss. 29, 1852 Miss. LEXIS 133 (Miss. 1852); Muse v. Muse, 76 Miss. 372, 24 So. 168, 1898 Miss. LEXIS 71 (Miss. 1898).

2. Persons eligible.

Although the statutes are silent on the subject, a minor cannot be appointed guardian of another minor, for this would not be within the purposes for which a guardian is appointed. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229, 1939 Miss. LEXIS 133 (Miss. 1939).

Mother who is suitable entitled to custody of children, on death of father, and fact that children, aged 13 and 8 years respectively, express wish to remain with grandmother is not controlling. Kinnaird v. Lowry, 102 Miss. 557, 59 So. 843, 1912 Miss. LEXIS 88 (Miss. 1912).

Where neither parent showed superior fitness, it was proper, on divorce, to award 2-year-old child to mother for probationary period with right to change custody if mother proved unfit. O'Neal v. O'Neal, 95 Miss. 415, 48 So. 623, 1909 Miss. LEXIS 232 (Miss. 1909).

In the appointment of guardians, the discretion of the court should be regulated by some definite principle, and the next of kin should not be excluded unless manifestly unsuited. Allen v. Peete, 25 Miss. 29, 1852 Miss. LEXIS 133 (Miss. 1852).

If the next of kin apply for appointment and be qualified, he must be preferred to a stranger; and if a stranger have been appointed, it is the duty of the court to remove the stranger on application of the next of kin, and appoint the next of kin, if the minor be under fourteen years of age. Spaun v. Collins, 18 Miss. 624, 1848 Miss. LEXIS 148 (Miss. 1848).

3. Selection by minor.

Right of infant over 14 to select guardian controlling if selection suitable. Maskew v. Parker, 127 Miss. 160, 89 So. 909, 1921 Miss. LEXIS 209 (Miss. 1921).

Mother who is suitable entitled to custody of children, on death of father, and fact that children, aged 13 and 8 years respectively, express wish to remain with grandmother is not controlling. Kinnaird v. Lowry, 102 Miss. 557, 59 So. 843, 1912 Miss. LEXIS 88 (Miss. 1912).

The minor, after arriving at the age of fourteen years, may select a guardian regardless of any appointment previously made by the court. Sessions v. Kell, 30 Miss. 458, 1855 Miss. LEXIS 119 (Miss. 1855).

4. Validity of appointment.

A child's paternal grandmother was entitled to reasonable advance notice of a guardianship proceeding with respect to the child and an opportunity to be heard because she was an eligible next of kin under § 93-13-13. Thus, a judgment appointing a guardian for the child would be vacated where the grandmother did not receive notice of the proceeding; a hearing on a motion to vacate the order appointing the guardian did not afford the grandmother the opportunity for a hearing to which she was entitled because she was in the posture of one seeking to remove a guardian and as such, carried a heavy burden, above and beyond what would have been demanded of her had she been a party in the original proceeding. In re Guardianship of Jefferson, 573 So. 2d 769, 1990 Miss. LEXIS 799 (Miss. 1990).

The manner of selection of guardians as provided by the statute is not exclusive and a selection made by a notary public was sufficient where the notary public was authorized to administer oaths. Vaughn v. Vaughn, 226 Miss. 153, 83 So. 2d 821, 1955 Miss. LEXIS 618 (Miss. 1955).

Appointment of orphaned child's grandmother as guardian without notice was of no effect against persons who, having lawfully taken such child into their custody and assumed the obligations to her incident to the parental relation, stood in loco parentis to her. Britt v. Allred, 199 Miss. 786, 25 So. 2d 711, 1946 Miss. LEXIS 246 (Miss. 1946).

In habeas corpus proceedings by grandmother who had obtained appointment as guardian of orphaned child without notice, evidence sustained award of custody to persons who, having lawfully taken child into their custody and assumed the obligations to her incident to the parental relation, stood in loco parentis to her. Britt v. Allred, 199 Miss. 786, 25 So. 2d 711, 1946 Miss. LEXIS 246 (Miss. 1946).

If the record of the appointment of a guardian shows that the minor resides in this state, but in a county other than the one where the appointment is made, the appointment is void. Duke v. State, 57 Miss. 229, 1879 Miss. LEXIS 52 (Miss. 1879).

5. Liability of guardian under void or defective appointment.

Bank appointed guardian although not qualifying held liable for interest at legal rate on minor's money from date of receipt to date of final settlement. Commercial Nat'l Bank & Trust Co. v. Hinton, 138 Miss. 536, 103 So. 359, 1925 Miss. LEXIS 76 (Miss. 1925).

A guardian whose appointment is a nullity can be made responsible for the property of the minor which came into his hands by a proper proceeding. Earle v. Crum, 42 Miss. 165, 1868 Miss. LEXIS 46 (Miss. 1868).

RESEARCH REFERENCES

ALR.

Consideration and weight of religious affiliations in appointment or removal of guardian for minor child. 22 A.L.R.2d 696.

Function, power, and discretion of court where there is testamentary appointment of guardian of minor. 67 A.L.R.2d 803.

Right of infant to select his own guardian. 85 A.L.R.2d 921.

Validity of guardianship proceeding based on brainwashing of subject by religious, political, or social organization. 44 A.L.R.4th 1207.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 19, 31 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 111 et seq. (order appointing guardian).

CJS.

39 C.J.S., Guardian and Ward §§ 13 et seq.

§ 93-13-15. Guardian of ward appointed by chancery court is general guardian.

(1)(a) Every guardian of any ward heretofore or who may be hereafter appointed by any chancery court or chancery clerk whose act is approved by the chancery court, or by any chancellor, is in fact a general guardian to the extent of his appointment according to the terms of the order or decree of appointment, such as: guardian of the estate of the ward is the general guardian of the ward and his estate; the guardian of the person and estate of a ward is the general guardian of the person and estate of such ward; the guardian of the person only of a ward is the general guardian of the ward named.

(b) In addition to the rights and duties of the guardian contained in this chapter, he shall also have those rights, powers and remedies as set forth in Section 91-9-9.

(2) All orders and decrees now or hereafter made in which the word "general" is not used in conjunction with the word "guardian" shall be construed and applied as if the word "general" had been used in conjunction with the word "guardian."

(3) After May 5, 1960, all orders or decrees appointing any guardian or ward shall designate such guardian as "general" guardian.

HISTORY:

Codes, 1942, § 404.5; Laws, 1960, ch. 220, §§ 1-4; Laws, 1972, ch. 408, § 6; Laws, 1994, ch. 589, § 5; Laws, 1999, ch. 374, § 5; Laws, 2002, ch. 614, § 1; Laws, 2008, ch. 452, § 5, eff from and after passage (approved Apr. 8, 2008).

Editor's Notes —

Section 91-9-9, referred to in (1)(b), was repealed by Laws 2014, ch. 421, § 105, effective July 1, 2014.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

JUDICIAL DECISIONS

1. In general.

Guardians may be appointed for minors under § 93-13-15. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

§ 93-13-17. Bond and oath of guardian.

Every guardian, before he shall have authority to act, shall, unless security be dispensed with by will or writing or as hereinafter provided, enter into bond payable to the state, in such penalty and with such sureties as the court may require; and the bond shall be recorded and may be put in suit for any breach of the condition, whether the appointment be legal or not; and the condition shall be as follows:

> "The condition of the above obligation is that if the above bound ________, as guardian of ________, of ________ County, shall faithfully discharge all the duties required of him by law, then the above obligation shall cease."

And the guardian shall also take and subscribe an oath, at or prior to the time of his appointment, faithfully to discharge the duties of guardian of the ward according to law.

A guardian need not enter into bond, however, as to such part of the assets of the ward's estate as may, pursuant to an order of the court in its discretion, be deposited in any one or more banking corporations, building and loan associations or savings and loan associations in this state so long as such deposits are fully insured, such deposits there to remain until the further order of the court, and a certified copy of the order for deposit having been furnished the depository or depositories and its receipt acknowledged.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(126); 1857, ch. 60, art. 143; 1871, §§ 1206, 1208; 1880, § 2098; 1892, § 2187; 1906, § 2404; Hemingway's 1917, § 1965; 1930, § 1869; 1942, § 405; Laws, 1972, ch. 408, § 7; Laws, 1987, ch. 368; Laws, 2001, ch. 422, § 5, eff from and after July 1, 2001.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Limitations of actions against guardians or their sureties, see § 15-1-27.

JUDICIAL DECISIONS

ANALYSIS

1. Furnishing bond in general.
2. Liability on bond.
3. —For collection of money.
4. —For loans.
5. —Conversion.
6. —On new or additional bond.
7. Liability of guardian to surety.
8. Settlement or release.
9. Suits on bond.
10. Parties.
11. Miscellaneous.

1. Furnishing bond in general.

Chancery court erred by not requiring the disabled son's mother to deposit all support paid by the father for the benefit of the son to a conservatorship account and in not requiring the mother to file an inventory and accounting of all support funds and to post a bond because the son may receive funds in the future that would constitute a separate financial estate and therefore the mother should have been required to comply with the statutory safeguards. Ravenstein v. Hawkins, 167 So. 3d 210, 2014 Miss. LEXIS 326 (Miss. 2014).

Former wife's claim that a conservatorship was invalid due to the chancery court's failure to require the co-conservators to post a bond was procedurally barred from consideration because the wife failed to raise the issue in the chancery court; assuming that a bond should have been required, mere irregularities in the appointment or proceedings were immune from collateral attack, and thus, the absence of bond was a curable defect. Collins v. Pinnacle Trust, 147 So. 3d 830, 2014 Miss. LEXIS 103 (Miss. 2014).

A person's authority to act as a legal guardian under § 93-13-17 may not be attacked, collaterally or otherwise, unless he or she is given the opportunity to post the bond required by decree of the chancellor. Matter of In re Estate of Moreland, 537 So. 2d 1337, 1989 Miss. LEXIS 2 (Miss. 1989).

A bank was improperly held in contempt for allowing a former guardian to make withdrawals from an infant's account without a court order, where the decree of the chancellor waiving the guardian's bond and requiring that funds in the infant's estate not be withdrawn from the bank without a court order, made pursuant to § 93-13-17, was void as to the bank, which was neither served with notice nor given an opportunity to be heard, and thus, the bank could not be held in contempt for failure to abide by the chancellor's decree. Mississippi Bank v. Kelly, 445 So. 2d 849, 1984 Miss. LEXIS 1632 (Miss. 1984).

Guardian who never posted the bond required by decree of the court authorizing her to settle doubtful claim of ward acted without authority in releasing such claim, and the release which she executed was null and void; it is incumbent upon those paying money to a guardian to make certain that the chancellor's decree is faithfully executed in every respect. Joyce v. Brown, 304 So. 2d 634, 1974 Miss. LEXIS 1455 (Miss. 1974).

A guardian's bond is not discharged by the execution of a second bond given to meet an increase of the ward's estate. Baum v. Lynn, 72 Miss. 932, 18 So. 428, 1895 Miss. LEXIS 52 (Miss. 1895).

Where a guardian appeared in open court and voluntarily tendered a new bond, which was by the chancellor approved, the necessity for a summons and a precedent order is dispensed with. The guardian merely did voluntarily what the court might have compelled him to do. McWilliams v. Norfleet, 60 Miss. 987, 1883 Miss. LEXIS 51 (Miss. 1883).

2. Liability on bond.

Demurrer was properly sustained to bill of review by restored incompetent against his wife (as former guardian), the successor guardian, together with the sureties on their respective bonds, as to the sale of land by the successor guardian to the wife after her resignation, then subsequently sold by her to third persons, where there was no charge in the bill that any of the expenditures made by the guardians were not fully authorized by the court, or that they were not fully supported by legal vouchers, there was no charge that the land was sold for less than a full and fair value, and it appeared that the proceeds of the sales were expended under orders of the court mainly for the support and maintenance of the complainant's minor children. O'Flarity v. O'Flarity, 201 Miss. 61, 28 So. 2d 569, 1947 Miss. LEXIS 368 (Miss. 1947).

Sustaining demurrer to bill of complaint by restored incompetent against his wife as former guardian to the effect that the complainant owned a stock of goods which was withheld from the inventory and was converted by such former guardian to her own use, was erroneous since such allegation required an answer when considered as being in the nature of a bill of review to surcharge her account as guardian. O'Flarity v. O'Flarity, 201 Miss. 61, 28 So. 2d 569, 1947 Miss. LEXIS 368 (Miss. 1947).

When guardian converts ward's money to his personal use without previously having arranged by proper proceeding to borrow funds on security approved by court, guardian is guilty of breach of his bond, and guardian and his bondsmen are liable as in debt for money converted and such debt cannot be released except on payment therefor in money. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

The liability of a surety on a guardian's bond is not probatable and is not barred by any statute of limitations relating to the probate of claims against the estate of decedents. Savings Bldg. & Loan Ass'n v. Tart, 81 Miss. 276, 32 So. 115, 1902 Miss. LEXIS 103 (Miss. 1902).

The liability of a surety is a debt chargeable upon his lands over and above what his personal estate may be sufficient to pay. Savings Bldg. & Loan Ass'n v. Tart, 81 Miss. 276, 32 So. 115, 1902 Miss. LEXIS 103 (Miss. 1902).

Persons who buy land from the heirs of a deceased surety on a duly recorded guardian's bond buy with constructive notice of its liability in case the decedent's personal estate is insufficient to pay his debts. Savings Bldg. & Loan Ass'n v. Tart, 81 Miss. 276, 32 So. 115, 1902 Miss. LEXIS 103 (Miss. 1902).

When a guardian has taken possession of, and for years exercises control over, the estate of his ward, the sureties on his bond are estopped by its recitals to deny the validity of his appointment in a proceeding after his death to recover the balance due the estate of the ward. Hauenstein v. Gillespie, 73 Miss. 742, 19 So. 673, 1896 Miss. LEXIS 199 (Miss. 1896).

A surety is not released by decree of the court approving acts of the guardian subsequent to the unauthorized acts; nothing but the payment can discharge the obligation. Bell v. Rudolph, 70 Miss. 234, 12 So. 153, 1892 Miss. LEXIS 95 (Miss. 1892).

3. —For collection of money.

A guardian and his sureties are accountable, not only for money collected by him, but also for money which he might have collected by proper diligence. Ames v. Williams, 74 Miss. 404, 20 So. 877, 1896 Miss. LEXIS 127 (Miss. 1896).

If a guardian neglect to collect a specified note due him as such, and delivers the same to his successor, his wards are not estopped from charging him and his sureties, as if he had actually collected the money due on the note, with interest, by the fact that they reduced the note to judgment against the maker even where the guardian is himself the maker of the note. Ames v. Williams, 74 Miss. 404, 20 So. 877, 1896 Miss. LEXIS 127 (Miss. 1896).

4. —For loans.

The sureties on a guardian's bond, although released by decree of court from further liability, remain liable for losses which result from a prior unauthorized loan of the ward's money. Bell v. Rudolph, 70 Miss. 234, 12 So. 153, 1892 Miss. LEXIS 95 (Miss. 1892).

5. —Conversion.

Sureties held not relieved from liability on bond of incompetent's guardian for guardian's conversion of incompetent's funds prior to time when court issued orders allowing guardian to borrow such funds on ground that court without sureties' knowledge or consent made improvident orders releasing security given by guardian until security became inadequate to cover amount converted. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Evidence held to justify decree holding sureties on bond of incompetent's guardian liable for guardian's conversion of incompetent's funds, notwithstanding court's orders allowing guardian to borrow incompetent's funds, on ground that guardian appropriated funds to his own personal use as fast as he received money for incompetent, and hence orders were void for fraud in procuring them because of failure to disclose previous conversion of funds. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Sureties on bond of incompetent's deceased guardian could not claim that successor guardian failed to prove that guardian had converted incompetent's funds prior to petitioning court for permission to borrow such funds because of failure of administrator of deceased guardian to testify as to what money and effects deceased guardian had on his death, where admitted decree of insolvency of guardian's estate at time of his death made such proof unnecessary. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Except as authorized by statute, guardian has no right to convert money of his ward to his own use and to spend it for his own personal purposes, and when he does so, it is as much an "embezzlement" as when treasurer of corporation or other fiduciary of funds does the like. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

6. —On new or additional bond.

The sureties of the new bond are liable, not only for the money and assets of the ward's estate, which actually came into the hands of the guardian after the execution of the new bond, but also for such as he might and could have collected by faithful administration of his office. McWilliams v. Norfleet, 63 Miss. 183, 1885 Miss. LEXIS 43 (Miss. 1885).

Where a new bond has been given and approved by the chancellor the sureties thereon are liable only for the defaults of the guardian occurring after the execution of this bond. McWilliams v. Norfleet, 60 Miss. 987, 1883 Miss. LEXIS 51 (Miss. 1883).

7. Liability of guardian to surety.

The surety on a guardian's bond from the date of its execution is a creditor of the principal for all sums he is required to pay because of the suretyship. Ames v. Dorrah, 76 Miss. 187, 23 So. 768, 1898 Miss. LEXIS 69 (Miss. 1898).

Defendant failed to establish an "insurable interest" under Miss. Code Ann. § 83-5-251(3) of the life of an insured because he did not complete the process for guardianship under Miss. Code Ann. § 93-13-17 and he failed to establish a legal relationship or an economic interest in the continued life of the insured. First Colony Life Ins. Co. v. Sanford, 480 F. Supp. 2d 870, 2007 U.S. Dist. LEXIS 15503 (S.D. Miss. 2007), rev'd, 555 F.3d 177, 2009 U.S. App. LEXIS 341 (5th Cir. Miss. 2009).

8. Settlement or release.

When guardian converts ward's money to his personal use without previously having arranged by proper proceeding to borrow funds on security approved by court, guardian is guilty of breach of his bond, and guardian and his bondsmen are liable as in debt for money converted and such debt cannot be released except on payment thereof in money. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Court may aid bondsmen of guardian who has converted ward's money without authority by accepting security for accrued debt from guardian, and enforcing it in behalf of bondsmen, but court has no power to release obligation of bondsmen on such security however ample, and liability continues until satisfied by payment and security of payment by mortgage or deed of trust on property, however adequate at time, is not such "payment." Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Where after the death of a guardian and maturity of the ward one who had borrowed the ward's money executes to her in settlement a conveyance of land "in consideration of the full acquittance, discharge and release of said grantor from all liability to the guardian or ward for and on account of said loan," in an action by the ward on the guardian's bond parol evidence is not admissible to show that it was also intended to release the guardian from all liability to the ward. Baum v. Lynn, 72 Miss. 932, 18 So. 428, 1895 Miss. LEXIS 52 (Miss. 1895).

The sureties cannot claim exemption from the rule excluding parol evidence in such case on the ground that they were not parties to the contract. As they claim under it, they are bound by its terms. Baum v. Lynn, 72 Miss. 932, 18 So. 428, 1895 Miss. LEXIS 52 (Miss. 1895).

A surety is not released by decree of the court approving acts of the guardian subsequent to the unauthorized acts; nothing but the payment can discharge the obligation. Bell v. Rudolph, 70 Miss. 234, 12 So. 153, 1892 Miss. LEXIS 95 (Miss. 1892).

9. Suits on bond.

The fact that the personal representative has filed an account of the guardianship, to which exceptions are pending, does not prevent suit on the bond by the wards for an account and to recover their estate and to subject property fraudulently conveyed by one of the sureties. Patty v. Williams, 71 Miss. 837, 15 So. 43, 1894 Miss. LEXIS 38 (Miss. 1894).

A previous order of the chancellor is unnecessary to authorize a suit on a guardian's bond. Klaus v. State, 54 Miss. 644, 1877 Miss. LEXIS 67 (Miss. 1877).

To sustain an action on a guardian's bond for a failure to deliver property to a subsequent guardian, it is unnecessary first to establish a decree of the chancery court directing its delivery; and in a suit thereon for a defalcation, it is unnecessary to show a decree in the first instance establishing the amount of the debt. Burrus v. Thomas, 21 Miss. 459, 1850 Miss. LEXIS 47 (Miss. 1850).

10. Parties.

The heirs of a deceased surety on a guardian's bond, and those holding under them the property of the decedent, are proper parties to the ward's suit in equity upon the bond, to subject the property, where the estate of the deceased has been finally administered and distributed. Horne v. Tartt, 76 Miss. 304, 24 So. 971, 1898 Miss. LEXIS 123 (Miss. 1898).

A suit in behalf of a lunatic against the sureties on his deceased guardian's bond is properly brought in the name of the lunatic suing by his guardian and next friend. Gillespie v. Hauenstein, 72 Miss. 838, 17 So. 602, 1895 Miss. LEXIS 22 (Miss. 1895).

In a suit in chancery on a guardian's bond the heirs of the deceased surety are proper parties where his estate has been finally administered and distributed and the effort is to subject it in the hands of his heirs. Gillespie v. Hauenstein, 72 Miss. 838, 17 So. 602, 1895 Miss. LEXIS 22 (Miss. 1895).

In a chancery suit by wards on the bond of their former guardian they may join as defendants voluntary grantees in order to subject property in their hands so conveyed. Such a conveyance in legal contemplation is fraudulent and subject to be set aside at the suit of creditors. Patty v. Williams, 71 Miss. 837, 15 So. 43, 1894 Miss. LEXIS 38 (Miss. 1894).

The state, although nominally the obligee, is not a necessary party to a suit in chancery on the bond of the guardian. Patty v. Williams, 71 Miss. 837, 15 So. 43, 1894 Miss. LEXIS 38 (Miss. 1894).

11. Miscellaneous.

Attorney's disbarment from the practice of law was appropriate because his fraud, perjury, embezzlement, and abuse concerning a minor client's guardianship rendered him grossly unfit to practice law. Consequently, the Mississippi Bar met its burden to show that the attorney should be disbarred immediately. Miss. Bar v. Brown, 118 So. 3d 545, 2012 Miss. LEXIS 474 (Miss. 2012).

Even though a formal guardianship over an insured minor was not completed under Miss. Code Ann. § 93-13-17, factual disputes prevented summary judgment as to whether a claimant stood in loco parentis to the insured and as to whether other factors could have led to the claimant having an insurable interest under Miss. Code Ann. §§ 83-5-251 and 83-5-253 in the insured's life so as to allow the claimant to recover life insurance proceeds after the death of the insured. First Colony Life Ins. Co. v. Sanford, 555 F.3d 177, 2009 U.S. App. LEXIS 341 (5th Cir. Miss. 2009).

RESEARCH REFERENCES

ALR.

Right of third person not named in bond or other contract conditioned for support of, or services to, another, to recover thereon. 11 A.L.R.2d 1010.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 67.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 151 et seq. (bond of guardian).

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 171 et seq. (oath of guardian).

9A Am. Jur. Legal Forms 2d, Guardian and Ward, §§ 133:41, 133:42 (guardian's security bond).

CJS.

39 C.J.S., Guardian and Ward §§ 13 et seq.

Law Reviews.

1984 Mississippi Supreme Court Review: Wills and Estates. 55 Miss. L. J. 120, March, 1985.

§ 93-13-19. Appointment of guardian pending appeal from grant of guardianship.

Whenever an appeal shall be taken from the grant of letters of guardianship, and there shall be no person qualified to discharge the duties pending the appeal, the court or clerk shall appoint some fit person for that purpose, who shall give bond and take the oath to discharge the duties as in other cases, until the appeal be decided.

HISTORY:

Codes, 1880, § 1986; 1892, § 2188; 1906, § 2405; Hemingway's 1917, § 1966; 1930, § 1870; 1942, § 406.

§ 93-13-21. Appointment of clerk when guardian will not qualify.

If someone will not qualify as guardian of a ward who has property, it shall be the duty of the chancery court or the chancellor in vacation to appoint the clerk of said court to be the guardian of the ward, who shall discharge the duties of guardian, under the order and direction of the court, and be subject to be dealt with as for a contempt for failure. He shall be required to give a special cumulative bond as guardian, and his official bond shall also cover his liability as guardian, and he shall be bound and liable in all respects as any other guardian; but he shall not be bound to incur any cost, except out of the estate of his ward; and he shall be allowed not more than ten percent (10%) on the amount of the estate, if finally settled. At the expiration of his right to the office, he shall make a settlement of his guardianship, and immediately deliver the property of the ward to his successor in office or to such other person as the court or chancellor may have directed.

HISTORY:

Codes, 1880, § 2117; 1892, § 2189; 1906, § 2406; Hemingway's 1917, § 1967; 1930, § 1871; 1942, § 407; Laws, 1896, ch. 92; Laws, 1928, ch. 148; Laws, 1972, ch. 408, § 8, eff from and after July 1, 1972.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Duties of chancery clerk generally, see §§ 9-5-131 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Jurisdiction of court.
2. Bond of clerk.
3. Compensation.
4. State as party to suit on bond.

1. Jurisdiction of court.

This section [Code 1942, § 407] committing the guardianship of minors to the clerk of the chancery court in certain cases does not confer jurisdiction on the court, but is merely statutory direction as to its general jurisdiction already existing under the constitution, and its decree appointing the clerk guardian cannot be collaterally attacked. This can only be done by showing that under no circumstances could the court have exercised jurisdiction. Ames v. Williams, 72 Miss. 760, 17 So. 762, 1895 Miss. LEXIS 28 (Miss. 1895).

In minor's business, as in matters of general equity, the chancery court exercises a general jurisdiction conferred by the constitution, and its records need not show the facts authorizing the exercise of such jurisdiction in a particular case. Ames v. Williams, 72 Miss. 760, 17 So. 762, 1895 Miss. LEXIS 28 (Miss. 1895).

The power of the chancery court to appoint guardians for minors does not depend on the statute regulating its exercise, but is a part of the general jurisdiction conferred by the constitution, and when such appointment is made every presumption applicable to the judgment of any other court of record is to be indulged in support of the decree. Ames v. Williams, 72 Miss. 760, 17 So. 762, 1895 Miss. LEXIS 28 (Miss. 1895).

2. Bond of clerk.

Because a chancery court clerk could be appointed as a guardian when no one else would qualify, the clerk's official bond could be used to secure the performance of the clerk's duties as guardian. United States Fid. & Guar. Co. v. Melson, 809 So. 2d 647, 2002 Miss. LEXIS 100 (Miss. 2002).

Where the chancery clerk has been appointed guardian, if no specified bond be required of him, the code provisions control, and his official bond will stand as security for the ward. Faust v. Murphy, 71 Miss. 120, 13 So. 862, 1893 Miss. LEXIS 135 (Miss. 1893).

3. Compensation.

Whenever any guardian has wholly collected and wholly disbursed money arising from personalty or rents of land, the aggregate sum so collected and disbursed constitutes a part of the estate finally settled, and as to that amount he has discharged the guardian's whole duty, and should receive a guardian's whole compensation. Maxwell v. Harkleroad, 77 Miss. 456, 27 So. 990, 1899 Miss. LEXIS 99 (Miss. 1899).

Where two or more clerks act successively for the same ward, no one of them (not having finally settled the estate) is entitled as compensation to five per centum commission on the value of the corpus of the ward's real estate, in addition to the commission on his personal estate. Bass v. Maxwell, 77 Miss. 117, 25 So. 873 (Miss. 1899).

4. State as party to suit on bond.

The state, although nominally the obligee, is not a necessary party to a suit in chancery on the bond of a chancery clerk acting as a guardian of minors to recover their estate. Patty v. Williams, 71 Miss. 837, 15 So. 43, 1894 Miss. LEXIS 38 (Miss. 1894).

§ 93-13-23. Removing guardian; requiring new bond.

The court by which a guardian was appointed, may, for sufficient cause, remove him after having him cited to appear. If the court should ascertain that the sureties of a guardian were insufficient at the time the bond was executed, or have since become so, or are of doubtful solvency, it may require the guardian to give a new bond; and if he refuse or neglect to do so, he may be removed. If the sureties of any guardian apprehend danger, and desire to be discharged, they may petition the court for that purpose, and the guardian shall be cited, and if, on hearing, the court should be of opinion that the complaint is well founded, the guardian may be required to give a new bond, and, on failure to do so, may be removed.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(129, 134); 1857, ch. 60, art. 145; 1871, § 2110; 1880, § 2101; 1892, § 2190; 1906, § 2407; Hemingway's 1917, § 1968; 1930, § 1872; 1942, § 408.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. New or additional bond.
3. Discharge of sureties.
4. Removal of guardian.
5. Liability on bond.
6. —Liability on new bond.

1. In general.

The terms "sureties" and "security" are used in their proper sense, the one indicating "persons" and the other "instruments," which secure. If the old bond were executed by new sureties, it would thereby become a new security, and a new bond distinct from the former would be a new security. The name is not important. State use of Baird v. Hull, 53 Miss. 626, 1876 Miss. LEXIS 126 (Miss. 1876); Bell v. Rudolph, 70 Miss. 234, 12 So. 153, 1892 Miss. LEXIS 95 (Miss. 1892).

2. New or additional bond.

If a new bond be tendered and approved, and the record be silent as to the circumstances which authorized the court to compel its execution or to accept it, the existence of such circumstances will be presumed. McWilliams v. Norfleet, 60 Miss. 987, 1883 Miss. LEXIS 51 (Miss. 1883).

3. Discharge of sureties.

The right of the surety to be relieved depends upon whether or not he is in danger of loss. Mere apprehension of loss or desire to be relieved is not sufficient. Coleman v. Lamar, 40 Miss. 775, 1866 Miss. LEXIS 116 (Miss. 1866).

The sureties are entitled to be discharged where they are in danger of loss, although they be indemnified by the guardian. Foster v. Bisland, 23 Miss. 296, 1852 Miss. LEXIS 206 (Miss. 1852).

4. Removal of guardian.

Existence of sufficient cause for removal of guardian is within sound discretion of chancellor, which will not be disturbed, except for manifest abuse. Conner v. Polk, 161 Miss. 24, 133 So. 604, 1931 Miss. LEXIS 239 (Miss. 1931).

Removing guardian of estate of minor on petition of mother and appointing mother as such guardian held not abuse of discretion. Conner v. Polk, 161 Miss. 24, 133 So. 604, 1931 Miss. LEXIS 239 (Miss. 1931).

Allegation of unfitness of guardian of minor's estate in petition of mother of minor for removal, also praying for appointment of mother, held surplusage. Conner v. Polk, 161 Miss. 24, 133 So. 604, 1931 Miss. LEXIS 239 (Miss. 1931).

Conviction of guardian of embezzlement warrants removal, regardless of his appeal and release on bail. Clark v. Smith, 110 Miss. 728, 70 So. 897, 1916 Miss. LEXIS 202 (Miss. 1916); Hemphill v. Smith, 128 Miss. 586, 91 So. 337, 1922 Miss. LEXIS 141 (Miss. 1922).

An order that the guardian be removed if he fail to give a new bond within a specified time, is void; he should have an opportunity to give the new bond before the order of removal is made. Fant v. McGowan, 57 Miss. 779, 1880 Miss. LEXIS 59 (Miss. 1880).

5. Liability on bond.

Liability of guardian of minor's estate on removal and surety on official bond ceases when final account is filed and approved. Conner v. Polk, 161 Miss. 24, 133 So. 604, 1931 Miss. LEXIS 239 (Miss. 1931).

6. —Liability on new bond.

Order releasing sureties on guardian's bond and ordering new bond does not make new bond retroactive unless so provided in the bond itself. Aetna Indem. Co. v. State, 101 Miss. 703, 57 So. 980, 1911 Miss. LEXIS 145 (Miss. 1911).

Conversion of funds by guardian under first bond renders first bondsmen liable and not sureties on second bond. Aetna Indem. Co. v. State, 101 Miss. 703, 57 So. 980, 1911 Miss. LEXIS 145 (Miss. 1911).

Where new bond is required, the sureties thereon are only liable for defaults accruing after it is given. State use of Baird v. Hull, 53 Miss. 626, 1876 Miss. LEXIS 126 (Miss. 1876); McWilliams v. Norfleet, 60 Miss. 987, 1883 Miss. LEXIS 51 (Miss. 1883).

RESEARCH REFERENCES

ALR.

Right of appeal from order on application for removal of personal representative, guardian, or trustee. 37 A.L.R.2d 751.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation. 96 A.L.R.3d 1102.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 77, 81-84.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 221 et seq. (removal of guardian).

CJS.

39 C.J.S., Guardian and Ward §§ 50–55.

§ 93-13-25. Guardians may resign; appointments to fill vacancies.

Any guardian may resign his guardianship, in the same manner and on the same terms as executors and administrators. Whenever a guardian dies, resigns, or is removed, the court may appoint another.

HISTORY:

Codes, 1880, § 2107; 1892, § 2191; 1906, § 2408; Hemingway's 1917, § 1969; 1930, § 1873; 1942, § 409.

JUDICIAL DECISIONS

1. In general.
When an order accepting a guardian's resignation provides that he and his sureties be discharged, upon payment and delivery to his successor of all money, and effects in his hands, until such time and delivery he may reduce to judgment promissory notes belonging to the ward and have execution of such judgment. Longino v. Delta Bank, 75 Miss. 407, 23 So. 178, 1897 Miss. LEXIS 132 (Miss. 1897).

RESEARCH REFERENCES

ALR.
Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation. 96 A.L.R.3d 1102.

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward §§ 79, 85.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 211 et seq. (resignation and appointment of successor).

CJS.
39 C.J.S., Guardian and Ward §§ 46, 47, 49.

§ 93-13-27. Judicial proceedings on behalf of ward to be brought in name of guardian.

All suits, complaints, actions and administrative and quasi judicial proceedings for or on behalf of a ward for whom a general guardian has been appointed shall be brought in the name of the general guardian for the use and benefit of such ward, be such general guardian that of his estate or that of his estate and person or that of his person only. And all such actions, suits or proceedings shall be commenced only after authority has been granted to such general guardian by proper order or decree of the court or chancellor of the county in this state in which the guardianship proceedings are pending, upon proper sworn petition and supporting oral testimony. A certified copy of said order authorizing such suit or proceedings shall be attached to the complaint or instrument or document originally filed as commencing such action, suits or proceedings. If such proceedings be commenced by act of said general guardian, then on request therefor a certified copy of said order or decree shall be submitted by said general guardian as evidence of his authority to the person or persons with or through whom the guardian may deal in performing any act commencing such proceedings.

HISTORY:
Codes, Hutchinson's 1848, ch. 36, art. 1(125); 1857, ch. 60, art. 142; 1871, § 1202; 1880, § 2097; 1892, § 2186; 1906, § 2403; Hemingway's 1917, § 1964; 1930, § 1868; 1942, § 404; Laws, 1960, ch. 215; Laws, 1972, ch. 408, § 5, eff from and after July 1, 1972.

Cross References —
Construction and meaning of term "ward," see § 1-3-58.

Another section derived from same 1942 code section, see § 93-13-13.

JUDICIAL DECISIONS

ANALYSIS

1. Constitutionality.
2. Relationship with other laws.
3. Statute of limitations.

1. Constitutionality.
In a medical malpractice case in which (1) a

personal representative's first compliant did not comply with the procedural requirement in Miss. Code Ann. § 93-13-27; (2) the first amended complaint complied with the procedural requirement in § 93-13-27; and (3) two doctors, a medical association, and a medical center moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the procedural defect in the first complaint was fatal to the cause of action and was not curable by an amended complaint, under the rationale of the Wimley and McClain decisions, the procedural mandate of § 93-13-27 was an unconstitutional violation of the separation of powers. LaFarge v. Kyker, 2009 U.S. Dist. LEXIS 85656 (N.D. Miss. Sept. 18, 2009).

2. Relationship with other laws.

In a medical malpractice case in which two doctors, a medical association, and a medical center filed Fed. R. Civ. P. 12(b)(6) motions to dismiss, arguing the personal representative did not have the authority to place them on notice under Miss. Code Ann. § 15-1-36 because she had not received judicial authority to place them on notice of her intent to file suit as a conservator at the time notice was given, the personal representative provided them with 60 days notice. While the personal representative had to receive judicial authorization before filing suit, Miss. Code Ann. § 93-13-27 did not require a personal representative or a conservator to obtain judicial authorization before sending a notice of intent letter. LaFarge v. Kyker, 2009 U.S. Dist. LEXIS 85656 (N.D. Miss. Sept. 18, 2009).

3. Statute of limitations.

Co-conservators' argument that their parent's disability remained in effect, tolling the statutes of limitation, until the conservator of the estate was authorized to file suit on their parent's behalf was without merit because their parent's disabilities were removed when the parent was appointed a conservator of the estate, co-conservators of the person, and a guardian ad litem. Benvenutti v. McAdams, 162 So. 3d 808, 2015 Miss. LEXIS 217 (Miss. 2015).

§ 93-13-29. Parent of nonresident minor may bring suit in state.

When a minor resides in a state or country whose laws do not provide for the appointment of a guardian during the life of parents, but vest the administration of the estate of the minor in a parent, such parent may sue for, receive and make a valid acquittance for the property, legacy, distributive share or chose in action of the minor after filing in the office of the clerk of the chancery court of the county where there may be some person indebted to the minor or having some of his effects in possession, a certificate from the judge or clerk of a court of record in the state or country where the minor resides, that the minor and parent reside within said state and the jurisdiction of said court.

HISTORY:

Codes, 1906, § 2429; Hemingway's 1917, § 1990; 1930, § 1909; 1942, § 446; Laws, 1904, ch. 149.

Cross References —

Grant of letters of administration, see § 91-7-63.

§ 93-13-31. Ward's property to be delivered to guardian.

When the guardian shall qualify, the court shall decree that the property belonging to the ward be delivered to the guardian. In case of a legacy, the court shall direct the delivery to be made as soon as it may appear that the same can be done without prejudice to the person administering the estate. In case of a distributive share, the court shall direct a delivery as soon as the same shall be ascertained and distribution can be had, the guardian to execute a refunding bond, if necessary. And on failure of a guardian, or other person, to comply with the decree, after due notice, his bond may be put in suit, or he may be attached, fined, and imprisoned for a contempt.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(127); 1857, ch. 60, art. 144; 1871, § 1209; 1880, § 2100; 1892, § 2193; 1906, § 2410; Hemingway's 1917, § 1971; 1930, § 1874; 1942, § 410.

JUDICIAL DECISIONS

1. In general.

A final decree in a suit begun and prosecuted by infants suing by next friend is a bar to a subsequent and like suit by a guardian of the infant involving the same questions and against the same defendants. Burkitt v. Burkitt, 81 Miss. 593, 33 So. 417, 1902 Miss. LEXIS 182 (Miss. 1902).

The legal title to a promissory note is in the payee, although he be designated as the guardian of another whose name appears on the face of the note, and he may transfer the same to an indorsee. Jenkins v. Sherman, 77 Miss. 884, 28 So. 726, 1900 Miss. LEXIS 55 (Miss. 1900).

RESEARCH REFERENCES

ALR.

Involuntary disclosure or surrender of will prior to testator's death. 75 A.L.R.4th 1144.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 99 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 311 et seq. (custody and management of estate).

CJS.

39 C.J.S., Guardian and Ward §§ 75 et seq.

§ 93-13-33. Inventories to be returned.

Every guardian shall, within three months after his appointment, return to the court, under oath, a true and perfect inventory of the estate, real and personal, and of all money or other things which he may have received as the property of his ward; and he shall return additional inventories of whatever he may subsequently receive. And he shall annually return an inventory, under oath, of the increase of the estate, if there be any. A guardian who shall fail to return inventories may be removed and his bond put in suit, unless he can show cause for the default.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(128); 1857, ch. 60, art. 146; 1871, § 1214; 1880, § 2102; 1892, § 2195; 1906, § 2412; Hemingway's 1917, § 1973; 1930, § 1875; 1942, § 411.

Cross References —

Fee for filing inventory, see § 25-7-9.

JUDICIAL DECISIONS

1. In general.

Chancery court erred by not requiring the disabled son's mother to deposit all support paid by the father for the benefit of the son to a conservatorship account and in not requiring the mother to file an inventory and accounting of all support funds and to post a bond because the son may receive funds in the future that would constitute a separate financial estate and therefore the mother should have been required to comply with the statutory safeguards. Ravenstein v. Hawkins, 167 So. 3d 210, 2014 Miss. LEXIS 326 (Miss. 2014).

Former conservator violated Miss. Code Ann. § 93-13-33 where he first filed an inventory of the ward's estate more than six months after he was appointed conservator. Bardwell v. Bardwell (In re Bardwell), 849 So. 2d 1240, 2003 Miss. LEXIS 336 (Miss. 2003).

A chancellor did not abuse his discretion in removing a conservator where inventories were not timely filed and no reason was given therefor, the conservator failed to seek court approval prior to making expenditures, and he purchased certificates of deposit, invested in stock and sold stock without prior approval.

Mathews v. Williams (In re Mathews), 633 So. 2d 1038, 1994 Miss. LEXIS 123 (Miss. 1994).

RESEARCH REFERENCES

CJS.

39 C.J.S., Guardian and Ward § 84.

§ 93-13-35. Allowance for maintenance and education of ward.

The chancery court or chancellor in vacation, may, at discretion, settle the sum to be expended in the maintenance and education of a ward, having regard to his or her station, future prospects and destination; and may allow expenditures in excess of the income of the estate, and, if necessary, may order sale of so much of the personal estate as may be necessary to meet such expenditures. And if the personal estate and the rents and profits of the real estate be not sufficient for the maintenance and education of the ward, the court may, on investigation, decree the sale of such part of the real estate of the ward as may be necessary for the purpose; but if it be more advantageous to the ward, the court may order the sale of real estate in preference to the sale of personal property. No guardian shall make any expenditure in excess of his ward's income for the ward's support and education without a previous order of the court or chancellor authorizing the same.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(131); 1857, ch. 60, art. 150; 1871, § 1220; 1880, § 2109; 1892, § 2197; 1906, § 2413; Hemingway's 1917, § 1974; 1930, § 1876; 1942, § 412; Laws, 1894, ch. 57.

Cross References —

Form of conveyance by guardian, see § 89-1-67.

Maintenance of minor distributee or legatee by executor or administrator, see § 91-7-143.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Particular expenditures.

1. In general.

A precedent order was necessary to authorize the guardian to exceed the income. Austin v. Lamar, 23 Miss. 189, 1851 Miss. LEXIS 35 (Miss. 1851); Frelick v. Turner, 26 Miss. 393, 1853 Miss. LEXIS 104 (Miss. 1853); Gilbert v. McEachen, 38 Miss. 469, 1860 Miss. LEXIS 17 (Miss. 1860); Wiggle v. Owen, 45 Miss. 691, 1871 Miss. LEXIS 118 (Miss. 1871); Boyd v. Hawkins, 60 Miss. 277, 1882 Miss. LEXIS 50 (Miss. 1882); Darter v. Speirs, 61 Miss. 148, 1883 Miss. LEXIS 89 (Miss. 1883); Ex parte George, 63 Miss. 143, 1885 Miss. LEXIS 35 (Miss. 1885).

Where a former conservator applied to receive fees from the ward's estate before he had filed an inventory of the estate, the chancery court improperly authorized the payment of excess fees that the conservator could not substantiate. Bardwell v. Bardwell (In re Bardwell), 849 So. 2d 1240, 2003 Miss. LEXIS 336 (Miss. 2003).

A minor under guardianship is a ward of the chancery court, and all receipts and disbursements of his estate are required to be under the authority and direction of the chancery court or the chancellor in vacation. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The amount of the expenditures by a guardian for the maintenance, support and education of his ward must be fixed by the court, there being no discretion in the guardian. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The expenses for the maintenance and support of the ward cannot be proved in any other way than that provided by statute. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The guardian has no power to bind the estate of his ward without the sanction of the chancery court or the chancellor, and if the guardian contracts for the maintenance, support and education of his ward without the sanction of the court or chancellor, the liability therefor is personal to him, and he cannot be allowed for it in his accounts for the ward. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

Where a guardian applies for the sale of a ward's land because of the insufficiency of the personal estate and the rents and profits of the real estate to maintain and educate him, or because it is deemed preferable that the real estate be sold instead of the personal, the court may act upon such application without previous issuance of a summons. Fitzpatrick v. Beal, 62 Miss. 244, 1884 Miss. LEXIS 64 (Miss. 1884).

2. Particular expenditures.

Where guardian of a minor ward deposited ward's estate in bank on time deposit with 4 per cent interest per annum, and thereafter withdrew such deposit without authority of the chancery court, and such guardian failed to file annual account or have expenditures for ward's maintenance, support and education approved by the court, guardian is liable for the amount so deposited with interest at 4 per cent from the time it was deposited in the bank until withdrawn therefrom, and thereafter he is liable for 8 per cent interest per annum. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The guardian, without a previous order of the chancery court, may bind the corpus of the estate of his ward for necessary medical and surgical attention and services to the ward, it being better to sacrifice the estate than the life of the ward. Williams v. Bonner, 79 Miss. 664, 31 So. 207, 1901 Miss. LEXIS 103 (Miss. 1901).

A physician who enters a charge on his books of accounts against the guardian for the necessary services rendered the ward, is not estopped thereby from propounding his claim against the estate of the ward. Williams v. Bonner, 79 Miss. 664, 31 So. 207, 1901 Miss. LEXIS 103 (Miss. 1901).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 95-97.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 271 et seq. (support and education of minor ward).

CJS.

39 C.J.S., Guardian and Ward §§ 63–74.

§ 93-13-37. Maintenance of minor ward who has a parent; appointment of a special general guardian under certain circumstances.

(1) If the minor ward has a father or mother, the court, or chancellor in vacation, shall determine whether the expense of maintaining and educating him shall be borne by his guardian or not.

(2)(a) If the minor ward has a father or mother but no parent able to take responsibility for the minor, and the minor's assets do not include any real property, cash-on-hand of no more than Two Hundred Fifty Dollars ($250.00), and personal property worth no more than One Thousand Dollars ($1,000.00), and the court finds that it would be in the best interests of the minor, a special general guardian who is related to the minor by blood or marriage may be appointed for the minor. An attorney is not required for this proceeding in chancery court, and the court shall waive annual or final accounting by the special general guardian.

(b) A special general guardian must comply with all relevant provisions of this chapter immediately upon there coming into his hands any realty, personalty or monies in excess of the limitations of this subsection (2).

HISTORY:

Codes, 1880, § 2111; 1892, § 2198; 1906, § 2414; Hemingway's 1917, § 1975; 1930, § 1877; 1942, § 413; Laws, 2013, ch. 339, § 1, eff from and after July 1, 2013.

Cross References —

Application to court for directions as to disposition of certain property by special general guardian appointed under this section, see § 93-13-55.

JUDICIAL DECISIONS

1. In general.

Precedent order of court or chancellor is indispensable in determining whether guardian shall bear expenses of ward having parent living. Chapman v. Pentecost, 161 Miss. 600, 137 So. 539, 1931 Miss. LEXIS 295 (Miss. 1931).

No recovery could be had on check given by guardian for minor's tuition without prior court order, where ward's parents were living. Chapman v. Pentecost, 161 Miss. 600, 137 So. 539, 1931 Miss. LEXIS 295 (Miss. 1931).

The court cannot "ratify" a guardian's expenditure for the maintenance of his ward who has a parent. A "precedent order" is necessary. Boyd v. Hawkins, 60 Miss. 277, 1882 Miss. LEXIS 50 (Miss. 1882); Darter v. Speirs, 61 Miss. 148, 1883 Miss. LEXIS 89 (Miss. 1883); Ex parte George, 63 Miss. 143, 1885 Miss. LEXIS 35 (Miss. 1885).

§ 93-13-38. General duties and powers of guardians.

(1) All the provisions of the law on the subject of executors and administrators, relating to settlement or disposition of property limitations, notice to creditors, probate and registration of claims, proceedings to insolvency and distribution of assets of insolvent estates, shall, as far as applicable and not otherwise provided, be observed and enforced in a guardianship of the person and estate. The requirements in a guardianship of the person are modified to the extent that notice to creditors is not required, reports will be made only as often as the court requires, and the guardianship may be closed without the need for any accounting unless otherwise determined by the court. Any assets that are received shall be reported immediately and at that point the guardianship shall be deemed to be a guardianship of the person and estate and all requirements for guardianship of the person and estate shall be followed.

(2) It shall be the duty of the guardian of wards as defined by Section 1-3-58, Mississippi Code of 1972, to improve the estate committed to his charge, and to apply so much of the income, profit or body thereof as may be necessary for the comfortable maintenance and support of the ward and of his family, if he have any, after obtaining an order of the court fixing the amount. And such guardian may be authorized by the court or chancellor to purchase on behalf of and in the name of the ward with any funds of such ward's estate sufficient and appropriate property for a home for such ward or his family on five (5) days' notice to a member of said family, or the necessary funds may be borrowed and the property purchased given as security. The guardian is empowered to collect and sue for and recover all debts due his said ward, and shall make payment of his debts out of the personal estate as executors and administrators discharge debts out of the estate of decedents, but the exempt property of the ward shall not be liable for debts, and no debts against such estate shall be payable by such guardian unless first probated and registered, as required of claims against the estate of decedent.

(3) The word "family" shall be taken for the purpose of this section to

mean husband or wife and children; if there be no husband, wife or children, the father and mother; and if there be no father or mother, then the grandfather and grandmother, sisters and brothers of said ward.

(4)(a) On application of the guardian or any interested party, and after notice to all interested persons and to such other persons as the court may direct, and on a showing that the ward will probably remain incompetent during his lifetime, the court may, after hearing and by order, authorize the guardian to apply such principal or income of the ward's estate as is not required for the support of the ward during his lifetime or of his family towards the establishment of an estate plan for the purpose of minimizing income, estate, inheritance, or other taxes payable out of the ward's estate. The court may authorize the guardian to make gifts of the ward's personal property or real estate, outright or in trust, on behalf of the ward, to or for the benefit of (i) organizations to which charitable contributions may be made under the Internal Revenue Code and in which it is shown the ward would reasonably have an interest, (ii) the ward's heirs at law who are identifiable at the time of the order, (iii) devisees under the ward's last validly executed will, if there be such a will, and (iv) a person serving as guardian of the ward provided he is eligible under either category (ii) or (iii) above.

(b) The person making application to the court shall outline the proposed estate plan, setting forth all the benefits to be derived therefrom. The application shall also indicate that the planned disposition is consistent with the intentions of the ward insofar as they can be ascertained. If the ward's intentions cannot be ascertained, the ward will be presumed to favor reduction in the incidence of the various forms of taxation and the partial distribution of his estate as herein provided.

(c) The court:

(i) Shall appoint a guardian ad litem for the ward; and

(ii) May appoint a guardian ad litem for any interested party at any stage of the proceedings, if deemed advisable for the protection of the interested party.

(d) Subsequent modifications of an approved plan may be made by similar application to the court.

(e) Before signing an order to effectuate the provisions of this subsection (4), the chancellor shall review the ward's will, if the will is known or can be produced, to determine that a gift made under this subsection (4) is consistent with the will.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(136, 137); 1857, ch. 60, arts. 155, 156; 1871, §§ 1242, 1244; 1880, §§ 2119, 2120; 1892, §§ 2219, 2220; 1906, §§ 2437, 2438; Hemingway's 1917, §§ 1998, 1999; 1930, §§ 1902, 1903; 1942, §§ 439, 440; Laws, 1896, ch. 97; Laws, 1924, ch. 164; Laws, 1938, ch. 271; Laws, 1960, chs. 217, 218; Laws, 1972, ch. 408, §§ 15, 16; Laws, 1996, ch. 462, § 1; Laws, 2013, ch. 554, § 1, eff from and after July 2, 2013.

Editor's note—

Code 1942, §§ 439, 440, from which § 93-13-137 was derived, was substantially amended by Laws, 1972, ch. 408, §§ 15, 16, so as to make the provisions thereof applicable to any and all persons under every form of legal disability.

Therefore, the section has been re-numbered as this section in order that it may appear along with other sections dealing with wards generally.

Cross References —

Powers in regard to trust, see § 81-5-33.

Authority to prudently invest in all property, see § 91-13-3.

Duties and powers of conservator, see § 93-13-259.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sale of ward's land.
3. Expenditure of ward's income.
4. Dependents or family entitled to support.

1. In general.

Savings clause in Miss. Code Ann. § 15-1-59 did not act to toll the statute of limitations regarding a judgment a ward's conservator obtained in divorce action against the ward's former husband. The right to pursue money owed to the ward was in the conservator not the ward so under Miss. Code Ann. § 15-1-53, the statute of limitations ran against the conservator. Lewis v. Smith (In re Lewis), 110 So. 3d 811, 2013 Miss. App. LEXIS 122 (Miss. Ct. App. 2013).

Chancery court did not err by refusing to appoint a first son as the conservator over a father's estate because there was a conflict of interest, as the first son candidly admitted that he would not sue himself under Miss. Code Ann. § 93-13-38(2) to recover indebtedness he owed; moreover, a second son was properly appointed as a temporary conservator over the father's person, despite the second son's habit of drinking and smoking, because the second son was able to care for the father, and the father wished to remain in his residence. Cole v. Cole (In re Cole), 958 So. 2d 276, 2007 Miss. App. LEXIS 398 (Miss. Ct. App. 2007).

Where a former conservator applied to receive fees from the ward's estate before he had filed an inventory of the estate, pursuant to Miss. Code Ann. § 39-13-38(2) the chancery court improperly authorized the payment of excess fees that the conservator could not substantiate. Bardwell v. Bardwell (In re Bardwell), 849 So. 2d 1240, 2003 Miss. LEXIS 336 (Miss. 2003).

This section does not incorporate all statutes relating to estates and administration of decedents into the body of law regulating guardianships; rather, it only extends as far as applicable those provisions relating to settlement or disposition of property limitations, notices to creditors, probate and registration of claims, proceedings to insolvency and distribution of assets of insolvent estates. Jackson v. Jackson, 732 So. 2d 916, 1999 Miss. LEXIS 54 (Miss. 1999).

This section does not incorporate § 91-7-3, which requires that letters of administration in the estate of a deceased person be granted preferring first the husband or wife into the body of law regulating guardianships. Jackson v. Jackson, 732 So. 2d 916, 1999 Miss. LEXIS 54 (Miss. 1999).

A chancellor did not abuse his discretion in removing a conservator where inventories were not timely filed and no reason was given therefor, the conservator failed to seek court approval prior to making expenditures, and he purchased certificates of deposit, invested in stock and sold stock without prior approval. Mathews v. Williams (In re Mathews), 633 So. 2d 1038, 1994 Miss. LEXIS 123 (Miss. 1994).

Although the appointment of non-distributee relatives lies within the discretion of the chancery court under § 91-7-63, a non-distributee relative had a legal right to letters of administration under the statute where she was the guardian of the sole minor heir. Matter of In re Estate of Moreland, 537 So. 2d 1337, 1989 Miss. LEXIS 2 (Miss. 1989).

The chancery court erroneously held that payments of allowances directly to a ward, and expenditures for his support and maintenance, should be calculated on a monthly basis, for the entire statutory scheme of accounting for management of the estates of adult wards is on the basis of an annual accounting, so that the proper period for such calculation is a year. Neville v. Guardianship of Kelso, 247 So. 2d 828, 1971 Miss. LEXIS 1460 (Miss. 1971).

Where the guardian of an adult non compos mentis received several thousand dollars from insurance companies over a two-year period in settlement of claims of the ward arising out of automobile accidents, and paid considerable sums during those two years for medical and hospital expenses of the ward as a result of those accidents, and the recoveries reduced the net amount which had to be paid from the ward's estate for his benefit, the guardian was entitled to have those recoveries applied as offsets to the expenses for the two-year period. Neville v. Guardianship of Kelso, 247 So. 2d 828, 1971 Miss. LEXIS 1460 (Miss. 1971).

Where the guardian of a non compos mentis adult fails to obtain a prior order approving a payment for his ward from income, he risks its disallowance by the court if the court finds insubstantial evidence that it was unreasonable or improper in supporting, maintaining, or educating the ward, and this interpretation is consistent with the terms of this section [Code 1942, § 440] with the legislative history of guardian and ward in Mississippi, and with the early, large body of case law on this subject. Neville v. Guardianship of Kelso, 247 So. 2d 828, 1971 Miss. LEXIS 1460 (Miss. 1971).

Previously unauthorized but reasonable and proper expenditures from income for an adult non compos mentis ward may be ratified and approved by the court after they are made, either by special order or on the annual or final account, and it was error for the chancellor to refuse to ratify and approve reasonable income expenditures on the ground that they were not emergency expenditures and only emergency expenditures might be ratified in that way. Neville v. Guardianship of Kelso, 247 So. 2d 828, 1971 Miss. LEXIS 1460 (Miss. 1971).

Supreme court, in affirming chancellor's refusal to confirm first of several sales of land by guardian of non compos mentis, would not determine validity of guardian's appointment or legality of sale to the highest bidder at the last sale, such matters not being presented by the record and the court being without the power or duty to render advisory opinions. Van Norman v. Barney, 199 Miss. 581, 24 So. 2d 866, 1946 Miss. LEXIS 227 (Miss. 1946).

By virtue of this section [Code 1942, § 439], the statute requiring actions against executors or administrators to be brought within four years after their qualification as such (Code 1930, § 2295 [Code 1942, § 725]), applies to claims against guardians for liability of their wards as well. First Nat'l Bank & Trust Co. v. Landau, 183 Miss. 651, 184 So. 618, 1938 Miss. LEXIS 278 (Miss. 1938).

Guardian with approval of the chancery court may renounce husband's will for widow non compos mentis. Hardy v. Richards, 98 Miss. 625, 54 So. 76, 1910 Miss. LEXIS 101 (Miss. 1910).

2. Sale of ward's land.

Where both guardian's petition and the advertisement under which sale of land was conducted omitted the township and range in which the land was located, the sale was void and consequently chancellor correctly refused to confirm title in the highest bidder. Van Norman v. Barney, 199 Miss. 581, 24 So. 2d 866, 1946 Miss. LEXIS 227 (Miss. 1946).

Sale of lands of person of unsound mind for payment of his debts can only be made by order of court. Sale by execution is void. Saunders v. Mitchell, 61 Miss. 321, 1883 Miss. LEXIS 131 (Miss. 1883).

3. Expenditure of ward's income.

While the capital of a ward's estate could not be expended without court order, where funds were disbursed without such order directly to a ward, who had regained her mental competency, at her direction, and were also expended on her behalf to comply with a court order in another action, it was not the intent of the legislature to require the guardian, or his insurer, to repay those amounts to the estate, as such a result would create an unintended windfall to the estate. United States Fid. & Guar. Co. v. Melson, 809 So. 2d 647, 2002 Miss. LEXIS 100 (Miss. 2002).

Guardian in order to expend more than income of ward's estate, except under extraordinary circumstances, must first secure court order fixing amount to be expended. Deposit Guaranty Bank & Trust Co. v. Mangum, 172 Miss. 443, 160 So. 386, 1935 Miss. LEXIS 145 (Miss. 1935).

This section [Code 1942, § 440] is not a mere re-enactment of common-law rule so as to give court authority to approve expenditures after they had been made, if court would have approved same had they been presented for allowance prior thereto. Deposit Guaranty Bank & Trust Co. v. Mangum, 172 Miss. 443, 160 So. 386, 1935 Miss. LEXIS 145 (Miss. 1935).

Where record disclosed that guardian had expended ward's funds and given ward money on ward's request without written court order authorizing such expenditures as required by statute, decree which approved guardian's final account was reversed and cause remanded to determine amount of sums which had to be expended before court order could be secured. Deposit Guaranty Bank & Trust Co. v. Mangum, 172 Miss. 443, 160 So. 386, 1935 Miss. LEXIS 145 (Miss. 1935).

4. Dependents or family entitled to support.

Where it appeared from the order discharging the conservator that the chancellor did ratify an expense disputed by the son but used to provide the required care for decedent, and it was within her discretion to do so, the son's claim pursuant to Miss. Code Ann. § 93-13-38 failed because there was substantial evidence to support the chancellor's decision to overrule the son's objections and discharge the conservator. Vinson v. Benson, 972 So. 2d 694, 2007 Miss. App. LEXIS 349 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 8 (Miss. 2008).

"Family" includes those whom insane person under normal circumstances would be under legal duty to support, such as wife and children, and under some circumstances may include others. In re Freeman's Estate, 171 Miss. 147, 157 So. 253, 1934 Miss. LEXIS 220 (Miss. 1934).

Woman who had become insane person's stepmother when he was infant and had cared for him during his infancy and to whose support he had contributed during his minority and until he joined army held member of his "family" so as to be entitled to support. In re Freeman's Estate, 171 Miss. 147, 157 So. 253, 1934 Miss. LEXIS 220 (Miss. 1934).

Dependent mother held entitled to support from estate of insane son, where he supported her and was single. Ex parte Phillips, 130 Miss. 682, 94 So. 840, 1922 Miss. LEXIS 239 (Miss. 1923).

RESEARCH REFERENCES

ALR.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, trustee of mentally or physically incompetent testator. 51 A.L.R.2d 770.

Power of guardian, committee, or trustee of mental incompetent, after latter's death, to pay debts and obligations. 60 A.L.R.2d 963.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court. 63 A.L.R.3d 780.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 86, 137.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Form 311 (petition or application for authority to purchase home for ward or his dependent family).

CJS.

39 C.J.S., Guardian and Ward §§ 67 et seq., 143 et seq.

§ 93-13-39. Payment of premiums on ward's life insurance.

The chancery court or the chancellor in vacation may upon petition of any guardian, authorize the guardian to pay from the current funds or surplus funds of his ward premiums on any insurance policy issued on the life of his ward during the lifetime of the ward's deceased parent, where in the chancellor's opinion the funds of the ward in the guardian's hands and the other property of the ward warrant the continuance of such policies.

HISTORY:

Codes, 1942, § 413.5; Laws, 1948, ch 235, § 1.

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 121.

§ 93-13-41. Care of real estate.

A guardian shall not commit waste on the real estate of his ward. A guardian having real estate under his care may either cultivate the same with the stock and implements belonging to his ward, or to be purchased by the order of the court or chancellor in vacation, with the money of the ward, or lease the same from year to year, or for a term not exceeding three (3) years if the ward will not sooner be of age; but upon application and proper showing made to the court or chancellor in vacation, a guardian may be allowed to lease said real estate for such longer time as may be shown to be advantageous to said estate; in no case, however, to extend beyond the majority of the ward, nor in any case to exceed six (6) years.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(130); 1857, ch. 60, art. 149; 1871, § 1219; 1880, § 2108; 1892, § 2202; 1906, § 2418; Hemingway's 1917, § 1979; 1930, § 1878; 1942, § 414; Laws, 1896, ch. 95; Laws, 1930, ch. 38; Laws, 1972, ch. 408, § 9, eff from and after July 1, 1972.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Management of farms and growing crops by executors and administrators, see §§ 91-7-169, 91-7-171.

JUDICIAL DECISIONS

1. In general.

With respect to a son's claim regarding appraisals and insurance policies, Miss. Code Ann. § 93-13-41 required only that the conservator not commit waste on the real estate of his ward, and appraisals were not required; the conservator's undisputed testimony that he maintained the status quo on the real property parcels with regard to the property tax and insurance policies constituted substantial evidence on which the chancellor could rely in approving the final accounting and discharging the conservator. Vinson v. Benson, 972 So. 2d 694, 2007 Miss. App. LEXIS 349 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 8 (Miss. 2008).

Although this provision is not to be strictly construed, there must be a reasonable basis for interpreting it so as to warrant the particular order. Thompson Funeral Home, Inc. v. Thompson, 249 Miss. 472, 162 So. 2d 874, 1964 Miss. LEXIS 408 (Miss. 1964).

The authority to lease conferred by this section [Code 1942, § 414] does not extend to a lease with option to purchase, and providing for the crediting of rents on the purchase price. Thompson Funeral Home, Inc. v. Thompson, 249 Miss. 472, 162 So. 2d 874, 1964 Miss. LEXIS 408 (Miss. 1964).

RESEARCH REFERENCES

ALR.

Guardian's power to make lease for infant ward beyond minority or term of guardianship. 6 A.L.R.3d 570.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 99, 124 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 501 et seq. (leases of ward's property).

CJS.

39 C.J.S., Guardian and Ward §§ 82 et seq.

§ 93-13-43. Lease of gas, oil and other mineral rights.

(1) When it would be for the interest of a ward, the guardian of said ward is hereby empowered to lease and grant oil, gas and other mineral rights, in consideration of the payment of an annual rental and/or a royalty or part or portion of the production thereof, upon such terms and for such length of time as may be for the best interests of the estate of his ward. A petition for said purpose shall be filed in the chancery court, setting forth the reasons why such lease should be made and the benefits to be derived therefrom, and a summons shall issue for the near relations of the ward as provided in Section 93-13-281. When the process has been duly served, the court in termtime or chancellor in vacation shall examine the allegations and evidence introduced by the guardian, and also the objections and evidence of those, if any, who may appear and object. If, on the hearing, the court be satisfied that the interest of the ward will be promoted by a lease as herein provided, it may authorize the guardian to enter into such lease on behalf of the ward and prescribe the terms and

conditions thereof and may require the guardian to give an additional bond, if necessary, faithfully to account for the proceeds of said lease. The notice to the near relations herein provided for shall be not less than ten (10) days before the hearing by the chancellor of the petition. In the event the near relations of the ward shall join in the petition in compliance with Section 93-13-281, the notice and summons herein provided shall not be required and said matter shall be proceeded with ex parte.

(2) When a ward, who has no guardian of his estate duly appointed and qualified pursuant to the laws of Mississippi, owns a mineral interest in real estate situated in the state, and an offer is made to lease the mineral interest on terms of an original consideration or bonus of not more than Two Thousand Dollars ($2,000.00), a primary term of not more than five (5) years, a royalty provision of not less than the one-eighth (⅛) of the oil which may be produced from the mineral interest, and reasonable royalty provisions as to all other minerals, a petition may be filed in the chancery court of the residence of the ward or in the chancery court wherein the mineral interest is located requesting approval and authority to execute the lease. The petition shall be brought by the ward by his next friend, and it shall join as defendants the parties provided in Section 93-13-281, or the parties designated by Section 93-13-281 may join and unite with the ward in the petition.

The court shall carefully consider the allegations of the petition and, if the court is satisfied from the evidence presented or otherwise that the proposed terms of the lease are adequate and reasonable and that it would be to the best interest of the ward that the lease be executed according to its terms, then the court may enter an order approving the proposed lease. The court or chancellor may direct the clerk to execute the lease to the lessee on the payment of the original bonus or consideration fixed and may direct the clerk to pay over the proceeds as provided in Section 93-13-211, provided that no part of the cost of said proceedings shall be taxed against said ward or his interests.

Any royalty payments which may accrue under the lease shall be paid according to the provisions of Section 93-13-215 and any delay rentals which may be paid shall be paid according to the provisions of Section 93-13-213, but if the amounts to be paid are in excess of the sums set forth in those sections, a guardian must then be appointed to receive the same.

HISTORY:

Codes, 1930, § 1879; 1942, § 415; 1930, ch 38; Laws, 1972, ch. 408, § 10; Laws, 1981, ch. 442, § 1, eff from and after July 1, 1981.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Leases by executors or administrators, see § 91-7-225.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 415] does not require confirmation of a mineral lease after execution has been authorized. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Jurisdiction to authorize guardian to execute mineral lease and to convey a one-half royalty interest in realty belonging to guardian's minor children and wards, followed domicil of the guardian-parent, although two of the minors lived at home of great-grandfather in another county wherein the realty was located. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

There is no finality to a decree for private sale or lease of mineral rights and royalties in realty belonging to minor wards as immunizes it to attack upon the ground of fraud of which a gross inadequacy of consideration is an element. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

Legal fraud upon the court must be shown by clear and convincing testimony in order to warrant setting aside decree authorizing guardian of minors to execute upon terms approved by the court a mineral lease and conveyance of one-half royalty interest in realty belonging to the minors. Corley v. Myers, 198 Miss. 380, 22 So. 2d 234, 1945 Miss. LEXIS 208 (Miss. 1945).

RESEARCH REFERENCES

ALR.

Guardian's power to make lease for infant ward beyond minority or term of guardianship. 6 A.L.R.3d 570.

Oil and gas royalty as real or personal property. 56 A.L.R.4th 539.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 124-125.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Form 503 (petition or application for authority to grant oil, gas, and mineral lease of ward's property); Form 522 (order authorizing oil, gas, and mineral lease of ward's property).

CJS.

39 C.J.S., Guardian and Ward §§ 127–130, 208, 209.

§ 93-13-45. Expenditures to improve land; conversion of property into money.

A guardian may be authorized by the court or chancellor to expend money of the ward in buildings and other improvements on the land of the ward, where the court or chancellor is satisfied that the interest of the ward will be promoted thereby. Where, in the opinion of the court or chancellor, it is to the interest of the ward to convert any of his property, real or personal, into money for the purpose of changing the character of investment, the court may, as in other cases, order it to be done, and how the money shall be invested.

HISTORY:

Codes, 1880, § 2112; 1892, § 2203; 1906, § 2419; Hemingway's 1917, § 1980; 1930, § 1880; 1942, § 416.

Cross References —

Form of conveyance by guardian, see § 89-1-67.

JUDICIAL DECISIONS

1. In general.

Chancery court may sell land of minor for reinvestment, even where remainder, if alienation not prohibited by will or deed during period when property may be held. Crawford v. Solomon, 131 Miss. 792, 95 So. 686, 1923 Miss. LEXIS 217 (Miss. 1923).

An application by the mother to have money which is bequeathed to her for life, remainder to her infant children, invested in lands, is not within the statute. West v. Robertson, 67 Miss. 213, 7 So. 224, 1889 Miss. LEXIS 51 (Miss. 1889).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 138.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Form 314 (petition or application for

leave to contract for repair of buildings); Form 332 (order granting leave to contract for repair of buildings).

CJS.
39 C.J.S., Guardian and Ward § 112.

§ 93-13-47. Creation, extension or renewal of encumbrances upon estate.

The guardian, with the approval of the chancery court or the chancellor in vacation, may, when it is shown to be to the best interest of the ward, create, extend or renew any encumbrance upon the real or personal estate of such ward; or may, when such is shown to be to the interest of the ward, execute a new encumbrance to obtain money to pay off such encumbrance, or may, when it is shown to be to the interest of the ward, with the approval of the chancery court or the chancellor in vacation, execute an encumbrance upon so much of the real estate of the ward as it may be necessary to encumber for the purpose of borrowing money to make any necessary repairs to such real estate, including the building of any new buildings as may be deemed to be to the best interest of said ward. Any such encumbrance so extended, renewed, or made, shall be a valid charge upon the property embraced therein.

HISTORY:
Codes, 1906, § 2420; Hemingway's 1917, § 1981; 1930, § 1881; 1942, § 417; Laws, 1900, ch. 91; Laws, 1914, ch. 202; Laws, 1958, ch. 234; Laws, 1960, ch. 216.

Cross References —
Renewal of obligation and encumbrances on estates by executors and administrators, see § 91-7-227.

RESEARCH REFERENCES

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward §§ 126-128.
13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 492 et seq. (mortgages).

CJS.
39 C.J.S., Guardian and Ward §§ 131, 204–207.

§ 93-13-49. Purchase of land.

The court may, on the application of a guardian, authorize him to purchase real estate for his ward with any surplus funds belonging to the ward, if the court be of opinion that it will promote the interest of the ward. The guardian shall be required to take sufficient title in the name of the ward, to be approved of by the court, and the deed shall be recorded in the proper county. A guardian may be authorized in like manner to complete payment for any land contracted for by the deceased ancestor of the ward in his lifetime; and if the payment cannot be completed without the sale of personal property or other real estate, the court may authorize a sale to be made, and direct the application of the proceeds to the payment of the purchase-money for the land; or, if the court should deem it more advisable, a sale of the ward's interest in the land which remains unpaid for may be decreed.

HISTORY:

Codes, 1857, ch. 60, art. 154; 1871, § 1224; 1880, § 2116; 1892, § 2206; 1906, § 2423; Hemingway's 1917, § 1984; 1930, § 1882; 1942, § 418.

Cross References —

Farm loan bonds as proper investment for guardians, see § 75-69-5.

JUDICIAL DECISIONS

1. In general.

Statements made to chancellor by solicitor of guardian on his personal knowledge regarding value of property which guardian desired to purchase for ward, held to authorize order authorizing purchase, notwithstanding statements were not made under oath. Henry v. Baker, 174 Miss. 676, 165 So. 444, 1936 Miss. LEXIS 211 (Miss. 1936).

Evidence held to sustain finding that property purchased by guardian for ward was worth purchase price and that sale was made in good faith; hence guardian was not liable to his successor for amount so expended. Henry v. Baker, 174 Miss. 676, 165 So. 444, 1936 Miss. LEXIS 211 (Miss. 1936).

Where a guardian has bought land in his own name, partly with his own money and partly with the money of his ward, the ward, on coming of age, may elect either to take ratable interest in the land or to charge upon it the amount of his money so used and interest. Fant v. Dunbar, 71 Miss. 576, 15 So. 30, 1893 Miss. LEXIS 112 (Miss. 1893).

If the guardian comply with the statute, and invest the surplus funds in property, the ward, on arriving at age, can claim nothing but the property. Gully v. Dunlap, 24 Miss. 410, 1852 Miss. LEXIS 67 (Miss. 1852).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward § 138.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Form 321 (petition or application for authority to purchase home for ward or his dependent family).

CJS.

39 C.J.S., Guardian and Ward §§ 119-125.

§ 93-13-51. Sale of land; title validated.

(1) When it would be for the personal best interest of the ward or advantageous to his estate to sell a part or the whole of his real estate, including timber or wood, the guardian may present a petition to the court for that purpose, setting forth the reasons why the proposed sale would be beneficial to the ward, and a summons shall issue as provided in Section 93-13-281. If the process be served, or if the petition be joined in by that person or those persons prescribed by Section 93-13-281, or if the guardian ad litem appointed by the court answer within the time fixed, the court shall examine the allegations of and evidence introduced by the guardian, and also the objections and evidence of those, if any, who may appear and object. If on the hearing, the court be satisfied that the interest of the ward will be promoted by the proposed sale, it may decree a sale, and prescribe the terms and conditions thereof, and the notice which shall be requisite, and may require the guardian of said ward or the clerk or commissioner of said court to execute the deed of conveyance to the purchaser of the land, timber or wood sold and require the guardian, clerk or commissioner to give an additional bond, if necessary, faithfully to account for the proceeds.

The sole compensation of the guardian, clerk or commissioner for executing the deed as herein provided shall be Three Dollars ($3.00), which sum may be taxed as a part of the cost of such proceedings.

Provided, however, in event the petition be joined in by that person or those persons prescribed by Section 93-13-281, the notice and summons, as herein provided, shall not be required and said matter shall be proceeded with ex parte.

(2) The title to any real estate heretofore sold, the proceedings therein having been followed in conformity with the provisions of this section, are hereby validated; and no title derived from the real estate of a ward shall be held invalid if the procedure herein contained has been conformed with.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(132); 1857, ch. 60, art. 151; 1871, § 1221; 1880, § 2113; 1892, § 2205; 1906, § 2422; Hemingway's 1917, § 1983; 1930, § 1883; 1942, § 419; Laws, 1940, ch. 250; Laws, 1946, ch. 415, §§ 1, 2; Laws, 1972, ch. 408, § 12, eff from and after July 1, 1972.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Sale by successor of guardian, see § 11-5-105.

Saving of rights of infants in sale under decree by chancery court, see § 11-5-115.

Form of conveyance by guardian, see § 89-1-67.

Sale of minor's interest in land without guardianship, see § 93-13-217.

JUDICIAL DECISIONS

ANALYSIS

1. Sale in general.
2. Petition for sale.
3. Summons.
4. Additional bond.
5. Liability on bonds.
6. Proceeds of sales.
7. Rights and remedies of purchasers.

1. Sale in general.

Miss. Code Annotated § 93-13-59 authorizes compromise of doubtful claims to real property as well as to personal property, and such compromise can be accomplished by execution of quit claim deed without triggering notice requirements of § 93-13-51. Talbert v. Henderson, 688 F. Supp. 250, 1987 U.S. Dist. LEXIS 13869 (S.D. Miss. 1987).

An incompetent's property can be validly disposed of only in conformity with statutory provisions. Thompson Funeral Home, Inc. v. Thompson, 249 Miss. 472, 162 So. 2d 874, 1964 Miss. LEXIS 408 (Miss. 1964).

Chancery court may sell minor's deteriorating estate for reinvestment. Kelly v. Neville, 136 Miss. 429, 101 So. 565, 1924 Miss. LEXIS 156 (Miss. 1924).

Until confirmation of the sale the guardian is without legal authority to receive the purchase-money. State use of Delmas v. Cox, 62 Miss. 786, 1885 Miss. LEXIS 148 (Miss. 1884).

2. Petition for sale.

It is not necessary that the petition be sworn to. Williamson v. Warren, 55 Miss. 199, 1877 Miss. LEXIS 123 (Miss. 1877).

3. Summons.

Sale of land owned by three minors is void where summons only served on a cousin of their mother who is their guardian, as each minor has the right to have the other two cited as his next of kin. Theobald v. Deslonde, 93 Miss. 208, 46 So. 712, 1908 Miss. LEXIS 105 (Miss. 1908).

A sale will be void if the record does not show that at least statutory number of near relatives were summoned, if there be so many in the state. Temple v. Hammock, 52 Miss. 360, 1876 Miss. LEXIS 222 (Miss. 1876); Fitzpatrick v. Beal, 62 Miss. 244, 1884 Miss. LEXIS 64 (Miss. 1884).

Where the service of the summons is defective merely, the decree cannot be impeached collaterally. Stampley v. King, 51 Miss. 728, 1875 Miss. LEXIS 99 (Miss. 1875).

4. Additional bond.

If an additional bond be required, and be executed, it will not supersede the general bond; both will be security for the proceeds of the land. State use of Baird v. Hull, 53 Miss. 626, 1876 Miss. LEXIS 126 (Miss. 1876); State use of Delmas v. Cox, 62 Miss. 786, 1885 Miss. LEXIS 148 (Miss. 1884).

Failure to give the additional bond, if required, will render the sale void. Vanderburg v. Williamson, 52 Miss. 233, 1876 Miss. LEXIS 204 (Miss. 1876).

5. Liability on bonds.

The clerk selling as commissioner and the sureties on his bond at the time of the sale and receipt of the purchase-money are liable, although a special statutory bond to account for the proceeds was executed by him before the sale, and they remain liable after the clerk has entered upon a new term of office and executed another official bond. Johnson v. Bobbitt, 81 Miss. 339, 33 So. 73, 1902 Miss. LEXIS 152 (Miss. 1902).

6. Proceeds of sales.

A decree of the chancery court directing its clerk having money belonging to an infant litigant in his hands from a sale made by him as a commissioner to pay it over to the guardian of the infant may be enforced and collected by the infant after he becomes adult, although in fact he never had a guardian. Johnson v. Bobbitt, 81 Miss. 339, 33 So. 73, 1902 Miss. LEXIS 152 (Miss. 1902).

7. Rights and remedies of purchasers.

One claiming under a guardian's sale neither reported to nor confirmed by the court, nor made in compliance with the decree ordering it, cannot claim as a bona fide purchaser for value where there is no evidence of payment of the purchase-money, except a vague recital in the guardian's void conveyance of payment of one-half at the time of sale. Hicks v. Blakeman, 74 Miss. 459, 21 So. 7, 1896 Miss. LEXIS 137 (Miss. 1896).

If such a purchaser enters upon the land in the honest belief that the title is good and makes permanent improvements he is entitled to a decree for them on the establishment of an adverse title. Hicks v. Blakeman, 74 Miss. 459, 21 So. 7, 1896 Miss. LEXIS 137 (Miss. 1896).

The amount that the market value of the land is enhanced by such improvements is the proper measure of his recovery therefor. Hicks v. Blakeman, 74 Miss. 459, 21 So. 7, 1896 Miss. LEXIS 137 (Miss. 1896).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 136 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 401 et seq. (sales of ward's property).

CJS.

39 C.J.S., Guardian and Ward §§ 126, 132–136, 140, 141.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-13-53. Sale of personalty.

The court, or chancellor in vacation may order a sale of personal property of a ward, whenever the interest of the ward will be promoted thereby, and the sale shall be made as directed by the court or chancellor.

HISTORY:

Codes, 1871, § 1221; 1880, § 2106; 1892, § 2201; 1906, § 2417; Hemingway's 1917, § 1978; 1930, § 1884; 1942, § 420.

JUDICIAL DECISIONS

1. In general.

A guardian in Mississippi has authority without order of the court, notwithstanding the provisions of the statute of that state that the chancery court may empower a guardian to sell personal property of his ward, to surrender a policy on the life of another payable to his ward on receiving its surrender value and to give a receipt in discharge thereof. MacLay v. Equitable Life Assurance Soc., 152 U.S. 499, 14 S. Ct. 678, 38 L. Ed. 528, 1894 U.S. LEXIS 2137 (U.S. 1894).

RESEARCH REFERENCES

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward §§ 136.

§ 93-13-55. Application to court for directions as to disposition of securities.

(1)(a) Whenever a guardian shall receive for his ward, by inheritance, bequest or gift, any stocks, bonds or other securities or investments, in which the guardian is not authorized by law to invest the monies of his ward, he shall apply to the court, or chancellor in vacation, for directions as to the disposition of the stocks, bonds or other securities or investments. The court shall determine whether the guardian shall retain the stocks, bonds or other securities or investments in the form in which they were received by the guardian, or sell the same and reinvest the proceeds. If the court or chancellor direct the guardian to retain the stocks, bonds or other securities or investments, responsibility shall not attach thereafter to the guardian as to the sufficiency of the investment.

(b) Whenever a special general guardian appointed under Section 93-13-37 shall receive for his ward, by inheritance, bequest, gift or other acquisition, any property in which the guardian is not authorized by law to invest the monies of his ward, he shall apply to the court, or chancellor in vacation, for directions as to the disposition of the property. If the court or chancellor directs the guardian to retain the property, responsibility shall not attach thereafter to the guardian, but the court, or chancellor in vacation, may impose a duty of accounting if it is found to be in the best interest of the ward and may enforce court rules governing guardianships as the court, in its discretion, deems appropriate.

(2) Nothing in subsection (1) shall be construed to allow the investment of the money of the ward by the guardian in any manner other than is authorized by law.

HISTORY:
Codes, 1942, § 420.5; Laws, 1954, ch. 217, §§ 1, 2 (¶¶ 1, 2); Laws, 2013, ch. 339, § 2, eff from and after July 1, 2013.

§ 93-13-57. Disposal of surplus money; penalty for failure to report surplus to court.

(1) Whenever the guardian has money of his ward not needed for current expenditures, or directed to be invested for the ward, he shall apply to the court, or chancellor in vacation, for direction as to the disposition he shall make of it. The court or chancellor shall determine whether he shall lend it at interest, and upon what security, or how he shall dispose of it. If the court or chancellor designate the person to whom the loan shall be made, or the security on which it shall be made, and the loan to be so made, responsibility shall not attach thereafter to the guardian; but if the court or chancellor shall entrust him with discretion in the matter, he shall be bound for the exercise of sound judgment. The court or chancellor in its or his discretion may direct an

investment in the bonds of the state or of any county, or municipality thereof, or of a levee board, or of the United States, or in shares of a building and loan association or a savings and loan association or in collateral trust notes registered and authenticated by trust departments of any approved state or national bank or in a common trust established by a bank or trust company, pursuant to the Uniform Common Trust Fund Law of Mississippi. Any guardian who fails to report to the court the fact that he has money of his ward not needed or allowed to be used for current expenditures, and to ask the order of the court as to the disposition of such money, may be chargeable with interest on the same at the rate of eight percent (8%) per annum during the time of failure.

(2) Whenever a special general guardian appointed pursuant to Section 93-13-37 has money or other property of his ward not in excess of the amounts or values listed, he shall apply to the court, or chancellor in vacation, for direction as to the disposition he shall make of it.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(133); 1857, ch. 60, art. 147; 1871, § 1217; 1880, § 2105; 1892, § 2200; 1906, § 2416; Hemingway's 1917, § 1977; 1930, § 1885; 1942, § 421; Laws, 1914, ch. 201; Laws, 1952, ch. 251; Laws, 1954, ch. 240; Laws, 2013, ch. 339, § 3, eff from and after July 1, 2013.

Cross References —

Investments authorized, see § 43-33-303.

Bonds of the Wavelands Regional Wastewater Management District as legal investments and securities, see § 49-17-199.

Bonds of the Mississippi Gulf Coast Regional Wastewater Authority as legal investments and securities, see § 49-17-339.

Investment in farms credit securities, see § 75-69-5.

Powers in regard to trust, see § 81-5-33.

Uniform Common Trust Fund Law, see § 81-5-37.

Fiduciary not to use funds; investment by fiduciary bank in time certificates of deposit, see § 91-7-253.

Investment by fiduciaries of funds held in trust, see § 91-13-1.

Authority to prudently invest in all property, see § 91-13-3.

Application to court for directions as to disposition of securities, see § 93-13-55.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Order or approval of court.
3. Liability.
4. —Failure to invest surplus.
5. —Insolvency of depository.
6. —Conversion.
7. Actions.

1. In general.

A chancellor did not abuse his discretion in removing a conservator where inventories were not timely filed and no reason was given therefor, the conservator failed to seek court approval prior to making expenditures, and he purchased certificates of deposit, invested in stock and sold stock without prior approval. Mathews v. Williams (In re Mathews), 633 So. 2d 1038, 1994 Miss. LEXIS 123 (Miss. 1994).

This statute does not authorize the investment of guardianship money in a partnership, and an order of chancery court so authorizing is void. Shemper v. Hancock Bank, 206 Miss. 775, 40 So. 2d 742, 1949 Miss. LEXIS 299 (Miss. 1949).

The provision of the statute requiring a guardian to apply to the chancery court or the chancellor for authority so to do before investing the funds of his ward is mandatory. Brewer v. Herron, 171 Miss. 435, 157 So. 522, 1934 Miss. LEXIS 242 (Miss. 1934).

Purpose of statutory requirement that guardian receive authority from chancery court or chancellor before investing wards' funds was to make it precedent duty of chancellor to supervise investment of wards' funds as security to be taken, and not to leave it to his subsequent discretion as to best way to protect wards' interests after loan had been made and funds expended. Brewer v. Herron, 171 Miss. 435, 157 So. 522, 1934 Miss. LEXIS 242 (Miss. 1934).

2. Order or approval of court.

A minor is not bound by her guardian's purchase of bank stock, even if such purchase should be sanctioned by the chancery court, because of the liability of stockholders which is imposed by law. Dorsey v. Murphy, 188 Miss. 291, 194 So. 603, 1940 Miss. LEXIS 29 (Miss. 1940).

Guardian held liable to ward for premiums paid on ward's life policy, notwithstanding chancellor had authorized procurement of policy and expenditures thereunder, since investments in life policies are not specified in statute authorizing investments by guardian, but whatever value policy had, inured to benefit of guardian. In re Guardianship of Horne, 178 Miss. 714, 173 So. 660, 1937 Miss. LEXIS 234 (Miss. 1937).

Evidence held to justify decree holding sureties on bond of incompetent's guardian liable for guardian's conversion of incompetent's funds, notwithstanding court's orders allowing guardian to borrow incompetent's funds, on ground that guardian appropriated funds to his own personal use as fast as he received money for incompetent, and hence orders were void for fraud in procuring them because of failure to disclose previous conversion of funds. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Sureties held not relieved from liability on bond of incompetent's guardian for guardian's conversion of incompetent's funds prior to time when court issued orders allowing guardian to borrow such funds on ground that court without sureties' knowledge or consent made improvident orders releasing security given by guardian until security became inadequate to cover amount converted. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Statutory requirement that guardian apply to chancery court, or chancellor, for authority before investing ward's funds being mandatory, guardian is liable for any loss resulting from inadequacy of security where loan is made without an antecedent order, notwithstanding subsequent order approving annual or final account. Brewer v. Herron, 171 Miss. 435, 157 So. 522, 1934 Miss. LEXIS 242 (Miss. 1934).

No stockholder's liability rested on guardian or ward where orders relating to investment of ward's funds in bank stock were invalid and ward, aged 20, repudiated investment. Carlisle v. Love, 170 Miss. 621, 155 So. 197, 1934 Miss. LEXIS 153 (Miss. 1934).

Court's orders, allowing insane person's guardian to borrow ward's funds, held not void on their face. Pan-American Life Ins. Co. v. Crymes, 169 Miss. 701, 153 So. 803, 1934 Miss. LEXIS 76 (Miss. 1934).

Where guardian applied to chancellor with reasonable promptness for order authorizing time deposit of ward's money in state bank, deposit of money in bank in meantime was authorized, particularly where deposit was then protected by state bank depositors' guaranty fund. In re Adams' Guardianship, 169 Miss. 20, 152 So. 836, 1934 Miss. LEXIS 30 (Miss. 1934).

Chancellor's order authorizing guardian to deposit ward's money in state bank on time deposit protected guardian thereafter so long as reputation of bank remained good and deposit was secured by bank depositors' guaranty fund. In re Adams' Guardianship, 169 Miss. 20, 152 So. 836, 1934 Miss. LEXIS 30 (Miss. 1934).

Guardian not presenting accounts as due and not charging himself, even in final account, with interest, could not have benefit of order permitting predecessor guardian to deposit money at 4 per cent. White v. Moore, 164 Miss. 272, 144 So. 696, 1932 Miss. LEXIS 255 (Miss. 1932).

3. Liability.

Compound interest ordinarily is chargeable in cases of fraud, gross negligence, or abuse of trust on the part of the guardian, but only simple interest will be charged in cases of simple neglect of duty without fraud or intentional misconduct. Jones v. Parker, 216 Miss. 64, 61 So. 2d 681, 1952 Miss. LEXIS 615 (Miss. 1952).

Where funds of mentally incompetent ward were commingled with those of guardian without any arrangement for borrowing such funds, estate of deceased guardian was chargeable with interest of six per cent per annum on amounts received by guardian from time to time less expenditures made for maintenance of ward and in absence of fraud or intentional misconduct, the interest allowed should not be compounded. Jones v. Parker, 216 Miss. 64, 61 So. 2d 681, 1952 Miss. LEXIS 615 (Miss. 1952).

Where guardian of a minor ward deposited ward's estate in bank on time deposit at 4 per cent interest per annum, and thereafter withdrew such deposit without authority of the chancery court, and such guardian failed to file annual account or have expenditures for ward's maintenance, support and education approved by the court, guardian is liable for the amount so deposited with interest at 4 per cent from the time it was deposited in the bank until withdrawn therefrom, and thereafter he is liable for 8 per cent interest per annum. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

A guardian's purchase of bank stock with funds of his ward, without the consent of the chancery court, was void, and the guardian and bank were liable under this section [Code 1942, § 421], with interest at the rate of 8 per cent per annum from the date of the sale of the stock. Dorsey v. Murphy, 188 Miss. 291, 194 So. 603, 1940 Miss. LEXIS 29 (Miss. 1940).

The liability of a guardian for the interest, under the statute, does not cease on the termination of the guardianship by the expiration or removal of the ward's disability, but continues until the debt be paid. Boyd v. Hawkins, 60 Miss. 277, 1882 Miss. LEXIS 50 (Miss. 1882).

4. —Failure to invest surplus.

National bank acting as guardian treating ward's funds as ordinary deposit held liable for 8 per cent interest up to time bank closed. Fidelity & Deposit Co. v. Deposit Guaranty Bank & Trust Co., 164 Miss. 286, 144 So. 700, 1932 Miss. LEXIS 257 (Miss. 1932).

Claim against insolvent bank as guardian for interest on guardianship funds should be paid pro rata with other unsecured creditors and depositors. Fidelity & Deposit Co. v. Deposit Guaranty Bank & Trust Co., 164 Miss. 286, 144 So. 700, 1932 Miss. LEXIS 257 (Miss. 1932).

Where bank, guardian, became insolvent, but receiver paid principal to new guardian, surety held entitled to compel bank or legal representative to pay interest on guardianship funds. Fidelity & Deposit Co. v. Deposit Guaranty Bank & Trust Co., 164 Miss. 286, 144 So. 700, 1932 Miss. LEXIS 257 (Miss. 1932).

Guardian not showing use made of ward's money held chargeable with 8 per cent interest. White v. Moore, 164 Miss. 272, 144 So. 696, 1932 Miss. LEXIS 255 (Miss. 1932).

5. —Insolvency of depository.

A prudent guardian acting with average business judgment, under the sanction of the chancery court as directed by this section [Code 1942, § 421], would be acquitted of responsibility for such losses as are necessarily incurred in the reorganization of a bank in which funds of a ward have been deposited. Dorsey v. Murphy, 188 Miss. 291, 194 So. 603, 1940 Miss. LEXIS 29 (Miss. 1940).

Where the guardian was not authorized by the chancery court to deposit, on time certificates, the first instalment payment of 20 per cent under a freezing agreement plan, the guardian and the bank were liable for that sum of money so redeposited with interest at 8 per cent. Dorsey v. Murphy, 188 Miss. 291, 194 So. 603, 1940 Miss. LEXIS 29 (Miss. 1940).

The fact that the disability of a minor ward was removed by the chancery court, together with the fact that she signed and approved the final account of her guardian, did not bind her as to the use of her funds for the improper purchase of bank stock by her guardian and the improper deposit of her funds under a freezing agreement, where the guardian did not make full disclosure to the ward of the exact status of his account so approved and she was not advised of the value of the securities. Dorsey v. Murphy, 188 Miss. 291, 194 So. 603, 1940 Miss. LEXIS 29 (Miss. 1940).

Where guardian was warned that state bank was in failing condition at least three weeks before it closed, and time deposit was not protected by bank depositors' guaranty fund, her failure to act promptly in accordance with changed condition made her liable for resulting loss, plus six per cent interest, less any legal expenditures for ward. In re Adams' Guardianship, 169 Miss. 20, 152 So. 836, 1934 Miss. LEXIS 30 (Miss. 1934).

Guardian, on being warned that state bank in which ward's money was on time deposit was in failing condition, should have taken note of fact that theretofore bank depositors' guaranty law had been suspended. In re Adams' Guardianship, 169 Miss. 20, 152 So. 836, 1934 Miss. LEXIS 30 (Miss. 1934).

Where guardian deposited money in C Bank under order of chancellor permitting such deposit and providing "the court does not relieve" the guardian of his bondsmen, sureties were not liable for loss due to failure of C Bank as the court could not add to their liability without their consent. Cohn v. Winslow, 115 Miss. 275, 76 So. 264, 1917 Miss. LEXIS 208 (Miss. 1917).

Mere failure of bank depository of ward's funds, did not operate ipso facto as breach of guardian's bond. United States Fidelity & Guaranty Co. v. Jackson, 111 Miss. 752, 72 So. 150, 1916 Miss. LEXIS 384 (Miss. 1916).

6. —Conversion.

When guardian converts ward's money to his personal use without previously having arranged by proper proceeding to borrow funds on security approved by court, guardian is guilty of breach of his bond, and guardian and his bondsmen are liable as in debt for money converted and such debt cannot be released except on payment thereof in money. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Except as authorized by statute, guardian has no right to convert money of his ward to his own use and to spend it for his own personal purposes, and when he does so, it is as much an "embezzlement" as when treasurer of corporation or other fiduciary of funds does the like. Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

Court may aid bondsmen of guardian who has converted ward's money without authority by accepting security for accrued debt from guardian, and enforcing it in behalf of bondsmen, but court has no power to release obligation of bondsmen on such security however ample, and liability continued until satisfied by payment and security of payment by mortgage or deed of trust on property, however adequate at time, is not such "payment." Reily v. Crymes, 176 Miss. 133, 168 So. 267, 1936 Miss. LEXIS 121 (Miss. 1936).

7. Actions.

Bill for loss from unauthorized loan made by former guardian out of guardianship funds was not prematurely brought where exact amount of loss could be determined in pending suit by staying proceedings against former guardian until foreclosure of deed of trust securing loan could be made, or bill amended so as to authorize sale of security or foreclosure of deed of trust by court for credit of proceeds of sale on note for which loan was given. Brewer v. Herron, 171 Miss. 435, 157 So. 522, 1934 Miss. LEXIS 242 (Miss. 1934).

In suit by new guardian to recover from insolvent bank, former guardian, interest upon guardianship funds, bank was unnecessary party; receiver being representative of all parties. Fidelity & Deposit Co. v. Deposit Guaranty Bank & Trust Co., 164 Miss. 286, 144 So. 700, 1932 Miss. LEXIS 257 (Miss. 1932).

Wards could not maintain suit against guardian and surety to recover funds lost by failure of bank before termination of guardianship. United States Fidelity & Guaranty Co. v. Jackson, 111 Miss. 752, 72 So. 150, 1916 Miss. LEXIS 384 (Miss. 1916).

RESEARCH REFERENCES

ALR.

Guardian's liability for interest on ward's funds. 72 A.L.R.2d 757.

Am. Jur.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 381 et seq. (investment of funds).

CJS.

39 C.J.S., Guardian and Ward §§ 94, 114.

§ 93-13-59. Sale or compromise of doubtful claims.

Guardians may be empowered by the court, or chancellor in vacation, to sell or compromise claims due their wards, on the same proceedings and under the same circumstances prescribed in reference to the sale or compromise by an executor or administrator of claims belonging to the estate of a deceased person. And the guardian in such case is authorized to receive in satisfaction of claims, when to the interest of the ward, property, real or personal, the title to be taken in the name of the ward.

HISTORY:

Codes, 1880, § 2110; 1892, § 2204; 1906, § 2421; Hemingway's 1917, § 1982; 1930, § 1886; 1942, ch. 422.

Cross References —

Sale or compromise of claims by executors and administrators, see § 91-7-229.

JUDICIAL DECISIONS

1. In general.

Chancery court properly awarded an insured attorney's fees because it did not abuse its discretion in determining that an insured's removal to federal court was unsubstantiated and contrary to well-established precedent; there was clearly established precedent that the Employment Retirement Income Security Act of 1974 did not preempt a chancery court's power to settle the claims of minors. Ashley Healthcare Plan v. Dillard (In re O.D.), 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Statute does not contain language which expressly implicates an Employment Retirement Income Security Act of 1974 (ERISA) plan; the statute falls within the realm of traditional domestic relations and does not expressly implicate an ERISA plan. Ashley Healthcare Plan v. Dillard (In re O.D.), 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Chancery court did not abuse its discretion in awarding an insured attorney's fees on the ground that an insurer's removal of the case to federal court was frivolous because the award was inextricably intertwined with its determination that it was clearly established that the chancery court's statutory duty to approve the settlement of the insured's liability insurance claims was not preempted by the Employment Retirement Income Security Act of 1974. Ashley Healthcare Plan v. Dillard (In re O.D.), 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Section 93-13-59 authorizes compromise of doubtful claims to real property as well as to personal property, and such compromise can be accomplished by execution of quit claim deed. Talbert v. Henderson, 688 F. Supp. 250, 1987 U.S. Dist. LEXIS 13869 (S.D. Miss. 1987).

Miss. Code Annotated § 93-13-59, which is identical statutory successor to § 422 of Miss. Code of 1942, authorizes compromise of doubtful claims to real property as well as to personal property, and such compromise can be accomplished by execution of quit claim deed without triggering notice requirements of Miss. Code Annotated § 93-13-51. Talbert v. Henderson, 688 F. Supp. 250, 1987 U.S. Dist. LEXIS 13869 (S.D. Miss. 1987).

Claims authorized in the Mississippi Uniform Law on Paternity may be settled pursuant to § 93-13-59 which authorizes guardians to settle doubtful claims of their wards. Atwood v. Hicks, 538 So. 2d 404, 1989 Miss. LEXIS 19 (Miss. 1989).

A decree dismissing a guardian's suit on behalf of incompetent grantors, on the ground that an amicable settlement has been reached, is subject to collateral attack where it fails to show that the settlement has been approved by the court or chancellor upon a petition for the purpose. Estate of Jones v. Culley, 242 Miss. 822, 134 So. 2d 723, 1961 Miss. LEXIS 598 (Miss. 1961).

Under this statute a guardian may be authorized to compromise a claim of the ward for wrongful death. Johnson v. Mississippi Power Co., 68 F.2d 545, 1934 U.S. App. LEXIS 4904 (5th Cir. Miss. 1934); Fox v. Fairchild, 133 Miss. 617, 98 So. 61, 1923 Miss. LEXIS 166 (Miss. 1923).

To make guardian's compromise settlement effective against wards, judicial sanction thereof must be on real, not perfunctory or merely formal, hearing. Union Chevrolet Co. v. Arrington, 162 Miss. 816, 138 So. 593, 1932 Miss. LEXIS 105 (Miss. 1932).

As respects compromise, chancellor cannot conduct hearing and enter decree where no witness in behalf of infants is heard, or is adverse to them. Union Chevrolet Co. v. Arrington, 162 Miss. 816, 138 So. 593, 1932 Miss. LEXIS 105 (Miss. 1932).

Chancellor properly refused to permit settlement for decedent's death made by guardian to be interposed in subsequent suit to infants' prejudice. Union Chevrolet Co. v. Arrington, 162 Miss. 816, 138 So. 593, 1932 Miss. LEXIS 105 (Miss. 1932).

Doctrine of indecent haste held inapplicable under circumstances to settlement made by decedent's widow in own behalf. Union Chevrolet Co. v. Arrington, 162 Miss. 816, 138 So. 593, 1932 Miss. LEXIS 105 (Miss. 1932).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 122, 123.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Form 316 (petition or application for authority to compromise ward's claim); Form 317 (petition or application for authority to compromise litigated controversy); Form 330 (order approving compromise of litigated controversy); Form 333 (order granting leave to compromise ward's claim).

CJS.

39 C.J.S., Guardian and Ward §§ 91, 142.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Joinder of Claims and Parties – Rules 13, 14, 17 and 18. 52 Miss. L. J. 37, March, 1982.

§ 93-13-61. Removal of ward and property to another county.

If a guardian desire to remove the person and/or personal property of his ward to any county other than that in which he was appointed guardian, he may, on petition, be allowed to do so, if the court deem it proper, and it may make an order to that effect, on condition that the guardian will qualify in the county to which he removes, or it may allow the removal and retain jurisdiction over the guardianship. The court of the county to which he removes, on production of the order authorizing the removal, may appoint him guardian. And when he shall produce to the court which originally appointed him the letters of guardianship from the court of the county to which he has removed, and make a settlement of his guardianship accounts, he may be discharged from his original bond; and thereafter he shall present his inventories and accounts to and be under the control of the court of the county to which he has removed. And the clerk of the court in which the settlement was made shall transmit a certified copy of the settlement, at the cost of the guardian, to the clerk of the court in which he was last appointed.

HISTORY:

Codes, 1857, ch. 60, art. 158; 1871, § 1228; 1880, § 2124; 1892, § 2207; 1906, § 2424; Hemingway's 1917, § 1985; 1930, § 1904; 1942, § 441; Laws, 1991, ch. 441, § 1, eff from and after July 1, 1991.

JUDICIAL DECISIONS

1. In general.

Guardian's removal of ward from county of guardianship without court's permission is not kidnapping. Hemphill v. State, 127 Miss. 805, 90 So. 488, 1921 Miss. LEXIS 283 (Miss. 1921).

RESEARCH REFERENCES

Am. Jur.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 201 et seq. (transfer of proceedings).

§ 93-13-63. Removal of ward and property from state.

If a guardian desire to remove the person and personal property of his ward out of this state, on petition and on his making settlement of his guardianship accounts, the court which appointed him may make an order to that effect; but the guardian shall first give a bond, with two sufficient sureties residing in this state, in the full value of the ward's personal estate, conditioned that he will qualify as guardian of the ward in the state or country to which he intends removing, and will there present and file in the proper court a complete inventory of his ward's property and effects; and, on failure to comply with the condition, the bond may be put in suit for the benefit of the ward.

HISTORY:

Codes, 1857, ch. 60, art. 159; 1871, § 1229; 1880, § 2125; 1892, § 2208; 1906, § 2425; Hemingway's 1917, § 1986; 1930, § 1905; 1942, § 442.

RESEARCH REFERENCES

CJS.

39 C.J.S., Guardian and Ward § 274.

§ 93-13-65. Seizure of property about to be unlawfully removed by guardian.

If the court, chancellor, or clerk be satisfied that any guardian is about to remove the property of his ward out of the state without lawful authority, it shall be the duty of the court, chancellor, or clerk to issue a precept to the sheriff of the proper county, commanding him to seize the property about to be removed, and to hold the same in his possession until legally disposed of; and the letters of such guardian may be revoked.

HISTORY:

Codes, 1857, ch. 60, art. 145; 1871, § 1213; 1880, § 2101; 1892, § 2199; 1906, § 2415; Hemingway's 1917, § 1976; 1930, § 1887; 1942, § 423.

Cross References —

Removal of property from state by executors or administrators, see § 91-7-257.

§ 93-13-67. Annual accounts; guardian's minimum commission; closure of guardianship file without final accounting under certain circumstances.

(1) Except as herein provided, and as provided in Section 93-13-7, or 93-13-37 and 93-13-38, every guardian shall, at least once in each year, and oftener if required, exhibit his account, showing the receipts of money on account of his ward, and showing the annual product of the estate under his management, and the sale or other disposition thereof, and showing also each item of his expenditure in the maintenance and education of his ward and in the preservation and management of his estate, supported by legal vouchers. In the event that the account shall be presented by a bank or trust company which is subject to the supervision of the Mississippi Department of Banking and Consumer Finance of the State of Mississippi or of the comptroller of the currency of the United States and such account, or the petition for the approval of same, shall contain a statement under oath by an officer of said bank or trust company showing that the vouchers covering the disbursements in the account presented are on file with the bank or trust company, the bank or trust company shall not be required to file vouchers. The bank or trust company shall produce the vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of the bank or trust company; the court on its own motion or on the motion of any interested party may require that the vouchers be produced and inspected at any hearing of any objections to the annual account. The accounts shall be examined, approved, and allowed by the court in the same way that the accounts of executors and administrators are examined, approved, and allowed. Compliance with the duties required, in this section, of guardian shall be enforced by the same means and in the same manner as is provided in respect to the accounts of executors and administrators.

(a) However, when the funds and personal property of the ward do not exceed the sum or value of Three Thousand Dollars ($3,000.00) and there is no prospect of further receipt to come into the hands of the guardian other than interest thereon, or in guardianships in which the only funds on hand or to be received by the guardian are funds paid or to be paid by the Department of Human Services for the benefit of the ward, the chancery court or chancellor in vacation, may, for good cause shown, in his discretion and upon being satisfied it is to the best interest and welfare of the ward, authorize the guardian to dispense with further such annual accounts, except such as may be a final account. Furthermore, the chancery court or chancellor in vacation may dispense with annual accounts if the ward's assets consist solely of funds on deposit at any banking corporation, building and loan association or savings and loan association in this state; have been so deposited under order of the court to remain until otherwise ordered; are fully insured; and a certified copy of the order to deposit, properly receipted, furnished the depository. If the court, or chancellor in vacation, authorizes the discontinuance of annual accounts, the guardian may, without further order of the court, from time to time pay the court costs and bond premiums owing by the estate or him as guardian, and, as well, he may likewise pay emergency obligations as he may have been empowered and allowed to do by necessity except for this section; but, he shall not pay from guardianship funds any other sums without further order of such court or chancellor without having first obtained order of the court or chancellor to do so. If emergency expenditure is needed for the immediate and necessary welfare of the ward, it shall at once be reported to the court, or chancellor in vacation, for approval. Furthermore, the court on its own motion or on the motion of any interested party may require the resumption and continuance of annual accounts.

(b) At the time of any annual account, the court, or a judge thereof in vacation, in its discretion, may allow to the guardian a minimum commission of One Hundred Dollars ($100.00) per annum for its services, anything in the statutes of this state to the contrary notwithstanding.

(2) If the ward was a minor and the guardianship terminates by any means upon the ward obtaining majority, if a final accounting is not made and the ward does not petition the court to compel a final accounting on or before July 1, 2014, or the twenty-second birthday of the ward, whichever comes last, the court may close its file on the guardianship unless it appears to the court that the court should seek accounting on its own motion.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(128); 1857, ch. 60, art. 147; 1871, §§ 1214, 1215; 1880, § 2103; 1892, § 2222; 1906, § 2441; Hemingway's 1917, § 2002; 1930, § 1889; 1942, § 425; Laws, 1960, ch. 217, § 1; Laws, 1962, ch. 273; Laws, 1966, ch. 320, § 1; Laws, 1972, ch. 408, § 13; Laws, 1974, ch. 365; Laws, 2013, ch. 339, § 4; Laws, 2013, ch. 554, § 2, eff from and after July 2, 2013.

Joint Legislative Committee Note —

Section 4 of ch. 339, Laws of 2013, effective from and after July 1, 2013 (approved March 14, 2013), amended this section. Section 2 of ch. 554, Laws of 2013, effective from and after July 2, 2013 (approved April 25, 2013), also amended this section. As set out above, this section reflects the language of Section 2 of ch. 554, Laws of 2013, which contains language that specifically provides that it supersedes § 93-13-67 as amended by ch. 339, Laws of 2013.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in the second sentence of (1) by substituting "Mississippi Department of Banking and Consumer Finance" for "Department of Finance and Administration." The Joint Committee ratified the correction at its July 24, 2014, meeting.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Effect of approval.
3. Sufficiency.
4. Particular allowances.
5. —Minor inaccuracies.

1. In general.

Chancery court erred by not requiring the disabled son's mother to deposit all support paid by the father for the benefit of the son to a conservatorship account and in not requiring the mother to file an inventory and accounting of all support funds and to post a bond because the son may receive funds in the future that would constitute a separate financial estate and therefore the mother should have been required to comply with the statutory safeguards. Ravenstein v. Hawkins, 167 So. 3d 210, 2014 Miss. LEXIS 326 (Miss. 2014).

Approval of the chancery court of the settlement had to be reversed and the monies awarded to the mother and her children had to be removed from their possession and added to the child's estate; a neutral conservator had to be appointed to replace the mother as conservator, and the conservator was required to make a quarterly accounting for the sake of protection of the estate and the child's interests pursuant to Miss. Code Ann. § 93-13-67. In re Brantley v. Brantley, 865 So. 2d 1126, 2004 Miss. LEXIS 184 (Miss. 2004).

A chancellor did not abuse his discretion in removing a conservator where inventories were not timely filed and no reason was given therefor, the conservator failed to seek court approval prior to making expenditures, and he purchased certificates of deposit, invested in stock and sold stock without prior approval. Mathews v. Williams (In re Mathews), 633 So. 2d 1038, 1994 Miss. LEXIS 123 (Miss. 1994).

A minor under guardianship is a ward of the chancery court, and all receipts and disbursements of his estate are required to be under the authority and direction of the chancery court or the chancellor in vacation. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The expenses for the maintenance and support of the ward cannot be proved in any other way than that provided by statute. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The amount of the expenditures by a guardian for the maintenance, support and education of his ward must be fixed by the court, there being no discretion in the guardian. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The guardian of a minor will not be permitted to file and have allowed the final account of his guardianship where he has failed to make annual accounts, as required by statute, and the expenditures shown by such final accounts were not authorized by previous orders of the chancery court, and are unsupported by any voucher. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

Guardian not presenting accounts as due and not charging himself, even in final account, with interest, could not have benefit of order permitting predecessor guardian to deposit money at four per cent. White v. Moore, 164 Miss. 272, 144 So. 696, 1932 Miss. LEXIS 255 (Miss. 1932).

2. Effect of approval.

They are final as to the guardian. Johnson v. Miller, 33 Miss. 553, 1857 Miss. LEXIS 76 (Miss. 1857); Effinger v. Richards, 35 Miss. 540, 1858 Miss. LEXIS 57 (Miss. 1858); Crump v. Gerock, 40 Miss. 765, 1866 Miss. LEXIS 115 (Miss. 1866).

The annual settlements, when allowed, are prima facie correct as against the ward. Austin v. Lamar, 23 Miss. 189, 1851 Miss. LEXIS 35 (Miss. 1851); Roach v. Jelks, 40 Miss. 754, 1866 Miss. LEXIS 112 (Miss. 1866).

3. Sufficiency.

Sworn account not accompanied by vouchers, and not approved by court order, is insufficient to support guardian's claim of credit for expenditures. White v. Moore, 164 Miss. 272, 144 So. 696, 1932 Miss. LEXIS 255 (Miss. 1932).

4. Particular allowances.

Chancellor did not err in approving the final accounting and discharging the conservator because under Miss. R. Civ. P. 19 joinder was not feasible because no person had been appointed to represent the estate, the estate suffered no prejudice, and neither Miss. Code Ann. § 93-13-67 nor case law indicated that the failure of the conservator to file accountings was fatal to the approval of a final accounting. Vinson v. Benson, 972 So. 2d 694, 2007 Miss. App. LEXIS 349 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 8 (Miss. 2008).

The guardian has no power to bind the estate of his ward without the sanction of the chancery court or the chancellor, and if the guardian contracts for the maintenance, support and education of his ward without the sanction of the court or chancellor, the liability therefor is personal to him, and he cannot be allowed for it in his accounts for the ward. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

Where guardian of a minor ward deposited ward's estate in bank on time deposit with 4 per cent interest per annum, and thereafter withdrew such deposit without authority of the chancery court, and such guardian failed to file annual account or have expenditures for ward's maintenance, support and education approved by the court, guardian is liable for the amount so deposited with interest at 4 per cent from the time it was deposited in the bank until withdrawn therefrom, and thereafter he is liable for 8 per cent interest per annum. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

Guardian held not chargeable with stock which was at one time held by guardian of ward's father, which stock never came to guardian's possession, and existence of which was not proven. In re Guardianship of Horne, 178 Miss. 714, 173 So. 660, 1937 Miss. LEXIS 234 (Miss. 1937).

Guardian, who had obtained authorization from chancellor to invest ward's funds in savings banks, and in loans, withdrew savings accounts because of apprehension as to soundness of banks, and whose annual accounts were not accompanied with detailed reports as to loans held not chargeable with interest because his accounts designated as cash assets represented by loans, where evidence showed that guardian accounted for interest which he collected, and that he did not use idle money for his own benefit. In re Guardianship of Horne, 178 Miss. 714, 173 So. 660, 1937 Miss. LEXIS 234 (Miss. 1937).

Evidence disclosing that ward's stock never paid a dividend after coming into hands of guardian, that only offer guardian ever had for stock was a nominal sum, and that guardian was not successful in realizing anything in bankruptcy proceedings of corporation which issued stock, held to transfer burden of proof to exceptor to show that at some time something could have been obtained out of such stock. In re Guardianship of Horne, 178 Miss. 714, 173 So. 660, 1937 Miss. LEXIS 234 (Miss. 1937).

5. —Minor inaccuracies.

Inaccuracies in such accounts arising from sheer inadvertence or oversight, or palpable mistake or miscalculation may, in proper cases, be corrected. But if the guardian have charged himself in dollars and cents, he will not be permitted to show by parol that the charge was in depreciated bank paper or Confederate notes. Bailey v. Dilworth, 18 Miss. 404, 1848 Miss. LEXIS 102 (Miss. 1848); Crump v. Gerock, 40 Miss. 765, 1866 Miss. LEXIS 115 (Miss. 1866); McFarlane v. Randle, 41 Miss. 411, 1867 Miss. LEXIS 13 (Miss. 1867).

RESEARCH REFERENCES

ALR.

Guardian's liability for interest on ward's funds. 72 A.L.R.2d 757.

Guardian's authority, without seeking court approval, to exercise ward's right to revoke trust. 53 A.L.R.4th 1297.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 164 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 561 et seq. (initial and intermediate accounts).

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 631 et seq. (reimbursement and compensation).

CJS.

39 C.J.S., Guardian and Ward §§ 210 et seq.

§ 93-13-69. Accounts to be kept separately.

The accounts of a guardian with each of several wards shall be kept and stated separately in all respects; but in the orders or decrees of the court respecting such accounts they shall be combined wherever practicable.

HISTORY:

Codes, 1880, § 2104; 1892, § 2194; 1906, § 2411; Hemingway's 1917, § 1972; 1930, § 1888; 1942, § 424.

§ 93-13-71. Vouchers; requirements.

The vouchers of a guardian required to be filed shall not be received, filed, or allowed unless they conform to, or be made to conform to, the requirements of law relating to the vouchers of executors and administrators.

HISTORY:
Codes, 1892, § 2224; 1906, § 2443; Hemingway's 1917, § 2004; 1930, § 1890; 1942, § 426; Laws, 1960, ch. 217, § 2.

JUDICIAL DECISIONS

1. In general.
A sworn account not accompanied by the vouchers required by law, and not approved by an order of the court, is insufficient, and is of no probative value in support of expenditures for which credit is claimed. White v. Moore, 164 Miss. 272, 144 So. 696, 1932 Miss. LEXIS 255 (Miss. 1932).

§ 93-13-73. Vouchers; production for inspection.

In every case where, under the provisions of this chapter, the filing of vouchers is not required, but the court requires that vouchers be produced for examination and inspection, it shall be a sufficient compliance with the provisions of this chapter if the fiduciary produces and exhibits on a hearing of the account pertinent papers or records substantiating every item of disbursement and the amount thereof. Such papers shall not be lodged of record with the clerk, but may be withdrawn by the fiduciary at the conclusion of the hearing thereon. The court, in its discretion, may require such fiduciary to file such substantiating papers or records, or suitable copies thereof, as the court deems necessary for purposes of record.

HISTORY:
Codes, 1942, § 426.5; Laws, 1960, ch. 217, § 11.

Cross References —
Bank or trust company being excused from filing vouchers under Uniform Veterans' Guardianship Law, see § 35-5-19.

Filing of vouchers by executors and administrators, see §§ 91-7-277, 91-7-279, 91-7-291, 91-7-297.

§ 93-13-75. When guardianship to cease.

The powers and duties of every guardian of a minor over the person and estate of the ward shall cease and determine when the ward shall arrive at the age of twenty-one (21) years, or, in the discretion of the chancellor, may cease and determine when the ward shall arrive at the age of eighteen (18) years. And the powers and duties of every guardian of the estate of a minor, person of unsound mind, or convict of felony, may also cease and determine on the approval of the chancery court or of the chancellor in vacation, when the funds and personal property, either or both, of the ward do not exceed the sum or value of Two Thousand Dollars ($2,000.00) and there is no prospect of further receipts to come into the hands of the guardian; provided that the court or chancellor, on the approval of the final account of such guardian, shall have power to require the property of such minor or adult incompetent, to be delivered to him or to some person, or bank for him, under such conditions and restrictions as the court or chancellor may impose; and compliance by the guardian with such order shall acquit him and his sureties. Any person or bank who under such an order or decree shall receive the money or property of a person under such disability shall thereby become amenable to the court for the proper disposition of it for the use and benefit of such incompetent; but shall not be required to give security therefor unless the court or chancellor shall so order. In either event the guardian shall forthwith deliver to the ward, or to such person or bank as the court or chancellor may designate, as the case may be, all the property of every description of the ward in his hands, and on failure, shall be liable to an action on his bond.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(135); 1857, ch. 60, art. 148; 1871, § 1218; 1880, § 2107; 1892, § 2223; 1906, § 2442; Hemingway's 1917, § 2003; 1930, § 1892; 1942, § 428; Laws, 1936, ch. 235; Laws, 1938, Ex. ch. 54; Laws, 1958, ch. 284; Laws, 1962, ch. 274; Laws, 1978, ch. 366, § 1; Laws, 1991, ch. 441, § 2, eff from and after July 1, 1991.

Cross References —

Procedure for restoration to reason and discharge of guardian of person for whom guardian has been appointed or who has been found in need of mental treatment, see § 93-13-151.

JUDICIAL DECISIONS

1. In general.

Guardian not allowed to make profit out of ward's estate, except what is lawfully allowed for carrying out his trust. Brandau v. Greer, 95 Miss. 100, 48 So. 519, 1909 Miss. LEXIS 217 (Miss. 1909).

Where guardian acquires property of wards under circumstances raising strong suspicion of unfairness, it will not be allowed to stand when assailed by them. Brandau v. Greer, 95 Miss. 100, 48 So. 519, 1909 Miss. LEXIS 217 (Miss. 1909).

Where guardian unfairly obtains property of infant wards, ratification must be with full knowledge of the facts and the law relating thereto, and then will not be permitted to stand except on clear proof that ratification took place when they were free from his influence. Brandau v. Greer, 95 Miss. 100, 48 So. 519, 1909 Miss. LEXIS 217 (Miss. 1909).

Wife of guardian cannot acquire property of ward which law forbids him to acquire. Brandau v. Greer, 95 Miss. 100, 48 So. 519, 1909 Miss. LEXIS 217 (Miss. 1909).

Limitations do not run against action on guardian's bond for failure to deliver property until final account had been filed and guardian discharged. Pattison v. Clingan, 93 Miss. 310, 47 So. 503 (Miss. 1908).

This section [Code 1942, § 428] contemplates filing of final account when property is turned over. Pattison v. Clingan, 93 Miss. 310, 47 So. 503 (Miss. 1908).

Where a guardian has bought land in his own name, partly with his own money and partly with money of his ward, on coming of age the ward may elect either to take a ratable interest in the land or to charge upon it the amount of his money so used and interest. He cannot elect to take the entire land. Fant v. Dunbar, 71 Miss. 576, 15 So. 30, 1893 Miss. LEXIS 112 (Miss. 1893).

An infant over eighteen years of age who is married, is not by the statute enabled to contract generally as an adult, yet the scope of his necessities is enlarged. Chapman v. Hughes, 61 Miss. 339, 1883 Miss. LEXIS 134 (Miss. 1883).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 74-77.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 241 et seq. (discharge of guardian).

CJS.

39 C.J.S., Guardian and Ward §§ 41, 44, 45.

§ 93-13-77. Final account and settlement; closure of guardianship file without final accounting under certain circumstances.

When the guardianship shall cease in any manner, except as provided in Section 93-13-37 or 93-13-67, the guardian shall make a final settlement of his guardianship by making out and presenting to the court, under oath, his final account, which shall contain a distinct statement of all the balances of his annual accounts, either as debits or credits, and also all other charges, expenditures, and amounts received, and not contained in any previous annual account. The final account shall remain on file for the inspection of the ward, and summons for him shall be issued, which shall notify him to appear on a day not less than one month after service thereof or completion of its publication, and show cause why the final account of the guardian should not be allowed and approved. In the event that the account shall be presented by a bank or trust company which is subject to the supervision of the Mississippi Department of Banking and Consumer Finance or of the comptroller of the currency of the United States and the account, or the petition for the approval of the account, shall contain a statement under oath by an officer of the bank or trust company showing that the vouchers covering the disbursements in the account presented are on file with the bank or trust company, the bank or trust company shall not be required to file vouchers. The bank or trust company shall produce the vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of the bank or trust company, and the court on its own motion, or on the motion of any interested party, may require that the vouchers be produced and inspected at the time of hearing of any objections that may be filed to any final account. The court shall examine the final account, and hear the evidence for and against it; and if the court is satisfied, after examination, that the account is just and true, shall make a final decree of approval, or may allow only so much of the account as is right; and in the decree it shall make an allowance to the guardian for his trouble, not exceeding ten percent (10%) on the value of the estate; and shall also decree that the property of the ward shall be delivered to him, if not already delivered, and that the guardian be discharged. In like manner, and under like restrictions, it shall be made the duty of an executor or administrator of a deceased guardian to make final settlement of their testator's or intestate's guardianship accounts in the chancery court in which the same may be pending; but any ward arriving at the age of twenty-one (21) years may petition the chancery court in which the guardianship is pending to waive the final settlement required by this section and discharge the guardian and his sureties, which petition shall be verified by oath, and the court shall grant the same unless there be reason to suspect that the petition was procured by the guardian through fraud or undue influence over the ward, in which case the court shall require proof of the good faith thereof.

If a final accounting is not made and the ward does not petition the court to compel a final accounting on or before July 1, 2014, or the twenty-second birthday of the ward, whichever comes last, the court may close its file on the guardianship unless it appears to the court that the court should seek accounting on its own motion.

HISTORY:

Codes, Hutchinson's 1848, ch. 36, art. 1(135); 1857, ch. 60, art. 148; 1871, § 1218; 1880, § 2107; 1892, § 2225; 1906, § 2444; Hemingway's 1917, § 2005; 1930, § 1893; 1942, § 429; Laws, 1898, ch. 63; Laws, 1960, ch. 217, § 3; Laws, 2013, ch. 339, § 5; Laws, 2013, ch. 554, § 3, eff from and after July 2, 2013.

Joint Legislative Committee Note —

Section 5 of ch. 339, Laws of 2013, effective from and after July 1, 2013 (approved March 14, 2013), amended this section. Section 3 of ch. 554, Laws of 2013, effective from and after July 2, 2013 (approved April 25, 2013), also amended this section. As set out above, this section reflects the language of Section 3 of ch. 554, Laws of 2013, which contains language that specifically provides that it supersedes § 93-13-77 as amended by ch. 339, Laws of 2013.

Cross References —

Limitation of actions against guardians or their sureties, see § 15-1-27.

Payment of income tax as prerequisite to approval of final account, see § 27-7-69.

Income tax upon fiduciary, see § 27-7-69.

Final account of executor or administrator, see § 91-7-291.

JUDICIAL DECISIONS

ANALYSIS

1. Final account and statement in general.
2. Notice.
3. Guardian's commission.
4. Expenditures by guardian.
5. Actions on bond.
6. —Parties.
7. —Limitation of actions.

1. Final account and statement in general.

Appellant daughter did not deny that she failed to seek reimbursement prior to the closure of the conservatorship; neither had she provided a reason why she failed to file such a claim for reimbursement. Accordingly, there was no error with the chancellor's determination that her claims for expenses were untimely and, therefore, barred. DeMoville v. Johnson (In re DeMoville P'ship), 26 So. 3d 366, 2009 Miss. App. LEXIS 286 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 37 (Miss. 2010), cert. denied, 2010 Miss. LEXIS 32 (Miss. Jan. 28, 2010).

Request for compensation for services rendered had to be made at the time a final accounting was filed and compensation, if any, included in the final decree approving the closure of the conservatorship; the conservator made no claim for compensation until after the heir filed suit against her, many months after the conservatorship was closed, and thus allowed the small remainder of the decedent's estate to be distributed to his heirs without making provision for the compensation she claimed to have earned. In re Estate of Thomas v. Thomas, 853 So. 2d 134, 2003 Miss. App. LEXIS 158 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 833 (Miss. Ct. App. 2003).

On final settlement the guardian may be allowed to correct palpable errors in his annual accounts. Crump v. Gerock, 40 Miss. 765, 1866 Miss. LEXIS 115 (Miss. 1866); McFarlane v. Randle, 41 Miss. 411, 1867 Miss. LEXIS 13 (Miss. 1867).

A minor under guardianship is a ward of the chancery court, and all receipts and disbursements of his estate are required to be under the authority and direction of the chancery court or the chancellor in vacation. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The guardian of a minor will not be permitted to file and have allowed the final account of his guardianship where he has failed to make annual accounts, as required by statute, and the expenditures shown by such final accounts were not authorized by previous orders of the chancery court, and are unsupported by any voucher. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

Settlement between administrator delaying settlement of estate and distributee, just reaching majority, must be closely scrutinized, and burden of proving good faith rested upon administrator. Russell v. Russell, 164 Miss. 335, 144 So. 542, 1932 Miss. LEXIS 248 (Miss. 1932).

Settlement whereby administrator falsely representing himself as solvent gave distributee, just reaching majority, personal note, held properly canceled. Russell v. Russell, 164 Miss. 335, 144 So. 542, 1932 Miss. LEXIS 248 (Miss. 1932).

When an order accepting a guardian's resignation provides that he and his sureties be discharged upon payment and delivery to his successor, when appointed, of all money and effects of his ward in his hands, the guardian, until such payment and delivery, may reduce to judgment the promissory notes belonging to the ward and have execution thereon. Longino v. Delta Bank, 75 Miss. 407, 23 So. 178, 1897 Miss. LEXIS 132 (Miss. 1897).

Where a guardian makes final settlement with a ward who has become adult, and the ward appears and files an answer and admits the correctness of the account, and afterwards files a bill denying the payment and seeking to surcharge the account, a decree dismissing the bill and refusing to open the account is correct, if the evidence establishes the truth of the answer. Gilleylen v. McKinney, 74 Miss. 764, 21 So. 918, 1897 Miss. LEXIS 66 (Miss. 1897).

2. Notice.

In a proceeding by an executor to revoke the letters of guardianship of the estate of the testator's son who was alleged to be the devisee and legatee of the bulk of the estate, and who was adjudged insane, the executor's motion to include, by amendment to his petition, the file in proceedings whereby the guardian was appointed for insane ward, was properly overruled, even though the executor was not served with process. Frierson v. Moorhead, 211 Miss. 811, 51 So. 2d 925, 1951 Miss. LEXIS 410 (Miss. 1951).

A final settlement cannot be made until after process on the ward. Moore v. Cason, 2 Miss. 53, 1834 Miss. LEXIS 12 (Miss. 1834).

3. Guardian's commission.

An agreement between the guardian on the one side and his female ward and her husband on the other, fixing the amount of commissions due the former may be enforced against the ward, though made during her minority, if such amount be within the limit prescribed by the statute, and it be not shown that the agreement was obtained by imposition. Hudson v. Strickland, 58 Miss. 186, 1880 Miss. LEXIS 108 (Miss. 1880).

4. Expenditures by guardian.

The amount of the expenditures by a guardian for the maintenance, support and education of his ward must be fixed by the court, there being no discretion in the guardian. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The expenses for the maintenance and support of the ward cannot be proved in any other way than that provided by statute. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

The guardian has no power to bind the estate of his ward without the sanction of the chancery court or the chancellor, and if the guardian contracts for the maintenance, support and education of his ward without the sanction of the court or chancellor, the liability therefor is personal to him, and he cannot be allowed for it in his accounts for the ward. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

Where guardian of a minor ward deposited ward's estate in bank on time deposit with 4 per cent interest per annum, and thereafter withdrew such deposit without authority of the chancery court, and such guardian failed to file annual account or have expenditures for ward's maintenance, support and education approved by the court, guardian is liable for the amount so deposited with interest at 4 per cent from the time it was deposited in the bank until withdrawn therefrom, and thereafter he is liable for 8 per cent interest per annum. Welch v. Childers, 195 Miss. 415, 15 So. 2d 690, 1943 Miss. LEXIS 167 (Miss. 1943).

5. Actions on bond.

6. —Parties.

The state, although nominally the obligee, is not a necessary party to a suit in chancery on the bond of the chancery clerk acting as guardian of minors to recover their estate. Only those who have some concern in the litigation, or whose presence is necessary to do justice between the parties in interest are necessary parties. Patty v. Williams, 71 Miss. 837, 15 So. 43, 1894 Miss. LEXIS 38 (Miss. 1894).

In a chancery suit by wards on the bond of their former guardian to recover their estate, they may join as defendants voluntary grantees of a deceased surety, in order to subject property in their hands so conveyed. Patty v. Williams, 71 Miss. 837, 15 So. 43, 1894 Miss. LEXIS 38 (Miss. 1894).

7. —Limitation of actions.

Before a final account of the guardian the statute of limitations does not run in favor of the surety as against the ward. Bell v. Rudolph, 70 Miss. 234, 12 So. 153, 1892 Miss. LEXIS 95 (Miss. 1892).

The statute of limitations does not begin to run against the ward, in favor of either principal or surety, for the breach of a guardian's bond by the failure of the guardian to deliver the estate to the ward on his arriving at the age of majority, until after such guardian has made a final account and settlement of his guardianship with the proper court. Nunnery v. Day, 64 Miss. 457, 1 So. 636, 1886 Miss. LEXIS 88 (Miss. 1886).

RESEARCH REFERENCES

ALR.

Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate. 1 A.L.R.2d 1060.

Guardian's liability for interest on ward's funds. 72 A.L.R.2d 757.

Judgment in guardian's final accounting proceedings as res judicata in ward's subsequent action against guardian. 34 A.L.R.4th 1121.

Guardian's authority, without seeking court approval, to exercise ward's right to revoke trust. 53 A.L.R.4th 1297.

Validity of inter vivos gift by ward to guardian or conservator. 70 A.L.R.4th 499.

Am. Jur.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 591 et seq. (final account); Forms 601 et seq. (settlement of accounts); Forms 631 et seq. (reimbursement and compensation).

CJS.

39 C.J.S., Guardian and Ward § 210 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Joinder of Claims and Parties – Rules 13, 14, 17 and 18. 52 Miss. L. J. 37, March, 1982.

§ 93-13-79. Solicitor's fees allowable.

In annual or final settlements all guardians shall be entitled to credit for solicitor's fees paid or allowed, and all the provisions of law in respect to such fees in cases of the administration of the estates of deceased shall apply to guardianships.

HISTORY:

Codes, 1892, § 2221; 1906, § 2439; Hemingway's 1917, § 2000; 1930, § 1891; 1942, § 427; Laws, 1882, p. 113.

Cross References —

Credit for attorneys' fees paid by executors or administrators, see § 91-7-281.

Compensation of guardian of lunatic or habitual drunkard, see § 93-13-133.

JUDICIAL DECISIONS

1. In general.

Attorney's fees in the management of statutory estates are not a charge upon the estate itself, but are personal obligations of the administrator or executor or guardian, and an allowance for attorney's fees must be done on the request or petition of the administrator or executor or guardian and not on the direct petition of the attorney himself. Hutton v. Gwin, 188 Miss. 763, 195 So. 486, 1940 Miss. LEXIS 55 (Miss. 1940).

Where the testator prescribed that his wife should be the guardian of the person and estate of his minor son until he should become twenty-one years of age and should give a bond as guardian effective during that time, and that after the minor had reached his majority the guardian should thereupon become trustee and should give bond as such trustee until the son should become thirty-one years old, at which time the balance of the estate was to be distributed, period of minority constituted a statutory guardianship and attorney's fees for services rendered during that period could not be allowed on the direct petition of the attorney himself. Hutton v. Gwin, 188 Miss. 763, 195 So. 486, 1940 Miss. LEXIS 55 (Miss. 1940).

RESEARCH REFERENCES

ALR.

Amount of attorneys' compensation in matters involving guardianship and trusts. 57 A.L.R.3d 550.

Am. Jur.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Form 636.1 (notice – motion for order directing payment of attorney fees); Form

637.1 (affidavit – in support of motion for order directing payment of attorney fees).

14 Am. Jur. Pl & Pr Forms (Rev), Incompetent Persons, Form 297.1 (affidavit – in support of motion for order directing payment of attorney fees).

13 Am. Jur. & Pr Forms (Rev), Guardian and Ward, Forms 634, 635 (affidavit in support of application to obtain allowance of attorney's fees).

CJS.

39 C.J.S., Guardian and Ward § 220.

PERSONS IN NEED OF MENTAL TREATMENT

Sec.
93-13-111. Appointment of guardians of person and estate, or either, for persons in need of mental treatment.

§ 93-13-111. Appointment of guardians of person and estate, or either, for persons in need of mental treatment.

The chancellor may appoint guardians of the person and estate, or either, of persons found to be in need of mental treatment as defined in Section 41-21-61 et seq. and incapable of taking care of his person and property, upon the motion of the chancellor or clerk of the chancery court, or upon the application of relatives or friends of such persons or upon the application of any other interested party. Such proceeding may be instituted by any relative or friend of such person or any other interested party by the filing of a sworn petition in the chancery court of the county of the residence of such person, setting forth that such person is in need of mental treatment and incapable of taking care of his person and estate, or either. Upon the filing of such petition, the chancellor of said court shall, by order, fix the day, time and place for the hearing thereof, either in termtime or in vacation, and the person who is alleged to be in need of mental treatment and incapable of taking care of his person or property shall be summoned to be and appear before said court at the time and place fixed, which said summons shall be served upon such person not less than five (5) days prior to the date fixed for such hearing. At such hearing all interested parties may appear and present evidence as to the truth and correctness of the allegations of the said petition. If the chancellor should find from the evidence that such person is in need of mental treatment and incapable of taking care of his estate and person, or either, the chancellor shall appoint a guardian of such person's estate and person, or either, as the case may be. In such cases, the costs and expenses of the proceedings shall be paid out of the estate of such person if a guardian is appointed. If a guardian is appointed and such person has no estate, or if no guardian is appointed, then such costs and expenses shall be paid by the person instituting the proceedings.

HISTORY:

Laws, 1976, ch. 376, § 1; brought forward without change, Laws, 2014, ch. 384, § 2, eff from and after July 1, 2014.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference. The reference in the first sentence, to "Section 41-21-61(c)" was changed to "Section 41-21-61 et seq." The Joint Committee ratified the correction at its April 28, 1999 meeting, and the section has been reprinted in the supplement to reflect the corrected language.

Editor's note—

This section was brought forward without change by Chapter 384,§ 2, Laws of 2014, effective July 1, 2014. Since the language of the section as it appears in the main volume is unaffected by the bringing forward of the section, it is not reprinted in this supplement.

Cross References —

Commitment of persons in need of mental treatment, see §§ 41-21-61 et seq.

Procedure for restoration to reason and discharge of guardian of person for whom guardian has been appointed or who has been found in need of mental treatment, see § 93-13-151.

Authority of courts to impose fee for any court-ordered home study relating to child custody matters, see § 93-17-12.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1.-10. [Reserved for future use].

II. Under Former Law.

11. Appointment generally.
12. Proceedings before clerk.
13. Evidence.
14. Appeal.
15. Costs.
16. Removal.

I. Under Current Law.

1.-10. [Reserved for future use].

II. Under Former Law.

11. Appointment generally.

The chancery court of the county in which a mental incompetent resided had jurisdiction of a proceeding by the sheriff, who had possession of incompetent's property, for the appointment of a guardian for the incompetent's estate and person, and since the chancellor had taken jurisdiction, the subsequent appointment by the chancery clerk of another county of another as guardian was ineffective. Swaney v. White, 230 Miss. 865, 92 So. 2d 453, 1957 Miss. LEXIS 434 (Miss. 1957).

In a proceeding by an executor to revoke the letters of guardianship of the estate of the testator's son who was alleged to be the devisee and legatee of the bulk of the estate, and who was adjudged insane, the executor's motion to include, by amendment to his petition, the file in proceedings whereby the guardian was appointed for insane ward, was properly overruled, even though the executor was not served with process. Frierson v. Moorhead, 211 Miss. 811, 51 So. 2d 925, 1951 Miss. LEXIS 410 (Miss. 1951).

The statute [Code 1942, § 430] does not require that notice of the application for the appointment of a guardian be given to a person who has been adjudicated upon inquisition to be of unsound mind, and there is no good reason why such notice should be required in cases where appointment is made immediately after the adjudication of insanity. Kimbrough v. Wright, 211 Miss. 63, 50 So. 2d 909, 1951 Miss. LEXIS 332 (Miss. 1951).

Under this section [Code 1942,§ 430] no preference is given to the nearest of kin in the appointment of a guardian to an adjudged lunatic, the power of appointment being confided to the discretion of the chancery court so long as not palpably abused. Barney v. Barney, 203 Miss. 228, 33 So. 2d 823, 1948 Miss. LEXIS 253 (Miss. 1948).

The refusal of the chancellor to appoint either the wife or the daughter of a lunatic as guardian was not abuse of discretion where their own testimony sufficiently showed that neither of them possessed the mental capacity which would make them competent for appointment. Barney v. Barney, 203 Miss. 228, 33 So. 2d 823, 1948 Miss. LEXIS 253 (Miss. 1948).

Proceeding under this section [Code 1942, § 430] can be instituted only by person interested such as public officer or relative or friend of alleged lunatic; chancery court may appoint guardian for person adjudged insane. Baum v. Greenwald, 95 Miss. 765, 49 So. 836, 1909 Miss. LEXIS 293 (Miss. 1909).

To justify the appointment of a guardian the evidence must clearly establish unsoundness of mind or inability to care for himself or property. Baum v. Greenwald, 95 Miss. 765, 49 So. 836, 1909 Miss. LEXIS 293 (Miss. 1909).

The next of kin has no legal right to the guardianship of a person or estate of a lunatic, but the power of appointment is confided to the discretion of the chancery court. Muse v. Muse, 76 Miss. 372, 24 So. 168, 1898 Miss. LEXIS 71 (Miss. 1898).

12. Proceedings before clerk.

This proceeding may be instituted before chancery court or the clerk; when instituted before clerk jury must report to clerk who must enter their finding on his minutes and report same at next sitting of chancery court for approval or rejection; clerk cannot set aside verdict or enter decree other than in accordance with it. Baum v. Greenwald, 95 Miss. 765, 49 So. 836, 1909 Miss. LEXIS 293 (Miss. 1909).

In proceeding before clerk not necessary to reduce testimony to writing, but where done is part of record and may be considered by chancellor on motion for approval. Baum v. Greenwald, 95 Miss. 765, 49 So. 836, 1909 Miss. LEXIS 293 (Miss. 1909).

13. Evidence.

Evidence must clearly establish unsoundness of mind and inability of person to care for himself or property to justify appointment of guardian. Baum v. Greenwald, 95 Miss. 765, 49 So. 836, 1909 Miss. LEXIS 293 (Miss. 1909).

14. Appeal.

While a chancellor might take notice of a petition filed by a person who does not have some legitimate present or prospective interest in a lunatic's estate, or who does not have some personal responsibility to the estate, care or welfare of the lunatic, for the removal of a guardian, such stranger would have no privilege to appeal should the chancellor refuse to do so. Barney v. Barney, 203 Miss. 228, 33 So. 2d 823, 1948 Miss. LEXIS 253 (Miss. 1948).

Any appeal by the guardian or next friend of a person of an unsound mind is within the saving of the statute of limitations. Such appeal is of the non compos mentis, though taken by his representative. Finney v. Speed, 71 Miss. 32, 14 So. 465, 1893 Miss. LEXIS 188 (Miss. 1893).

15. Costs.

Individual bringing proceeding must be taxed with costs where evidence does not establish incompetency of alleged insane person. Baum v. Greenwald, 95 Miss. 765, 49 So. 836, 1909 Miss. LEXIS 293 (Miss. 1909).

16. Removal.

The person who in his own name would petition to have a guardian of an estate removed must be a person who has some legitimate interest present or prospective in that estate, or who has some personal responsibility as regards the estate or the care or welfare of the lunatic. Barney v. Barney, 203 Miss. 228, 33 So. 2d 823, 1948 Miss. LEXIS 253 (Miss. 1948).

RESEARCH REFERENCES

ALR.

Mental condition which will justify the appointment of guardian, committee, or conservator of the estate for an incompetent or spendthrift. 9 A.L.R.3d 774.

Priority and preference in appointment of conservator or guardian for an incompetent. 65 A.L.R.3d 991.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 17 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 51 et seq. (petition or application – for appointment of guardian, committee, or conservator – insane or incompetent person).

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 51 et seq. (appointment of guardian for incompetent person).

INCOMPETENT PERSONS, CONVICTS, DRUNKARDS AND DRUG ADDICTS

Sec.	
93-13-121.	Incompetent adult; appointment of guardian.
93-13-123.	Incompetent persons; guardian for nonresident.
93-13-125.	Persons of unsound mind; guardian for resident confined but not properly adjudged mentally unsound.
93-13-127.	Persons of unsound mind; qualifications and powers of guardians; jurisdiction and powers of court.
93-13-128.	Persons of unsound mind; guardianship unaffected by statutory provisions for commitment of persons in need of mental treatment.
93-13-129.	Persons of unsound mind; appointment of clerk where no guardian will qualify.
93-13-131.	Drunkards and drug addicts; appointment of guardian; confinement in treatment facility.
93-13-133.	Persons of unsound mind, drunkards and drug addicts; when guardianship to cease.

Sec.
93-13-135. Offenders; appointment of guardian; when guardianship to cease; appointment of guardian to make health-care decisions.
93-13-137. Renumbered § 93-13-38.

§ 93-13-121. Incompetent adult; appointment of guardian.

In any case where a guardian has been appointed for an adult person by a court of competent jurisdiction of any state, and the adult thereafter, at the time of filing the petition provided for in this section, is a resident of this state and is incompetent to manage his or her estate, the chancery court of the county of the domicile of the adult shall have jurisdiction and authority to appoint a guardian for the incompetent adult upon the conditions specified in this section; however, infirmities of old age shall not be considered elements of infirmities.

The petition for the appointment of a guardian under the provisions of this section shall be filed by the incompetent person or his guardian in the office of the clerk of the chancery court in the county of the residence of the incompetent person and process shall be served as provided in Section 93-13-281, unless joined in by that person or those persons prescribed in that section.

Upon the return day of the process, the chancellor, if in vacation, or the court, if in termtime, shall cause the applicant to appear in person and then and there examine the applicant and all interested parties, and if, after the examination, the chancellor in vacation or the court in termtime is of the opinion that the applicant is incompetent to manage his or her estate, then it shall be the duty of the court to appoint a guardian of the estate of the applicant; however, in no instance shall the court have authority to appoint a guardian under the provisions of this section unless it examines the applicant in person and finds after the examination that the applicant is incompetent to manage his or her estate.

A guardian appointed under the provisions of this section shall be required to make and file annual accounts of his acts and doings as in case of guardians for persons with mental illness.

HISTORY:

Codes, 1942, § 434; Laws, 1938, ch. 263; Laws, 1972, ch. 408, § 14; Laws, 2008, ch. 442, § 30, eff from and after July 1, 2008.

Cross References —

Revocation of a power of attorney by the appointment of a conservator, general guardian or guardian for a disabled or incompetent principal, see § 87-3-113.

Appointment of guardians for persons in need of mental treatment, see § 93-13-111.

Procedure for restoration to reason and discharge of guardian of person for whom guardian has been appointed or who has been found in need of mental treatment, see § 93-13-151.

JUDICIAL DECISIONS

1. In general.

Guardians may be appointed under § 93-13-121 for incompetent adults. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

RESEARCH REFERENCES

ALR.

Termination of continuing guaranty by appointment of guardian or conservator for guarantor. 55 A.L.R.3d 344.

Priority and preference in appointment of conservator or guardian for an incompetent. 65 A.L.R.3d 991.

Validity of guardianship proceeding based on brainwashing of subject by religious, political, or social organization. 44 A.L.R.4th 1207.

Postmajority disability as reviving parental duty to support child. 48 A.L.R.4th 919.

Am. Jur.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 51 et seq. (petition or application – for appointment of guardian, committee, or conservator – insane or incompetent person).

9A Am. Jur. Legal Forms 2d, Guardian and Ward § 133:44 (appointment of guardian for incompetent person – certification by doctor).

§ 93-13-123. Incompetent persons; guardian for nonresident.

The chancery court of any county in which may be situated the property or any part of the property, or debt due to, or right of action of any person who has been adjudicated to be incompetent by proper proceedings in another state, or of a citizen of this state who is incompetent and is confined out of this state in a psychiatric hospital or institution, shall have jurisdiction to appoint a guardian of the estate of the person who is incompetent. The chancery court of the county of residence of those persons shall likewise have that jurisdiction.

HISTORY:

Codes, Hemingway's 1917, § 397; 1930, § 1896; 1942, § 432; Laws, 1914, ch. 159; Laws, 1920, ch. 317; Laws, 1956, ch. 210, §§ 1, 2; Laws, 2008, ch. 442, § 29, eff from and after July 1, 2008.

Cross References —

Appointment of guardians for persons in need of mental treatment, see § 93-13-111.

Another section derived from same 1942 code section, see § 93-13-125.

Procedure for restoration to reason and discharge of guardian of person for whom guardian has been appointed or who has been found in need of mental treatment, see § 93-13-151.

JUDICIAL DECISIONS

1. In general.

Guardians may be appointed under § 93-13-123 for persons of unsound mind. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 17 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 51 et seq. (appointment of guardian for incompetent person).

8 Am. Jur. Trials, Incompetency and commitment proceedings, §§ 18 et seq.

CJS.

57 C.J.S., Mental Health §§ 22 et seq.

§ 93-13-125. Persons of unsound mind; guardian for resident confined but not properly adjudged mentally unsound.

The chancery court of any county in which may be situated the property or any part thereof, or debt due to, or right of action of any citizens of this state who have not been adjudged to be of unsound mind, or may have been so adjudged in proceedings which did not fully comply with the law in effect at the time of such adjudication, may appoint guardians of the estates of such persons, provided such persons: (1) have been continuously confined in a mental hospital operated by the State of Mississippi or by the United States government within the State of Mississippi for a period of more than one year and are still so confined, (2) are of unsound mind, (3) are mentally incapable of taking care of their estates, and (4) are incapable of responding to process. Such appointment may be made upon the sworn petition of a relative or friend of such person or upon the petition of any other interested party and if there is attached to such petition a certificate of the director of the hospital in which such person is confined showing the existence of the conditions hereinabove prescribed, no process upon such person or further proof of incompetency shall be required. If at any time it be made to appear to the satisfaction of the court that such person has been restored to sanity, such guardianship may be terminated and ended as now provided by law.

HISTORY:

Codes, Hemingway's 1917, § 397; 1930, § 1896; 1942, § 432; Laws, 1914, ch. 159; Laws, 1920, ch. 317; Laws, 1956, ch. 210, §§ 1, 2, eff. July 1, 1956.

Cross References —

Another section derived from same 1942 code section, see § 93-13-123.

Appointment of guardians for persons in need of mental treatment, see § 93-13-111.

Procedure for restoration to reason and discharge of guardian of person for whom guardian has been appointed or who has been found in need of mental treatment, see § 93-13-151.

JUDICIAL DECISIONS

1. In general.

Guardians may be appointed under 93-3-125 for persons of unsound mind. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 17 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 51 et seq. (appointment of guardian for incompetent person).

8 Am. Jur. Trials, Incompetency and commitment proceedings, §§ 18 et seq.

CJS.

57 C.J.S., Mental Health §§ 22 et seq.

§ 93-13-127. Persons of unsound mind; qualifications and powers of guardians; jurisdiction and powers of court.

The guardians mentioned in Sections 93-13-123 and 93-13-125 shall have the powers of and qualify the same as guardians of resident persons of unsound mind, giving bond and taking the oath of office and being governed by the law regulating guardians of resident persons of unsound mind. The chancery court shall have the same powers and jurisdiction in reference to debts due, rights of action, and property as said chancery court has of the property, debts, and rights of action of resident persons of unsound mind.

HISTORY:
Codes, Hemingway's 1917, § 398; 1930, § 1897; 1942, § 433; Laws, 1914, ch. 159; Laws, 1920, ch. 317; brought forward without change, Laws, 2014, ch. 384, § 3, eff from and after July 1, 2014.

Editor's note—
This section was brought forward without change by Chapter 384,§ 2, Laws of 2014, effective July 1, 2014. Since the language of the section as it appears in the main volume is unaffected by the bringing forward of the section, it is not reprinted in this supplement.

§ 93-13-128. Persons of unsound mind; guardianship unaffected by statutory provisions for commitment of persons in need of mental treatment.

Nothing contained in Chapter 492, Laws of 1975, shall operate to affect the validity of any guardianship heretofore created for persons of unsound mind.

HISTORY:
Laws, 1976, ch. 376, § 3, eff from and after passage (approved April 26, 1976).

Cross References —
Commitment of persons in need of mental treatment, see §§ 41-21-61 et seq.

§ 93-13-129. Persons of unsound mind; appointment of clerk where no guardian will qualify.

If some one will not qualify as guardian of a person of unsound mind, the guardianship may be devolved upon the clerk of the chancery court of the county, subject to all the provisions of law for his being guardian of minors.

HISTORY:
Codes, 1880, § 2122; 1892, § 2214; 1906, § 2432; Hemingway's 1917, § 1993; 1930, § 1895; 1942, § 431.

§ 93-13-131. Drunkards and drug addicts; appointment of guardian; confinement in treatment facility.

The chancery court of the county in which an habitual drunkard, habitual user of cocaine, opium or morphine resides may appoint a guardian to him on the application of a relative or friend. When an application for appointment of a guardian is presented, if the court is satisfied there is probable grounds for the appointment, it shall direct a writ to the sheriff, commanding him to summon the person alleged to be an habitual drunkard, habitual user of cocaine, or opium or morphine. On return of the summons executed, the court shall examine the question and determine whether the person is an habitual drunkard, habitual user of cocaine, opium or morphine, and for that purpose may summon and hear witnesses, orally or by deposition, and hear the parties and their evidence. If the court is satisfied that the person is an habitual drunkard, habitual user of cocaine, opium or morphine, it shall appoint a guardian to take care of him and his estate, both real and personal, and the costs of the inquisition shall be paid out of the estate. And the court or chancellor may direct the confinement of any person adjudged to be an habitual drunkard, habitual user of cocaine, or opium or morphine, in a facility that treats alcohol or substance abuse.

HISTORY:
Codes, 1892, § 2215; 1906, § 2433; Hemingway's 1917, § 1994; 1930, § 1898; 1942, § 435; Laws, 1950, ch. 349, § 13; Laws, 2008, ch. 442, § 31, eff from and after July 1, 2008.

Cross References —
Appointment of guardians for persons in need of mental treatment, see § 93-13-111.

Procedure for restoration to reason and discharge of guardian of person for whom guardian has been appointed or who has been found in need of mental treatment, see § 93-13-151.

JUDICIAL DECISIONS

1. In general.
Guardians may be appointed under 93-13-131 for alcoholics or drug addicts. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

RESEARCH REFERENCES

Am. Jur.
39 Am. Jur. 2d, Guardian and Ward §§ 17 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Form 61 (petition or application alleging incompetency due to drug addiction).

§ 93-13-133. Persons of unsound mind, drunkards and drug addicts; when guardianship to cease.

If it be made to appear to the satisfaction of the court that a person who was of unsound mind has been restored to sanity or that one adjudged an habitual drunkard, or habitual user of cocaine, or opium or morphine, has sufficiently reformed to justify it, the court may order the estate, real and personal, or so much thereof as may not have been legally disposed of, and such profits as there may be, to be delivered to him, and may allow the guardian such reasonable compensation as it may deem proper, and the guardianship shall cease.

HISTORY:
Codes, 1892, § 2216; 1906, § 2434; Hemingway's 1917, § 1995; 1930, § 1900; 1942, § 437.

Cross References —
Procedure for restoration to reason and discharge of guardian of person for whom guardian has been appointed or who has been found in need of mental treatment, see § 93-13-151.

RESEARCH REFERENCES

ALR.
Amount of attorneys' compensation in matters involving guardianship and trusts. 57 A.L.R.3d 550.

§ 93-13-135. Offenders; appointment of guardian; when guardianship to cease; appointment of guardian to make health-care decisions.

(1) When any offender shall be sentenced to the Penitentiary for a year or longer, the chancery court of the county of his residence, or where any of his property may be, may appoint a guardian, who shall take charge of the real and personal estate of the offender. The guardianship shall cease when the

term of imprisonment shall expire or the offender dies; and so much of the estate of the offender as may be then in the hands of his guardian, shall be restored to him, or his legal representatives in case of his death, the guardian having such reasonable allowance therefrom for his services as the court may deem proper.

(2) A chancery court of the county of residence of an offender who is a resident of Mississippi may appoint a guardian to make health-care decisions for the offender. Process shall be served as provided in Section 93-13-281, unless joined in by that person or those persons prescribed in that section. The health-care guardianship shall cease when the offender's term of imprisonment expires or the offender dies. A guardian appointed under this subsection shall make and file annual accounts of the health-care decisions made on behalf of the offender.

HISTORY:

Codes, 1880, § 2123; 1892, § 2218; 1906, § 2436; Hemingway's 1917, § 1997; 1930, § 1901; 1942, § 438; Laws, 2012, ch. 529, § 2, eff from and after July 1, 2012.

Cross References —

Appointment of commissioner to make health-care decisions for offender who lacks capacity and does not have relative available, see § 47-5-180.

JUDICIAL DECISIONS

1. In general.

Guardians may be appointed under 93-13-135 for convicts in the penitentiary. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

§ 93-13-137. Renumbered § 93-13-38.

Editor's Notes —

Code 1942, §§ 439, 440, from which Code 1972, § 93-13-137, was derived, was substantially amended by Laws, 1972, ch. 408, §§ 15, 16, so as to make the provisions thereof applicable to any and all persons under every form of legal disability. Therefore, the section has been re-numbered as § 93-13-38 in order that it may appear along with other sections dealing with wards generally.

RESTORATION TO REASON

Sec.
93-13-151. Procedure for restoration to reason; discharge of guardian.

§ 93-13-151. Procedure for restoration to reason; discharge of guardian.

When any person for whom a guardian has been appointed or who has been found to be in need of mental treatment, under the provisions of Sections 41-21-61 through 41-21-105 or any other statute, shall be restored to reason, the chancery court of the county wherein such guardian was appointed or such adjudication had may so determine and adjudicate upon the filing of a proper petition therefor, supported by such proof as the chancellor may deem sufficient. Such a petition may be heard by such chancellor, either in term-time or in vacation, at such time and place as the chancellor may fix; and at such hearing, all interested parties shall have the right to appear and offer testimony. Such adjudication of such person's restoration to reason shall be competent proof thereof in any court of competent jurisdiction; and if a guardian of the estate and property, or either, of such person shall have been appointed and be then serving, such guardian shall forthwith be discharged and the control of the estate of such person returned to him.

HISTORY:

Laws, 1976, ch. 376, § 2, eff from and after passage (approved April 26, 1976).

RESEARCH REFERENCES

ALR.

Habeas corpus on ground of restoration to sanity of one confined as an incompetent other than in connection with crime. 21 A.L.R.2d 1004.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity of for restoration. 33 A.L.R.2d 1145.

Am. Jur.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 241 et seq. (discharge of guardian).

14 Am. Jur. Pl & Pr Forms (Rev), Incompetent Persons, Forms 261 et seq. (restoration to competency).

8 Am. Jur. Trials, Incompetency and Commitment Proceedings, §§ 1 et seq.

CJS.

57 C.J.S., Mental Health § 182.

ARMED FORCES PERSONNEL

Sec.
93-13-161. Appointment of guardian for estate of person in armed forces listed as missing, etc.

§ 93-13-161. Appointment of guardian for estate of person in armed forces listed as missing, etc.

(1) Whenever a person, hereinafter referred to as an absentee, who while serving in or with the armed forces of the United States, or while serving as a merchant seaman, has been officially reported or listed as missing, or missing in action, or interned in a neutral country, or beleaguered, besieged, or captured by an enemy, has an interest in any property in this state or is a legal resident of this state and has not appointed an attorney-in-fact with authority to act in his behalf in regard to his property or interest, then the chancery court, or the chancellor in vacation, of the county of such absentee's legal residence, or of the county where the absentee's property is situated, upon petition alleging the foregoing facts and showing the necessity for providing care of the property of such absentee made by any person authorized under law to act as guardian, giving preference to next of kin as now provided by law, and upon good cause being shown, may appoint a guardian to take charge of the absentee's estate.

(2) The court shall have full discretionary authority to appoint any suitable person as such guardian and may require such guardian to post an adequate corporate surety bond and to make such reports as required by law. The guardian shall have the same powers and authority as the guardian of the

estate of an infant or incompetent, depending upon whether the absentee is an infant or adult, and in the latter case, the powers and authority shall be the same as in the guardianship of an incompetent.

(3) At any time upon petition signed by the absentee, or on petition of an attorney-in-fact acting under power of attorney granted by the absentee, the court shall direct the termination of the guardianship and the transfer of all property held thereunder to the absentee or to the designated attorney-in-fact. Likewise, if at any time subsequent to the appointment of a guardian it shall appear that the absentee has died and an executor or administrator had been appointed for his estate, the court shall direct the termination of the guardianship and the transfer of all property of the deceased absentee held thereunder to such executor or administrator.

HISTORY:

Codes, 1942, § 450-01; Laws, 1946, ch. 309, §§ 1-3.

Cross References —

Guardianship of war veterans, see §§ 35-5-1 et seq.

JUDICIAL DECISIONS

1. In general.

Guardians may be appointed under 93-13-161 for persons in the armed forces or merchant seamen reported as missing. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

NONRESIDENT GUARDIANS

Sec.	
93-13-181.	Appointment of nonresident guardian when ward's property in this state.
93-13-183.	Non-resident guardian may sue in this state for ward's property.
93-13-185.	How ward's property may be removed from this state.
93-13-187.	Term "guardian" defined.

§ 93-13-181. Appointment of nonresident guardian when ward's property in this state.

When any ward resides out of this state, but has property, real or personal, in this state, and a guardian has been appointed to such ward in the state of his residence, such guardian shall be entitled to be appointed guardian of such nonresident ward by the chancery court of the county in this state in which such property, or any part thereof, is situated, upon producing to such court the original letters of guardianship issued to such nonresident guardian, or a certified copy thereof, duly authenticated, and upon executing bond with sureties as is required of other guardians.

HISTORY:

Codes, Hemingway's 1921 Supp. § 2005a; 1930, § 1906; 1942, § 443; Laws, 1918, ch. 236; Laws, 1972, ch. 408, § 17, eff from and after July 1, 1972.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

JUDICIAL DECISIONS

1. In general.

A guardian, appointed in Louisiana, of a minor, residing in Louisiana and having property in this state, offering to comply with the laws of this state, was entitled to displace and be substituted for the guardian appointed for such minor in this state, notwithstanding a delay of 1 ½ years. Washington Bank & Trust Co. v. Magee, 187 Miss. 198, 192 So. 438, 1939 Miss. LEXIS 101 (Miss. 1939).

Guardian appointed for non-resident ward in other state held entitled to be substituted as guardian. Moore v. Jones, 99 So. 437 (Miss. 1924).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 34, 35, 222 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 651 et seq. (foreign guardians).

CJS.

39 C.J.S., Guardian and Ward § 277.

§ 93-13-183. Non-resident guardian may sue in this state for ward's property.

When any minor or person of unsound mind, shall reside out of this state, but has personal property, or is entitled to a legacy, or a distributive share of an estate being administered, or any debt or right of action, in this state, and a guardian has been appointed for such minor or person of unsound mind in the state or country of his residence, such guardian may sue in the courts of this state for, or may receive without suit, and give a valid receipt and acquittance for, such personal property, or legacy, or distributive share of an estate being administered as aforesaid, or may collect such debt or right in action, after filing in the office of the clerk of the chancery court of the county in this state where there may be some person indebted to such minor or person of unsound mind, or where any part of such personal property may be situated, or in which such estate may be administered a certified copy of the letters of guardianship issued to such non-resident guardian in the state or country where he was originally appointed, and a certificate of the officer before whom he is there liable to account as such guardian, that he is there liable to account for the thing sued for or received. When a certified copy of the letters of guardianship as aforesaid, and a certificate of the officer before whom such guardian is liable to account as aforesaid, shall be filed as aforesaid, it shall be conclusively presumed that the appointment and qualification of such guardian was in all respects valid and regular and lawful under the laws of the state and country where he was originally appointed.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2005c; 1930, § 1908; 1942, § 445; Laws, 1918, ch. 236.

Cross References —

Suits by nonresident executors or administrators, see § 91-7-259.

Delivery of ward's property to guardian, see § 93-13-31.

§ 93-13-185. How ward's property may be removed from this state.

If any such non-resident guardian shall desire to remove the personal property of his ward out of this state, he shall present his petition for that purpose to the court in this state in which he was appointed, and on making a final settlement of his guardianship accounts in this state, the court may, if it shall deem it proper, make an order to that effect. But such guardian shall first give bond with a surety, or sureties, to be approved by such court, or the clerk of such court, in the full value of the ward's personal estate so sought to be removed, conditioned that he will present to the court in the state of his residence, by which he was originally appointed, a full and complete inventory of the property and effects of the ward, to be removed from this state, and on failure to comply with the condition of such bond, the bond may be put in suit for the benefit of the ward.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2005b; 1930, § 1907; 1942, § 444; Laws, 1918, ch. 236.

RESEARCH REFERENCES

Am. Jur.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 671 et seq. (removal of property by foreign guardian).

§ 93-13-187. Term "guardian" defined.

Whenever the word "guardian" is used in Sections 93-13-181 through 93-13-187, it shall be held and construed to relate and apply to and embrace any and all persons who, under the law of any other state or country, stand in the relation of guardian to such ward, whether such person be known as curator, tutor, committee, or conservator of the property of such ward, or by whatsoever name or title such person may be known.

HISTORY:

Codes, Hemingway's 1921 Supp. § 2005d; 1930, § 1910; 1942, § 447; Laws, 1918, ch. 236; Laws, 1960, ch. 219; Laws, 1972, ch. 408, § 18, eff from and after July 1, 1972.

SMALL TRANSACTIONS PERFORMED WITHOUT GUARDIANSHIP

Sec.

93-13-211. Money or personal property not exceeding twenty-five thousand dollars.

93-13-213. Delay rental due ward under oil, gas, mineral lease.

93-13-215. Royalties, etc. due ward under oil, gas and mineral lease.

93-13-217. Undivided interest in real estate of ward sold without guardianship in certain cases.

93-13-219. Sale of undivided interest in real estate; summons; conduct of proceedings.

§ 93-13-211. Money or personal property not exceeding twenty-five thousand dollars.

(1) When a ward is entitled under a judgment, order or decree of any

court, or from any other source, to a sum of money not greater than Twenty-five Thousand Dollars ($25,000.00), or to personal property not exceeding in value that sum, the chancery court of the county of the residence of the ward or the chancery court of the county wherein the person is entitled to the money or property, may order the money or property to be delivered to the ward or to some other person for him if he has no guardian, and compliance with the order shall acquit and release the person so delivering the same.

(2) However, if the sum of money or personal property is not due the ward under a judgment, order or decree of a court, the chancery court before ordering the money or personal property paid over or delivered as provided in this section shall fully investigate the matter and shall satisfy itself by evidence, or otherwise, that the proposed sum of money to be paid, either as liquidated or unliquidated damages because of any claim of the ward whatsoever whether arising ex delicto or ex contractu, is a fair settlement of the claim of the ward, and that it is to the best interest of the ward that the settlement be made, or that the personal property be delivered to the ward. Thereupon the chancery court may authorize and decree that said sum of money or personal property be accepted by the ward and paid or delivered by the party owing or having the same as authorized by the decree of the court, and compliance with the order in the latter event shall acquit and release the person so paying or delivering the same. He, who under the order shall receive the money or property of a person under such disability, shall thereby become amenable to the court for the disposition of it for the use and benefit of the person under disability but shall not be required to furnish security therefor unless the chancery court shall so order.

HISTORY:

Codes, 1880, § 2073; 1892, § 1958; 1906, § 2132; Hemingway's 1917, § 1800; 1930, § 1911; 1942, § 448; Laws, 1918, ch. 126; Laws, 1938, ch. 272; Laws, 1944, ch. 308, § 1; Laws, 1956, ch. 211; Laws, 1962, ch. 275; Laws, 1964, ch. 292; Laws, 1972, ch. 408, § 19; Laws, 1986, ch. 387; Laws, 2010, ch. 552, § 1, eff from and after July 1, 2010.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Fiduciary accounts payable at death, see § 81-5-62.

Payment of the proceeds of a savings account payable on death to a beneficiary under sixteen years of age, see § 81-12-145(c)(iv).

Application of §§ 93-13-211 et seq. to payment of savings association or savings and loan associations accounts payable at death, to surviving beneficiaries under age 16, see § 81-12-145.

Savings bank to make payment in accordance with provisions of § 93-13-211 et seq. where named beneficiary, under 16 years of age, survives death of person opening account and no guardian is appointed, see § 81-14-363.

Other sections derived from same 1942 code section, see §§ 93-13-213, 93-13-215.

Execution of mineral leases on small interests without appointment of a guardian, see § 93-13-43.

Applicability of this section to payment of proceeds from sale of ward's interest in real property without appointment of guardian, see § 93-13-217.

JUDICIAL DECISIONS

1. In general.

Since a decree rendered upon ex parte petition of an injured employee and his parents under this section [Code 1942, § 448] only authorized the minor to do that which he could do if he were an adult, whereas the settlement clause of Code 1942, § 6998-36 applies to all employees, adults and minors, their dependents, and employers and insurers, the settlement of the tort claim by the injured minor employee with a negligent third party, before any action was brought, and without the approval of the workmen's compensation commission, was invalid and did not bind the employer and compensation insurer. Powe v. Jackson, 236 Miss. 11, 109 So. 2d 546, 1959 Miss. LEXIS 288 (Miss. 1959).

Where infant testamentary beneficiary received her share of estate, other beneficiaries could not complain as procedure did not defeat purpose of testator. United States Fidelity & Guaranty Co. v. State, 110 Miss. 16, 69 So. 1007, 1915 Miss. LEXIS 20 (Miss. 1915).

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Joinder of Claims and Parties – Rules 13, 14, 17, 18. 52 Miss. L. J. 37, March, 1982.

§ 93-13-213. Delay rental due ward under oil, gas, mineral lease.

When there is due and payable to a ward who has no guardian of his estate duly appointed and qualified pursuant to the statutes of this state a sum not to exceed Fifty Dollars ($50.00) in any one (1) year as delay rental under any oil and gas or oil, gas and mineral lease, such payment may be made directly to the ward if he is above the age of twelve (12) years, or in any case it may be made to the father and mother or to the surviving parent of such ward for his use and benefit without the payment of same into the chancery court as provided in the Section 93-13-211.

In lieu of making payment directly to said ward or to his designated representatives as above provided, the same may be made to the depository named in any such lease or to any successor depository thereunder in the manner provided for in such lease for the account of said ward or his representatives as above specified.

A payment of delay rental to a ward made as herein provided shall be good and valid in law and shall discharge the party or parties owing and paying such rental from all liability therefor to such ward.

Any successor depository under a lease may be paid out by the depository directly to said ward if above the age of twelve (12) years, or in any event may be paid to the parents or to the surviving parent of the ward for his use and benefit without complying with Section 93-13-211, and the payment so made shall discharge and acquit the depository of its obligation to the ward for such rental.

HISTORY:

Codes, 1880, § 2073; 1892, § 1958; 1906, § 2132; Hemingway's 1917, § 1800; 1930, § 1911; 1942, § 448; Laws, 1918, ch. 126; Laws, 1938, ch. 272; Laws, 1944, ch. 308, § 1; Laws, 1956, ch. 211; Laws, 1962, ch. 275; Laws, 1964, ch. 292; Laws, 1972, ch. 408, § 19, eff from and after July 1, 1972.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Other sections derived from same 1942 code section, see §§ 93-13-211, 93-13-215.

Execution of mineral leases on small interests without appointment of a guardian, see § 93-13-43.

§ 93-13-215. Royalties, etc. due ward under oil, gas and mineral lease.

When there is due and payable to a ward who has no guardian of his estate duly appointed and qualified pursuant to the statutes of this state a sum not to exceed Two Hundred Fifty Dollars ($250.00) as accrued or impounded runs of production under an oil, gas and mineral lease producing any such mineral, or as royalties, including shut-in gas royalties, overriding royalties, or other payments out of production accrued to such ward under a lease producing oil, gas and minerals, such payment may be made by the individual or company holding the same as provided in Section 93-13-213 dealing with payment of delay rentals. Said individual or company may continue paying such funds in like manner on a monthly basis or on such terms as provided in the lease or instrument creating the ward's interest so long as the said payments do not exceed Twenty-five Dollars ($25.00) per month, or an average of such amounts if payments are made on other than a monthly basis.

HISTORY:

Codes, 1880, § 2073; 1892, § 1958; 1906, § 2132; Hemingway's 1917, § 1800; 1930, § 1911; 1942, § 448; Laws, 1918, ch. 126; Laws, 1938, ch. 272; Laws, 1944, ch. 308, § 1; Laws, 1956, ch. 211; Laws, 1962, ch. 275; Laws, 1964, ch. 292; Laws, 1972, ch. 408, § 19, eff from and after July 1, 1972.

Cross References —

Construction and meaning of term "ward," see § 1-3-58.

Other sections derived from same 1942 code section, see §§ 93-13-211, 93-13-213.

Execution of mineral leases on small interests without appointment of a guardian, see § 93-13-43.

§ 93-13-217. Undivided interest in real estate of ward sold without guardianship in certain cases.

Whenever any interest, legal or equitable, in any real property in this state is owned by a ward or wards, whether said owner is a resident or a nonresident, and the interest is worth at a fair and reasonable market price less than the sum of Ten Thousand Dollars ($10,000.00), and a purchaser desires to purchase said ward's property or interest therein for less than Ten Thousand Dollars ($10,000.00) a petition may be filed in the chancery court of the county of the residence of the ward or in the chancery court of the county where the property or any part thereof is located requesting approval and authority to sell said ward's property. The petition shall be brought by the ward through next friend and shall join as respondents the parties provided in Section 93-13-281 or the parties designated by Section 93-13-281 may join and unite with the ward in the petition. The court shall consider the allegations of the petition and if the court is satisfied from the evidence presented that the proposed sales price is adequate and reasonable and the sale would be to the best interest of the ward then the court may enter an order authorizing the proposed sale. The court shall direct the clerk to execute a deed to the purchaser on the payment of the purchase price fixed and may direct the clerk to pay over the proceeds to some suitable person as provided in Section 93-13-211 provided no part of the costs of said proceedings shall be taxed against said ward or his interest.

HISTORY:

Codes, 1930, §§ 1912, 1913; 1942, §§ 449, 450; Laws, 1922, ch. 285; Laws, 1962, ch. 276; Laws, 1964, ch. 293; Laws, 1966, ch. 321, § 1; Laws, 1971, ch. 356, § 1; Laws, 1972, ch. 408, § 20; Laws, 1981, ch. 452, § 1; Laws, 1991, ch.

338, § 1, eff from and after July 1, 1991.

Cross References —

Another section derived from same 1942 code section, see § 93-13-219.

§ 93-13-219. Sale of undivided interest in real estate; summons; conduct of proceedings.

Summons may be served personally and by publication as in other cases of minors or persons of unsound minds in the chancery court. The petition shall be filed in the county where the property is located, and the summons may be made returnable to term time, or on a day and at a place to be designated by the chancellor, or on any Saturday at the office of the chancellor of the district. The proceedings shall be conducted as are other proceedings in probate so far as applicable.

HISTORY:

Codes, 1930, § 1913; 1942, § 450.

Cross References —

Another section derived from same 1942 code section, see § 93-13-217.

CONSERVATORS

Sec.
93-13-251. Petition for appointment of conservator; jurisdiction of courts.
93-13-253. Notice of time and place of hearing; persons to whom notice must be given; service.
93-13-255. Hearing; appointment of guardian ad litem; examination and certificate of physicians.
93-13-257. Costs; party liable.
93-13-259. Duties and powers of conservator.
93-13-261. Limitation on contractual powers and obligations of person protected.
93-13-263. Support for dependents.
93-13-265. Procedure for restoration.
93-13-267. Resignation or discharge of conservator.

§ 93-13-251. Petition for appointment of conservator; jurisdiction of courts.

If a person is incapable of managing his own estate by reason of advanced age, physical incapacity or mental weakness, or because the person is missing or outside of the United States and unable to return, the chancery court of the county wherein the person resides or, in the case of a missing or absent person, the chancery court of the county where the person most recently resided, upon the petition of the person or of one or more of his friends or relatives, may appoint a conservator to have charge and management of the property of the person and, if the court deems it advisable, also to have charge and custody of the person subject to the direction of the appointing court.

HISTORY:

Codes, 1942, § 434-01; Laws, 1962, ch. 281, § 1; Laws, 2008, ch. 496, § 1; brought forward without change, Laws, 2014, ch. 384, § 4, eff from and after July 1, 2014.

Editor's Notes —

This section was brought forward without change by Chapter 384, § 4, Laws of 2014, effective July 1, 2014. Since the language of the section as it appears in the main volume is unaffected by the bringing forward of the section, it is not reprinted in this supplement.

Cross References —

Provision of the Mississippi Vulnerable Persons Act to effect that the State Department of Public Welfare may petition for appointment of a conservator for any vulnerable person pursuant to this section, see § 43-47-29.

Revocation of a power of attorney by the appointment of a conservator, general guardian or guardian for a disabled or incompetent principal, see § 87-3-113.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Appointment proper.

1. In general.

Chancery court erred by applying the legal standard for modification of child custody in appointing the mother as the son's conservator and the appointment was reversed. Ravenstein v. Hawkins, 167 So. 3d 210, 2014 Miss. LEXIS 326 (Miss. 2014).

Chancellor did not err in appointing a conservator to the mother's estate where the undisputed medical condition of the mother's severe dementia rendered her incapable of managing her own property; the sister's own admission that her mother could not handle matters on her own, as well as the physicians' testimony and chancellor's findings, illustrated that the mother was in need of a conservator. In re DeMoville v. Johnson, 856 So. 2d 607, 2003 Miss. App. LEXIS 558 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473, 2004 Miss. LEXIS 207 (Miss. 2004).

Decedent's conservatorship was imposed due to physical incapacity and advancing age, the fact that he was mentally alert and competent was of no consequence; the deeds the decedent signed over to the conservator were not valid where the conservator failed to seek approval of the court for the conveyance of the decedent's land to herself. In re Estate of Thomas v. Thomas, 853 So. 2d 134, 2003 Miss. App. LEXIS 158 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 833 (Miss. Ct. App. 2003).

Under § 93-13-251, a conservator for the management of property may be appointed by the chancery court of the county of the residence of any person who, by reason of advanced age, physical incapacity, or mental weakness is incapable of managing his own estate, and, additionally, if the court deems it advisable, the conservator may have charge and custody of the person as well as the property. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

Where adult ward, a resident and citizen of Lee County, after suffering injuries allegedly caused by defendant, convalesced at the home of his wife's parents in Itawamba County, the Chancery Court of Lee County could properly appoint a conservator for the ward, notwithstanding the argument that only the Chancery Court of Itawamba County had authority to make such an appointment since ward presently resided in the latter county, where no showing was made that ward had voluntarily abandoned his Lee County domicil and established a residence, as such is recognized by law, in Itawamba County. Majors v. Purnell's Pride, Inc., 360 F. Supp. 328, 1973 U.S. Dist. LEXIS 13389 (N.D. Miss. 1973).

2. Appointment proper.

Former wife's claim that a conservatorship was invalid due to the chancery court's failure to require the co-conservators to post a bond was procedurally barred from consideration because the wife failed to raise the issue in the chancery court; assuming that a bond should have been required, mere irregularities in the appointment or proceedings were immune from collateral attack, and thus, the absence of bond was a curable defect. Collins v. Pinnacle Trust, 147 So. 3d 830, 2014 Miss. LEXIS 103 (Miss. 2014).

Because conservators' position that a former husband was competent to join in the petition to appoint a conservator was not inconsistent with a position taken in prior litigation,judicial estoppel was not applicable; there was no evidence that the conservators took any position with regard to Stuart's competency in a criminal matter. Collins v. Pinnacle Trust, 147 So. 3d 830, 2014 Miss. LEXIS 103 (Miss. 2014).

Chancery court did not err in denying a former wife's petition to set aside the conservatorship over her former husband because the conservatorship was not invalid due to lack of notice to the wife; the husband was competent to join in the petition to appoint a conservator, and absent a finding that he was not competent to join the petition, the wife was not entitled to notice of the hearing. Collins v. Pinnacle Trust, 147 So. 3d 830, 2014 Miss. LEXIS 103 (Miss. 2014).

Appointment of a conservator for an elderly ward was supported by substantial evidence where the ward testified that she had been told she had Alzheimer's and that her mind was not as clear as it once had been and both a doctor and a psychologist who examined the ward testified that she was unable to attend to her physical needs or to manage her financial affairs. Salter v. Johnston, 98 So. 3d 1130, 2012 Miss. App. LEXIS 626 (Miss. Ct. App. 2012).

Order appointing a son conservator over the person and estate of his mother was upheld where the mother, a 76-year-old woman, was of below average intellect and had never concerned herself with the handling of her own business affairs; she exhibited overall indifference to her business affairs and her living conditions alike. Hester v. Hester (In re Hester), 989 So. 2d 986, 2008 Miss. App. LEXIS 247 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian &amp; Ward § 1, 23.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 51, 53, 56 (petition or application for appointment of guardian, committee, or conservator).

Law Reviews.

1984 Mississippi Supreme Court Review: Wills and Estates. 55 Miss. L. J. 120, March, 1985.

§ 93-13-253. Notice of time and place of hearing; persons to whom notice must be given; service.

Upon the filing of the petition, the clerk of the court shall set a time and place for hearing and shall cause not less than five (5) days' notice thereof to be given to the person for whom the conservator is to be appointed, except that the court may, for good cause shown, direct that a shorter notice be given. Unless the court finds that the person for whom the conservator is to be appointed is competent and joins in the petition, the notice shall also be given to one (1) relative of the person for whom the conservator is to be appointed who is not the petitioner and who resides in Mississippi if such relative is within the third degree of kinship, preferring first the spouse, unless legally separated, then an ascendant or descendant, then a brother or sister, then an adult niece, nephew, aunt or uncle, so that personal service is had on the person for whom the conservator is to be appointed and on one (1) relative who resides in Mississippi other than the petitioner. If no relative within the third degree of kinship to the person for whom the conservator is to be appointed is found residing in the State of Mississippi, the court shall either designate some other appropriate person to receive the notice or appoint a guardian ad litem to receive notice. If the person for whom the conservator is to be appointed is entitled to any benefit, estate or income paid or payable by or through the Veterans' Administration of the United States government, such administration shall also be given such notice.

Notice may be by personal service by the sheriff as in service of other process but nothing herein shall be construed to prevent competent persons from accepting notice in person from the clerk or his deputy.

HISTORY:

Codes, 1942, § 434-02; Laws, 1962, ch. 281, § 2; Laws, 2008, ch. 496, § 2, eff from and after July 1, 2008.

JUDICIAL DECISIONS

1. Notice.

Chancery court properly appointed a nephew as conservator of his aunt's person and estate because the nephew's failure to give statutory notice to the aunt's other relative (the nephew's brother) was not a reversible error where the brother later voluntarily signed a waiver of notice, two physicians determined that the aunt could not manage her affairs, the nephew had been acting on the aunt's behalf for several years, and the evidence presented by the aunt claiming that the nephew breached his fiduciary duty under her power of attorney was vague and speculative. Jackson v. Reed (In re Estate of Jackson), 203 So. 3d 4, 2016 Miss. App. LEXIS 632 (Miss. Ct. App. 2016).

Chancery court did not err by awarding post-majority child support to the mother on the ground that she did not have standing to seek such support because a review of the record indicated that the parties complied with all notice requirements prior to the conservatorship hearing. Ravenstein v. Hawkins, 167 So. 3d 210, 2014 Miss. LEXIS 326 (Miss. 2014).

Chancery court did not err in denying a former wife's petition to set aside the conservatorship over her former husband because the conservatorship was not invalid due to lack of notice to the wife; the husband was competent to join in the petition to appoint a conservator, and absent a finding that he was not competent to join the petition, the wife was not entitled to notice of the hearing. Collins v. Pinnacle Trust, 147 So. 3d 830, 2014 Miss. LEXIS 103 (Miss. 2014).

In the conservator's suit to set aside a deed conveyed by the ward, where his sister claimed the conservatorship was invalid because process was never served on a relative, the chancellor erred by concluding that Miss. Code Ann. § 93-13-253 did not require service of process on a relative when the party petitioning for a conservatorship was the ward; the Court of Appeals of Mississippi found that it was unreasonable to conclude that the legislature intended that a person in need of a conservatorship due to mental incompetency could waive the statutorily-mandated service of process on a relative by signing the petition to establish the conservatorship. Armstrong v. Estate of Thames, 958 So. 2d 1258, 2007 Miss. App. LEXIS 397 (Miss. Ct. App. 2007).

Appointment of conservator was invalid because the conservator failed to give any family members notice of the appointment, especially the wife of the person for whom she was appointed conservator. Smith v. King, 942 So. 2d 1290, 2006 Miss. LEXIS 586 (Miss. 2006).

Although the mother failed to meet the requirement of sending notice to next of kin, the father of the child, the mistake was not fatal considering all of the facts of the case; the father was present in the courtroom during the proceeding; while in court, the father was asked directly if he had any problem with the granting of the conservatorship, and he responded that he had no objection, which constituted an overt act that submitted the father to the jurisdiction of the court and therefore amounted to notice of the proceedings. In re Brantley v. Brantley, 865 So. 2d 1126, 2004 Miss. LEXIS 184 (Miss. 2004).

§ 93-13-255. Hearing; appointment of guardian ad litem; examination and certificate of physicians.

The chancery court shall conduct a hearing to determine whether a conservator is needed for the person or the estate of the person. Before such hearing, the court may, in its discretion, appoint a guardian ad litem to look after the interest of the person in question, which guardian ad litem shall be present at the hearing and present the interests of the persons for whose property or person a conservator is to be appointed.

The chancery judge shall be the judge of the number and character of the witnesses and proof to be presented, except that there shall be included therein at least two (2) physicians who are duly authorized to practice medicine in this state, or another state or one (1) such physician and a psychologist, licensed in this state or another state, each of whom shall be required to make a personal examination of the subject party, and each of whom shall make in writing a certificate of the result of such examination, which certificate shall be filed with the clerk of the court and become a part of the record of the case. They may also be called to testify at the hearing.

HISTORY:
Codes, 1942, § 434-03; Laws, 1962, ch. 281, § 3; Laws, 1984, ch. 520, § 4; Laws, 1993, ch. 511, § 1, eff from and after July 1, 1993.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Appointment proper.

1. In general.

Section 99-13-255 provides that two reputable licensed physicians with three years' actual practice, who have personally examined defendant, must testify as to medical conditions; the physician may not, however, testify as to the ultimate legal issue in the case. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

2. Appointment proper.

Conservatorship was not invalid due to the failure to file a certificate of a medical professional with the clerk of court because the affidavits filed with a former husband's petition satisfied the requirements of the statute. Collins v. Pinnacle Trust, 147 So. 3d 830, 2014 Miss. LEXIS 103 (Miss. 2014).

Order appointing a son conservator over the person and estate of his mother was upheld where the mother, a 76-year-old woman, was of below average intellect and had never concerned herself with the handling of her own business affairs; in deciding whether a conservator was needed, the chancellor had the benefit of two separate evaluations of the mother's medical condition. Hester v. Hester (In re Hester), 989 So. 2d 986, 2008 Miss. App. LEXIS 247 (Miss. Ct. App. 2008).

§ 93-13-257. Costs; party liable.

If the petition is sustained, the costs shall be paid out of the estate of the person for whom a conservator is requested, but if the petition be not sustained, the costs shall be paid by the party requesting the appointment of the conservator.

HISTORY:
Codes, 1942, § 434-04; Laws, 1962, ch. 281, § 4, eff from and after passage (approved March 20, 1962).

JUDICIAL DECISIONS

1. In general.

An award of attorney's fees from the estate of a ward to the conservator's attorneys was premature where the sole inquiry at the hearing was whether the conservator should be removed. Mathews v. Williams (In re Mathews), 633 So. 2d 1038, 1994 Miss. LEXIS 123 (Miss. 1994).

The chancery court has substantial discretion in determining the amount of attorney's fees and expenses to award as part of the costs of establishing a conservatorship. In re Conservatorship of Stallings, 523 So. 2d 49, 1988 Miss. LEXIS 69 (Miss. 1988).

§ 93-13-259. Duties and powers of conservator.

Should the court appoint the conservator of the property or person or property and person of the subject party, the said conservator shall have the same duties, powers and responsibilities as a guardian of a minor, and all laws relative to the guardianship of a minor shall be applicable to a conservator.

HISTORY:

Codes, 1942, § 434-05; Laws, 1962, ch. 281, § 5, eff from and after passage (approved March 20, 1962).

JUDICIAL DECISIONS

1. In general.

Appellant daughter did not deny that she failed to seek reimbursement prior to the closure of the conservatorship; neither had she provided a reason why she failed to file such a claim for reimbursement. Accordingly, there was no error with the chancellor's determination that her claims for expenses were untimely and, therefore, barred under Miss. Code Ann. § 93-13-259. DeMoville v. Johnson (In re DeMoville P'ship), 26 So. 3d 366, 2009 Miss. App. LEXIS 286 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 37 (Miss. 2010), cert. denied, 2010 Miss. LEXIS 32 (Miss. Jan. 28, 2010).

Chancery court did not err by refusing to appoint a first son as the conservator over a father's estate because there was a conflict of interest, as the first son candidly admitted that he would not sue himself under Miss. Code Ann. § 93-13-38(2) to recover indebtedness he owed; moreover, a second son was properly appointed as a temporary conservator over the father's person, despite the second son's habit of drinking and smoking, because the second son was able to care for the father, and the father wished to remain in his residence. Cole v. Cole (In re Cole), 958 So. 2d 276, 2007 Miss. App. LEXIS 398 (Miss. Ct. App. 2007).

This section cannot be read to make applicable to conservators those statutes or portions of statutes which are intended only to address issues relating to orphaned minors, such as § 93-13-13, which addresses the appointment of testamentary guardians for children. Jackson v. Jackson, 732 So. 2d 916, 1999 Miss. LEXIS 54 (Miss. 1999).

A chancellor did not abuse his discretion in removing a conservator where inventories were not timely filed and no reason was given therefor, the conservator failed to seek court approval prior to making expenditures, and he purchased certificates of deposit, invested in stock and sold stock without prior approval. Mathews v. Williams (In re Mathews), 633 So. 2d 1038, 1994 Miss. LEXIS 123 (Miss. 1994).

A finding that a conservator and his wife violated the fiduciary duty to the ward and converted the ward's funds to their own use was supported by evidence that the ward's funds had been used to purchase a van which was used by the conservator and his wife, and that the conservator, his wife, and their children were the recipients of loans and gifts from monies in the conservatorship account, without previous court approval. Bryan v. Holzer, 589 So. 2d 648, 1991 Miss. LEXIS 762 (Miss. 1991).

The Chancery Court has discretion in determining whether a ward under conservatorship should have an allowance and if so, how much allowance that ward should be granted. This is so because wards under conservatorship may have sufficient mental ability to manage a limited monthly income. The court has broad discretion to authorize modest allowances to be given to and used by the ward as he or she sees fit without further accounting. In re Conservatorship of Stallings, 523 So. 2d 49, 1988 Miss. LEXIS 69 (Miss. 1988).

In view of statute (§ 93-13-259) stating that conservators have same powers, rights and duties as guardians, statute (§ 11-51-99) governing appeals by guardians also governs appeals by conservators; accordingly, conservator appealing decree discharging conservator is entitled to do so with supersedeas without bond in accordance with § 11-51-99. Conservatorship of Harris v. King, 480 So. 2d 1131, 1985 Miss. LEXIS 2371 (Miss. 1985).

Elderly individual who has had conservator appointed to handle business affairs has standing to object to conservator's petition for approval of annual accounting, inventory and discharge; court should appoint guardian ad litem, probably attorney, for individual and instruct guardian ad litem to investigate matters alleged by individual; if proper and necessary, court should grant guardian ad litem permission to file suit against conservator on behalf of individual. Anthony v. National Bank of Commerce, 468 So. 2d 41, 1985 Miss. LEXIS 2033 (Miss. 1985).

The feature distinguishing a conservatorship from a guardianship is the lack of necessity of an incompetency determination or of the existence of a legal disability for its initiation; however, after establishment of such protective procedures, the duties, responsibilities, and powers, under § 93-13-259, of a guardian or conservator are the same. Harvey v. Meador, 459 So. 2d 288, 1984 Miss. LEXIS 1985 (Miss. 1984).

Before a conservator is permitted to withdraw his ward's funds from a joint account with another, during the life of both, it is necessary for him to secure an order from a chancery court that a certain amount of the funds are required for the ward's necessities, since this corresponds with the duty of a guardian as it has existed for a long time, and since by statute the duties and powers of a conservator and guardian are the same. In re Estate of Atkins, 422 So. 2d 754, 1982 Miss. LEXIS 2316 (Miss. 1982).

§ 93-13-261. Limitation on contractual powers and obligations of person protected.

So long as there is a duly appointed conservator, the person whose property or person is in the charge of such conservator shall be limited in his or her contractual powers and contractual obligations and conveyance powers to the same extent as a minor.

HISTORY:

Codes, 1942, § 434-06; Laws, 1962, ch. 281, § 6, eff from and after passage (approved March 20, 1962).

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Void transfers.

1. In general.

A person of sound and disposing mind whose property has been placed under conservatorship may execute a valid will and may do so without the knowledge of the conservator or the permission of the court. Lee v. Lee, 337 So. 2d 713, 1976 Miss. LEXIS 1588 (Miss. 1976).

2. Void transfers.

Decedent's conservatorship was imposed due to physical incapacity and advancing age, the fact that he was mentally alert and competent was of no consequence; the deeds the decedent signed over to the conservator were not valid where the conservator failed to seek approval of the court for the conveyance of the decedent's land to herself. In re Estate of Thomas v. Thomas, 853 So. 2d 134, 2003 Miss. App. LEXIS 158 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 833 (Miss. Ct. App. 2003).

Where conservator conveyed his ward's real property without court order, the executor and sole devisee of the ward was entitled to void the transfer because the deed became void ab initio when its legality was challenged. Scott v. Nelson, 820 So. 2d 23, 2002 Miss. App. LEXIS 45 (Miss. Ct. App. 2002).

RESEARCH REFERENCES

ALR.

Termination of continuing guaranty by appointment of guardian or conservator for guarantor. 55 A.L.R.3d 344.

§ 93-13-263. Support for dependents.

If there be any persons dependent upon the person for whom the conservator has been appointed, the court shall provide for their support and maintenance from the assets of said estate and the conservator shall be directed to make the necessary support and maintenance available from the assets of said estate.

HISTORY:

Codes, 1942, § 434-09; Laws, 1962, ch. 281, § 9, eff from and after passage (approved March 20, 1962).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian &amp; Ward §§ 108, 109.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Form 286 (order to show cause why income from incompetent's estate should not be

applied toward support of relative); Forms 303, 304 (order authorizing expenditure for support of incompetent's dependents).

§ 93-13-265. Procedure for restoration.

When any person for whom a conservator has been appointed, as set out above, is afterwards restored in mind or body, the procedure for his restoration shall be on petition for appropriate hearing by the court and decree thereof.

HISTORY:
Codes, 1942, § 434-08; Laws, 1962, ch. 281, § 8, eff from and after passage (approved March 20, 1962).

Cross References —
Procedure for restoration to reason and discharge of guardian of person for whom guardian has been appointed or who has been found in need of mental treatment, see § 93-13-151.

JUDICIAL DECISIONS

1. Appropriateness of conservatorship.
Conservatorship was appropriate for the child's estate because a guardianship of a minor was terminated when the ward reached the age of 21, Miss. Code Ann. § 93-13-75, while a conservatorship could only be terminated if the person was restored in mind and body; in light of the unfortunate reality that the child would most likely not recover from her severe injuries, a conservatorship was appropriate. In re Brantley v. Brantley, 865 So. 2d 1126, 2004 Miss. LEXIS 184 (Miss. 2004).

§ 93-13-267. Resignation or discharge of conservator.

A conservator may resign or be discharged in the same manner as a guardian of a minor and may also be discharged by the appointing court when it appears that the conservatorship is no longer necessary.

HISTORY:
Codes, 1942, § 434-07; Laws, 1962, ch. 281, § 7, eff from and after passage (approved March 20, 1962).

Cross References —
Resignation or removal of guardians generally, see §§ 93-13-23, 93-13-25.

Termination of guardianship generally, see § 93-13-75.

JUDICIAL DECISIONS

1. In general.
Because a ward had a history of dissipating his estate and the monies that were allotted to him for monthly living expenses, and recently had criminal legal troubles involving drug charges, a chancellor did not err in refusing to terminate the conservatorship over a ward Campbell v. Conservatorship of Campbell, 5 So. 3d 470, 2008 Miss. App. LEXIS 610 (Miss. Ct. App. 2008).

Chancellor may allow third party, who is substantially involved with ward, to file petition seeking removal of present conservator and appointment of third party to succeed conservator; if petition is granted, present conservator is entitled to appeal with supersedeas without bond. Conservatorship of Harris v. King, 480 So. 2d 1131, 1985 Miss. LEXIS 2371 (Miss. 1985).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Guardian &amp; Ward §§ 79 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Guardian and Ward, Forms 211 et seq. (resignation of guardian); Forms 221 et seq. (removal of guardian); Forms 241 et seq. (discharge of guardian).

CJS.

39 C.J.S., Guardian and Ward §§ 45, 46.

JOINDER OF PARTIES IN SUITS INVOLVING WARDS

Sec.
93-13-281. Joinder of parties in suits involving wards.

§ 93-13-281. Joinder of parties in suits involving wards.

In all proceedings involving a ward and brought under Chapter 13, Title 93, Mississippi Code of 1972, except as hereinafter provided, the proceedings shall join as defendants the parents or parent of the ward then living, or if neither be living, two of his adult kin within the third degree computed according to the civil law. When such petition shall be filed, the clerk shall issue process as in other suits to make such person or persons parties defendants, which process shall be executed and returned as in other cases. The clerk shall make publication for nonresident defendants as required by law. Any person so made a party, or any other relative or friend of the ward, may appear and resist the application.

In cases where a ward has been adopted by decree of court, the adoptive parent or parents, or the next of kin of the adoptive parent or parents, as the case may be, shall be joined as defendants in lieu of the natural parents or the next of kin of the natural parents, as herein provided. Where the custody and control of a ward has been by decree of court awarded to one of the natural parents, it shall be sufficient herein to join as defendant only the parent to whom the custody and control has been awarded.

In case there be no adult relations within said third degree, the court may, in its discretion, designate a guardian ad litem who shall be required to answer the said petition for and on behalf of said ward within a time fixed by the court.

Process need not be served hereunder, however, if the parent or parents then living, or if they both be not living if any two (2) of his adult kin within the third degree computed according to the civil law, shall unite with the guardian in his petition. If the ward has no parent then living and no kindred within the prescribed degree whose place of residence is known to him or his next friend, it shall not be necessary to make any person defendant thereto.

In cases where a ward has been adopted by decree of court, the adoptive parent or parents, or the next of kin of the adoptive parent or parents, as the case may be, may unite with the guardian in his petition in lieu of the natural parents as herein provided. Where the custody and control of a ward has been by decree of court awarded to one of the natural parents or adopted parents, as the case may be, to the exclusion of the other, it shall be sufficient herein for only the parent to whom the custody and control has been awarded to unite with the guardian in his petition as herein provided.

Provided, however, in all proceedings involving a ward who is married, in lieu of the foregoing provisions, there may be joined as defendants the spouse of the ward and one (1) other adult kin within the third degree computed according to the civil law if the spouse is at least twenty-one (21) years of age or the spouse and two (2) adult kin within the third degree computed according to the civil law if the spouse is not at least twenty-one (21) years of age or the said spouse and kin may unite with the ward in his petition.

HISTORY:

Codes, 1942, § 399.5; Laws, 1972, ch. 408, § 11; Laws, 1978, ch. 456, § 1, eff from and after June 1, 1978.

Cross References —

Lease of gas, oil and other mineral rights by or on behalf of ward, see § 93-13-43.

Joinder of parties named in this section in petition to sell interest of ward in real property without appointment of guardian, see § 93-13-217.

JUDICIAL DECISIONS

1. In general.

Conservator admitted that she did not serve any of the ward's relatives, and without complying with the notice requirement, the grandchildren could never have had any reason to know or object to the proceedings; Miss. Code Ann. § 93-13-281 was intended to prevent a claimant from sleeping on enforcing his rights, not to prevent a claimant from bringing suit for something of which he was not aware, and thus there could be no application of the status of limitations when the grandchildren were not aware that the sale had taken place and the decrees purportedly authorizing the conveyance of real property were not made in conformity with law. Russell v. Allen (In re Allen), 962 So. 2d 737, 2007 Miss. App. LEXIS 519 (Miss. Ct. App. 2007).

The putative father of two minor children was not entitled to notice of a proposed settlement of claims for personal injuries suffered by the children where he had never been recognized by law as their father and did not live with or support the children. In re Hemphill-Weathers v. Farrish, 779 So. 2d 167, 2001 Miss. App. LEXIS 25 (Miss. Ct. App. 2001).

Adult relative of individual for whom conservator has been appointed who is given notice of conservatorship proceedings and made party to proceedings must be granted right to participate in proceedings. Anthony v. National Bank of Commerce, 468 So. 2d 41, 1985 Miss. LEXIS 2033 (Miss. 1985).

RESEARCH REFERENCES

ALR.

Appealability of order with respect to motion for joinder of additional parties. 16 A.L.R.2d 1023.

Appealability of order sustaining demurrer, or its equivalent, to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action. 56 A.L.R.2d 1238.

Am. Jur.

39 Am. Jur. 2d, Guardian and Ward §§ 163, 165.

19 Am. Jur. Pl & Pr Forms (Rev), Parties, Forms 51 et seq. (joinder).

CJS.

39 C.J.S., Guardian and Ward § 260.

CHAPTER 14.

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

Article 1. General provisions. 93-14-101
Article 2. Jurisdiction. 93-14-201
Article 3. Transfer of Guardianship or Conservatorship. 93-14-301
Article 4. Registration and recognition of orders from other states. 93-14-401
Article 5. Miscellaneous Provisions. 93-14-501

ARTICLE 1.

GENERAL PROVISIONS.

Sec.
93-14-101. Short title.
93-14-102. Definitions.
93-14-103. International application of chapter.
93-14-104. Communication between courts.
93-14-105. Cooperation between courts.
93-14-106. Taking testimony in another state.

§ 93-14-101. Short title.

This chapter may be cited as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Editor's Notes —

Section 93-14-504 makes this chapter applicable to guardianship and protective proceedings begun on or after July 1, 2014, and this article applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

Comparable Laws from other States —

Alabama: Code of Ala. §§ 26-2B-101 et seq.
Alaska: Alaska Stat. § 13.27.010 et seq.
Arizona: A.R.S. 14-12101 et seq.
Arkansas: A.C.A. § 28-74-101 et seq.
Colorado: C.R.S. 15-14.5-101 et seq.
Delaware: 12 Del. C. § 39A-101 et seq.
District of Columbia: D.C. Code § 21-2401.01 et seq.
Hawaii: HRS § 551G-1 et seq.
Idaho: Idaho Code § 15-13-101 et seq.
Illinois: 755 ILCS 8/101 et seq.
Indiana: Burns Ind. Code Ann. § 29-3.5-1-1 et seq.
Iowa: Iowa Code § 633.700 et seq.
Kansas: KRS § 387.810 et seq.
Maine: 18-A M.R.S. § 5-511 et seq.
Maryland: Md. ESTATES AND TRUSTS Code Ann. § 13.5-101 et seq.
Minnesota: Minn. Stat. § 524.5-601 et seq.
Missouri: § 475.501 R.S.Mo. et seq.
Montana: Mont. Code Anno. § 72-5-601 et seq.
Nebraska: R.R.S. Neb. § 30-3901 et seq.
Nevada: Nev. Rev. Stat. Ann. § 159.1991 et seq.
New Mexico: N.M. Stat. Ann. § 45-5A-101 et seq.
New York: NY CLS Men Hyg § 83.01 et seq.
North Dakota: N.D. Cent. Code § 28-35-01 et seq.
Oklahoma: 30 Okl. St. § 3-301 et seq.
Oregon: ORS § 125.800 et seq.
Pennsylvania: 20 Pa.C.S. § 59 et seq.
South Dakota: S.D. Codified Laws § 29A-5A-101 et seq.
Tennessee: Tenn. Code Ann. § 34-8-101 et seq.
Utah: Utah Code Ann. § 75-5b-101 et seq.
Vermont: 14 V.S.A. § 3151 et seq.
Virginia: Va. Code Ann. § 64.2-2100 et seq.

Washington: Rev. Code Wash. (ARCW) § 11.90.010 et seq.

West Virginia: W. Va. Code § 44C-1-1 et seq.

Wyoming: Wyo. Stat. § 3-8-101 et seq.

§ 93-14-102. Definitions.

In this chapter:

(1) "Adult" means an individual who has attained eighteen (18) years of age.

(2) "Conservator" means a person appointed by the court to administer the property of an adult, including a person appointed under Section 93-13-251 et seq.

(3) "Guardian" means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under Section 93-13-111 and Sections 93-13-121 through 93-13-135.

(4) "Guardianship order" means an order appointing a guardian.

(5) "Guardianship proceeding" means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.

(6) "Incapacitated person" means an adult for whom a guardian has been appointed.

(7) "Party" means the respondent, petitioner, guardian, conservator, or any other person allowed by the court to participate in a guardianship or protective proceeding.

(8) "Person," except in the term incapacitated person or protected person, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(9) "Protected person" means an adult for whom a protective order has been issued.

(10) "Protective order" means an order appointing a conservator or other order related to management of an adult's property.

(11) "Protective proceeding" means a judicial proceeding in which a protective order is sought or has been issued.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Respondent" means an adult for whom a protective order or the appointment of a guardian is sought.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

Article 1 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

§ 93-14-103. International application of chapter.

A court of this state may treat a foreign country as if it were a state for the purpose of applying this article and Articles 2, 3, and 5.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Article 1 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

§ 93-14-104. Communication between courts.

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter. The court may allow the parties to participate in the communication. Except as otherwise provided in subsection (b), the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.

(b) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

Article 1 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

§ 93-14-105. Cooperation between courts.

(a) In a guardianship or protective proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:

(1) Hold an evidentiary hearing;

(2) Order a person in that state to produce evidence or give testimony pursuant to procedures of that state;

(3) Order that an evaluation or assessment be made of the respondent;

(4) Order any appropriate investigation of a person involved in a proceeding;

(5) Forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph (1) or any other proceeding, any evidence otherwise produced under paragraph (2), and any evaluation or assessment prepared in compliance with an order under paragraph (3) or (4);

(6) Issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the incapacitated or protected person;

(7) Issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as defined in 45 CFR Section 164.504.

(b) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (a), a court of this state has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

Article 1 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

§ 93-14-106. Taking testimony in another state.

(a) In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(b) In a guardianship or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

Article 1 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

ARTICLE 2.

JURISDICTION.

Sec.

93-14-201. Definitions; significant connection factors.
93-14-202. Exclusive basis.
93-14-203. Jurisdiction.
93-14-204. Special jurisdiction.
93-14-205. Exclusive and continuing jurisdiction.
93-14-206. Appropriate forum.
93-14-207. Jurisdiction declined by reason of conduct.
93-14-208. Notice of proceeding.
93-14-209. Proceedings in more than one state.

§ 93-14-201. Definitions; significant connection factors.

(a) In this article:

(1) "Emergency" means a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf.

(2) "Home state" means the state in which the respondent was physically present, including any period of temporary absence, for at least six (6) consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six (6) consecutive months ending within the six (6) months prior to the filing of the petition.

(3) "Significant-connection state" means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(b) In determining under Section 93-14-203 and Section 93-14-301(e) whether a respondent has a significant connection with a particular state, the court shall consider:

(1) The location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;

(2) The length of time the respondent at any time was physically present in the state and the duration of any absence;

(3) The location of the respondent's property; and

(4) The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-202. Exclusive basis.

This article provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-203. Jurisdiction.

A court of this state has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

(1) This state is the respondent's home state;

(2) On the date the petition is filed, this state is a significant-connection state and:

(A) The respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

(B) The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:

(i) A petition for an appointment or order is not filed in the respondent's home state;

(ii) An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and

(iii) The court in this state concludes that it is an appropriate forum under the factors set forth in Section 93-14-206;

(3) This state does not have jurisdiction under either paragraph (1) or (2), the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the Constitutions of this state and the United States; or

(4) The requirements for special jurisdiction under Section 93-14-204 are met.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-204. Special jurisdiction.

(a) A court of this state lacking jurisdiction under Section 93-14-203(1) through (3) has special jurisdiction to do any of the following:

(1) Appoint a guardian in an emergency for a term not exceeding ninety (90) days for a respondent who is physically present in this state;.

(2) Issue a protective order with respect to real or tangible personal property located in this state;

(3) Appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to Section 93-14-301.

(b) If a petition for the appointment of a guardian in an emergency is brought in this state and this state was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-205. Exclusive and continuing jurisdiction.

Except as otherwise provided in Section 93-14-204, a court that has appointed a guardian or issued a protective order consistent with this chapter has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-206. Appropriate forum.

(a) A court of this state having jurisdiction under Section 93-14-203 to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(b) If a court of this state declines to exercise its jurisdiction under subsection (a), it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

(c) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

(1) Any expressed preference of the respondent;

(2) Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;

(3) The length of time the respondent was physically present in or was a legal resident of this or another state;

(4) The distance of the respondent from the court in each state;

(5) The financial circumstances of the respondent's estate;

(6) The nature and location of the evidence;

(7) The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

(8) The familiarity of the court of each state with the facts and issues in the proceeding; and

(9) If an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-207. Jurisdiction declined by reason of conduct.

(a) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

(1) Decline to exercise jurisdiction;

(2) Exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or

(3) Continue to exercise jurisdiction after considering:

(A) The extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(B) Whether it is a more appropriate forum than the court of any other state under the factors set forth in Section 93-14-206(c); and

(C) Whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of Section 93-14-203.

(b) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this chapter.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-208. Notice of proceeding.

If a petition for the appointment of a guardian or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice must be given in the same manner as notice is required to be given in this state.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-209. Proceedings in more than one state.

Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in this state under Section 93-14-204(a)(1) or (a)(2), if a petition for the appointment of a guardian or issuance of a protective order is filed in this state and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(1) If the court in this state has jurisdiction under Section 93-14-203, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to Section 93-14-203 before the appointment or issuance of the order.

(2) If the court in this state does not have jurisdiction under Section 93-14-203, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this state shall dismiss the petition unless the court in the other state determines that the court in this state is a more appropriate forum.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

ARTICLE 3.

TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP.

Sec.
93-14-301. Transfer of guardianship or conservatorship.
93-14-302. Accepting guardianship or conservatorship transferred from another state.

§ 93-14-301. Transfer of guardianship or conservatorship.

(a) A guardian or conservator appointed in this state may petition the court to transfer the guardianship or conservatorship to another state.

(b) Notice of a petition under subsection (a) must be given to the persons that would be entitled to notice of a petition in this state for the appointment of a guardian or conservator.

(c) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subsection (a).

(d) The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(1) The incapacitated person is physically present in or is reasonably expected to move permanently to the other state;

(2) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the incapacitated person; and

(3) Plans for care and services for the incapacitated person in the other state are reasonable and sufficient.

(e) The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(1) The protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors in Section 93-14-201(b);

(2) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(3) Adequate arrangements will be made for management of the protected person's property.

(f) The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(1) A provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to Section 93-14-302; and

(2) The documents required to terminate a guardianship or conservatorship in this state.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Editor's Notes —

Section 93-14-504 makes this article applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-302. Accepting guardianship or conservatorship transferred from another state.

(a) To confirm transfer of a guardianship or conservatorship transferred to this state under provisions similar to Section 93-14-301, the guardian or conservator must petition the court in this state to accept the guardianship or conservatorship. The petition must include a certified copy of the other state's provisional order of transfer.

(b) Notice of a petition under subsection (a) must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(c) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subsection (a).

(d) The court shall issue an order provisionally granting a petition filed under subsection (a) unless:

(1) An objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(2) The guardian or conservator is ineligible for appointment in this state.

(e) The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to Section 93-14-301 transferring the proceeding to this state.

(f) Not later than ninety (90) days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

(g) In granting a petition under this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

(h) The denial by a court of this state of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in this state under Sections 93-13-251 through 93-13-267, Section 93-13-111, Sections 93-13-121 through 93-13-135 and Section 35-5-1 et seq. if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

Article 3 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

ARTICLE 4.

REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES.

Sec.
93-14-401. Registration of guardianship orders.
93-14-402. Registration of protective orders.
93-14-403. Effect of registration.

§ 93-14-401. Registration of guardianship orders.

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Editor's Notes —
Section 93-14-504 makes this article applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued.

Cross References —
Article 4 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

§ 93-14-402. Registration of protective orders.

If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Article 4 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

§ 93-14-403. Effect of registration.

(a) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this chapter and other law of this state to enforce a registered order.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —
Article 4 is applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued, see § 93-14-504.

ARTICLE 5.

MISCELLANEOUS PROVISIONS.

Sec.
93-14-501. Uniformity of application and construction.
93-14-502. Relation to Electronic Signatures in Global and National Commerce Act.
93-14-503. Reserved.
93-14-504. Transitional provision.

§ 93-14-501. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Editor's Notes —
Section 93-14-504 makes this section applicable to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued.

Cross References —
Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-502. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 USCS, Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 USCS Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 USCS Section 7003(b).

HISTORY:
Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Editor's Notes —
Section 93-14-504 makes this section applicable to proceedings begun before July 1, 2014,

regardless of whether a guardianship or protective order has been issued.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

§ 93-14-503. [Reserved].

[Reserved for future codification purposes.]

§ 93-14-504. Transitional provision.

(a) This chapter applies to guardianship and protective proceedings begun on or after July 1, 2014.

(b) Articles 1, 3 and 4 and Sections 93-14-501 and 93-14-502 apply to proceedings begun before July 1, 2014, regardless of whether a guardianship or protective order has been issued.

HISTORY:

Laws, 2014, ch. 384, § 1, eff from and after July 1, 2014.

Cross References —

Mississippi court may treat a foreign country as if it were a state for the purpose of applying Articles 1, 2, 3 and 5, see § 93-14-103.

CHAPTER 15.

MISSISSIPPI TERMINATION OF PARENTAL RIGHTS LAW

Sec.
93-15-1 through 93-15-11. Repealed.
93-15-101. Short title.
93-15-103. Definitions.
93-15-105. Jurisdiction and venue.
93-15-107. Commencement of proceedings; parties; summons.
93-15-109. Surrender of a child to the Department of Child Protection Services or a home.
93-15-111. Termination by written voluntary release.
93-15-113. Conduct of hearing for involuntary termination of parental rights; counsel for parent.
93-15-115. Involuntary termination when child in care and custody or under the supervision of the Department of Child Protection Services pursuant to youth court proceedings and reasonable efforts for reunification are required; standard of proof.
93-15-117. Involuntary termination when child in care and custody or under supervision of the Department of Child Protection Services pursuant to youth court proceedings and reasonable efforts for reunification are not required; standard of proof.
93-15-119. Involuntary termination in chancery court for reasons of abandonment, desertion, or parental unfitness to raise the child; standard of proof.
93-15-121. Grounds for termination.
93-15-123. Court discretion not to terminate.
93-15-125. Compliance with Indian Child Welfare Act.
93-15-127. Effect on another parent's rights.
93-15-129. Petitions involving sexual abuse or serious bodily injury treated as preference case.
93-15-131. Post-judgment proceedings.
93-15-133. Review by Supreme Court.

§§ 93-15-1 through 93-15-11. Repealed.

Repealed by Laws, 1980, ch. 485, § 5, eff from and after July 1, 1980.

§ 93-15-1. [Codes, 1942, § 1269-21; Laws, 1968, ch. 323, § 2, eff from and after July 1, 1968]

§ 93-15-3. [Codes, 1942, § 1269-22; Laws, 1968, ch. 323, § 3, eff from and after July 1, 1968]

§ 93-15-5. [Codes, 1942, § 1269-23; Laws, 1968, ch. 323, § 4, eff from and after July 1, 1968]

§ 93-15-7. [Codes, 1942, § 1269-24; Laws, 1968, ch. 323, § 5, eff from and after July 1, 1968]

§ 93-15-9. [Codes, 1942, § 1269-25; Laws, 1968, ch. 323, § 6, eff from and after July 1, 1968]

§ 93-15-11. [Codes, 1942, § 1269-26; Laws, 1968, ch. 323, § 7, eff from and after July 1, 1968]

Editor's Notes —

Former § 93-15-1 was entitled: Proceedings to terminate rights of parents who are unfit or have abandoned child-petition.

Former § 93-15-3 was entitled: Setting cause for hearing-service of process.

Former § 93-15-5 was entitled: Child, his legal guardian or persons having custody to be made defendant-guardian ad litem.

Former § 93-15-7 was entitled: Termination of parental rights.

Former § 93-15-9 was entitled: Placing child in custody of suitable person, institution, or agency-adoption.

Former § 93-15-11 was entitled: Appeal.

§ 93-15-101. Short title.

This chapter shall be known and may be cited as the "Mississippi Termination of Parental Rights Law."

HISTORY:

Laws, 1980, ch. 485, § 1; Laws, 2016, ch. 431, § 1, eff from and after passage (approved Apr. 18, 2016).

Cross References —

Prohibition of one having had parental rights terminated under this chapter from working, volunteering, or residing in family child care home, see § 43-20-57.

Authority of courts to impose fee for any court-ordered home study relating to child custody matters, see § 93-17-12.

JUDICIAL DECISIONS

ANALYSIS

1. Jurisdiction.
2. Termination improper.

1. Jurisdiction.

Although the chancellor initially granted the mother's motion to terminate the father's parental rights, the Hinds County Chancery Court did not have proper subject matter jurisdiction to do so because the Scott County Chancery Court entered the initial order of child custody; when presented with information regarding the jurisdictional problem, the chancellor immediately corrected the defect by setting aside his previous orders and instructing that any further proceedings regarding the case be brought before the Scott County Chancery Court, pursuant to Miss. Code Ann. § 93-5-23. C.M. v. R.D.H., 947 So. 2d 1023, 2007 Miss. App. LEXIS 29 (Miss. Ct. App. 2007).

2. Termination improper.

Termination of the mother's parental rights was inappropriate under the Termination of Rights of Unfit Parents Law because the county's evidence did not overcome the strong presumption of retaining parental rights in the mother's favor; there was a failure to show an extreme and deep-seated antipathy by the child toward the parent or any other substantial erosion of the relationship between the two as required pursuant to Miss. Code Ann. [former] § 93-15-103(3)(f). In re V.M.S., 938 So. 2d 829, 2006 Miss. LEXIS 530 (Miss. 2006).

RESEARCH REFERENCES

ALR.

Rights of unwed father to obstruct adoption of his child by withholding consent. 61 A.L.R.5th 151.

Natural parent's indigence resulting from unemployment or underemployment as precluding finding that failure to support child waived requirement of consent to adoption. 83 A.L.R.5th 375.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

1989 Mississippi Supreme Court Review: Termination of Parental Rights. 59 Miss. L. J. 896, Winter, 1989.

Practice References.

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-15-103. Definitions.

For purposes of this chapter, unless a different meaning is plainly expressed by the context, the following definitions apply:

(a) "Abandonment" means any conduct by the parent, whether consisting of a single incident or actions over an extended period of time, that evinces a settled purpose to relinquish all parental claims and responsibilities to the child. Abandonment may be established by showing:

(i) For a child who is under three (3) years of age on the date that the petition for termination of parental rights was filed, that the parent has deliberately made no contact with the child for six (6) months;

(ii) For a child who is three (3) years of age or older on the date that the petition for termination of parental rights was filed, that the parent has deliberately made no contact with the child for at least one (1) year; or

(iii) If the child is under six (6) years of age, that the parent has exposed the child in any highway, street, field, outhouse, or elsewhere with the intent to wholly abandon the child.

(b) "Child" means a person under eighteen (18) years of age.

(c) "Court" means the court having jurisdiction under the Mississippi Termination of Parental Rights Law.

(d) "Desertion" means:

(i) Any conduct by the parent over an extended period of time that demonstrates a willful neglect or refusal to provide for the support and maintenance of the child; or

(ii) That the parent has not demonstrated, within a reasonable period of time after the birth of the child, a full commitment to the responsibilities of parenthood.

(e) "Home" means any charitable or religious corporation or organization or the superintendent or head of the charitable or religious corporation or organization organized under the laws of the State of Mississippi, any public authority to which has been granted the power to provide care for or procure the adoption of children by any Mississippi statute, and any association or institution engaged in placing children for adoption on July 1, 1955.

(f) "Interested person" means any person related to the child by consanguinity or affinity, a custodian or legal guardian of the child, a guardian ad litem representing the child's best interests, or an attorney representing the child's preferences under Rule 13 of the Uniform Rules of Youth Court Practice.

(g) "Minor parent" means any parent under twenty-one (21) years of age.

(h) "Parent" means a natural or adoptive parent of the child.

(i) "Permanency outcome" means achieving a permanent or long-term custodial arrangement for the custody and care of the child that ends the supervision of the Department of Child Protection Services.

(j) "Qualified health professional" means a licensed or certified professional who is engaged in the delivery of health services and who meets all applicable federal or state requirements to provide professional services.

(k) "Qualified mental health professional" means a person with at least a master's degree in mental health or a related field and who has either a professional license or a Department of Mental Health credential as a mental health therapist.

(*l*) "Reunification" means the restoration of the parent's custodial rights in providing for the safety and welfare of the child which ends the supervision of the Department of Child Protection Services.

HISTORY:

Laws, 2016, ch. 431, § 3; Laws, 2017, ch. 372, § 1, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

A former § 93-15-103 [Laws, 1980, ch. 485, § 2; Laws, 1993, ch. 475, § 1; Laws, 1998, ch. 516, § 10; Laws, 2003, ch. 359, § 2, eff from and after July 1, 2003; Repealed by Laws, 2016, ch. 431, § 23, effective April 18, 2016] provided factors that justify adoption, grounds for termination of parental rights, and alternatives to the termination of parental rights. For present similar provisions, see §§ 93-15-115 through 93-15-121.

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, substituted "Department of Child Protection Services" for "Department of Human Services" in (i) and (*l*).

Cross References —

Authority of courts to impose fee for any court-ordered home study relating to child custody matters, see § 93-17-12.

RESEARCH REFERENCES

ALR.

Physical abuse of child by parent as ground for termination of parent's right to child. 53 A.L.R.3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child. 58 A.L.R.3d 1074.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 A.L.R.3d 417.

Standing of foster parent to seek termination of rights of foster child's natural parents. 21 A.L.R.4th 535.

Right of parent to regain custody of child after temporary conditional relinquishment of custody. 35 A.L.R.4th 61.

Visitation rights of homosexual or lesbian parent. 36 A.L.R.4th 997.

Attorneys' fee awards in parent-nonparent child custody case. 45 A.L.R.4th 212.

Child custody and visitation rights of person infected with AIDS. 86 A.L.R.4th 211.

Parent's mental deficiency as factor in termination of parental rights. 1 A.L.R.5th 469.

Parent's use of drugs as factor in award of custody of children, visitation rights, or termination of parental rights. 20 A.L.R.5th 534.

Mental health of contesting parent as factor in award of child custody. 53 A.L.R.5th 375.

Sufficiency of evidence to establish parent's knowledge or allowance of child's sexual abuse by another under statute permitting termination of parental rights for "allowing" or "knowingly allowing" such abuse to occur. 53 A.L.R.5th 499.

Parents' mental illness or mental deficiency as ground for termination of parental rights – Constitutional issues. 110 A.L.R.5th 579.

Parents' mental illness or mental deficiency as ground for termination of parental rights – General considerations. 113 A.L.R.5th 349.

Parents' mental illness or mental deficiency as ground for termination of parental rights – Effect on parenting ability and parental rights. 116 A.L.R.5th 559.

Parents' mental illness or mental deficiency as ground for termination of parental rights – Best interests analysis. 117 A.L.R.5th 349.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Issues concerning guardian ad litem and counsel. 118 A.L.R.5th 561.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Applicability of Americans With Disabilities Act. 119 A.L.R.5th 351.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Evidentiary issues. 122 A.L.R.5th 385.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Issues concerning rehabilitative and reunification services. 12 A.L.R.6th 417.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 69-155.

59 Am. Jur. 2d, Parent and Child §§ 40, 41.

14 Am. Jur. Pl & Pr Forms (Rev), Incompetent Persons, Form 322.3 (complaint, petition, or declaration – to terminate parental rights of incompetent parent – by state department of human services and foster parents).

7 Am. Jur. Legal Forms 2d, Desertion and Nonsupport §§ 89:1 et seq.

CJS.

2 C.J.S., Adoption of Persons §§ 48 et seq.

67A C.J.S., Parent §§ 31 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

1989 Mississippi Supreme Court Review: Termination of Parental Rights. 59 Miss. L. J. 896, Winter, 1989.

§ 93-15-105. Jurisdiction and venue.

(1) The chancery court has original exclusive jurisdiction over all termination of parental rights proceedings except that a county court, when sitting as a youth court with jurisdiction of a child in an abuse or neglect proceeding, has original exclusive jurisdiction to hear a petition for termination of parental rights against a parent of that child.

(2)(a) Venue in a county court sitting as a youth court for termination of parental rights proceedings shall be in the county in which the court has jurisdiction of the child in the abuse or neglect proceedings. Venue in chancery court for termination of parental rights proceedings shall be proper either in the county in which the defendant resides, the child resides or in the county where an agency or institution having custody of the child is located.

(b) Transfers of venue shall be governed by the Mississippi Rules of Civil Procedure.

HISTORY:

Laws, 2016, ch. 431, § 4, eff from and after passage (approved Apr. 18, 2016).

Editor's Notes —

A former § 93-15-105 [Laws, 1980, ch. 485, § 3; Laws, 1996, ch. 396, § 1; Laws, 2003, ch. 359, § 1; Laws, 2005, ch. 426, § 1, eff from and after July 1, 2005; Repealed by Laws, 2016, ch. 431, § 23, effective April 18, 2016] related to the petition for termination of parental rights, process, hearing, determination of the rights of the father of a child born out of wedlock in certain cases, and the waiver of the 30-day service in adoptions of children from foreign countries. For present similar provisions, see § 93-15-107.

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Cross References —

Petition for determination of rights in proposed adoption of natural child, see § 93-17-6.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. Jurisdiction.

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. Jurisdiction.

Termination of the mother's parental rights was appropriate pursuant to Miss. Code Ann. § 43-15-13(3) and Miss. Code Ann. § 93-15-105(1) because the Department of Human Services (DHS) had the statutory duty to file for termination of the mother's parental rights even though the mother was still in the legal custody of the DHS. In the Interest of C.B.Y., 936 So. 2d 974, 2006 Miss. App. LEXIS 617 (Miss. Ct. App. 2006).

Chancery court which granted the custody of children in a divorce proceeding had, as between the same parties, continuing exclusive jurisdiction to modify the decree upon subsequent changed circumstances; therefore, the language in Miss. Code Ann. § 93-15-105 allowing a litigant to file an action for contempt and for termination of parental rights in chancery court where the child resided applied in situations where there was not a trial court already having previous continuing exclusive jurisdiction. Tollison v. Tollison, 841 So. 2d 1062, 2003 Miss. LEXIS 95 (Miss. 2003).

A chancery court may not exercise jurisdiction over an abused or neglected child or any proceeding pertaining thereto over which the youth court may exercise jurisdiction if there has been a prior proceeding in the youth court concerning that same child. K. M. K. v. S. L. M., 775 So. 2d 115, 2000 Miss. LEXIS 278 (Miss. 2000).

OPINIONS OF THE ATTORNEY GENERAL

When the Department of Human Services (DHS) calls an expert witness in a parental termination case, the expense incurred would be the responsibility of the department; however, if an expert witness is sought on the motion of the guardian ad litem or the court, and the court so orders, any expert witness fee or expense would be borne by the county, not by DHS. .

RESEARCH REFERENCES

ALR.

Natural parent's parental rights as affected by consent to child's adoption by other natural parent. 37 A.L.R.4th 724.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 69-155.

59 Am. Jur. 2d, Parent and Child §§ 42, 43.

19 Am. Jur. Pl & Pr Forms (Rev), Parent and Child, Form 5 (petition or application by mother to declare child free from father's custody and control because of abandonment); Form 32 (petition or application by county agency to declare child ward of court); Form 35 (petition or application of minor suing by guardian ad litem to be declared free from father's custody because of father's cruel treatment); Form 38 (affidavit by mother for constructive service of father who abandoned minor child).

13A Am. Jur. Legal Forms 2d, Parent and Child §§ 191:19 et seq. (agreements to surrender custody of child).

CJS.

2 C.J.S., Adoption of Persons §§ 48 et seq.

67A C.J.S., Parent and Child §§ 31 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81, 82. 52 Miss. L. J. 105, March, 1982.

§ 93-15-107. Commencement of proceedings; parties; summons.

(1)(a) Involuntary termination of parental rights proceedings are commenced upon the filing of a petition under this chapter. The petition may be filed by any interested person, or any agency, institution or person holding custody of the child. The simultaneous filing of a petition for adoption is not a prerequisite for filing a petition under this chapter.

(b) The proceeding shall be triable, either in term time or vacation, thirty (30) days after personal service of process to any necessary party or, for a necessary party whose address is unknown after diligent search, thirty (30) days after the date of the first publication of service of process by publication that complies with the Mississippi Rules of Civil Procedure.

(c) Necessary parties to a termination of parental rights action shall include the mother of the child, the legal father of the child, the putative father of the child when known, and any agency, institution or person holding custody of the child. The absence of a necessary party who has been properly served does not preclude the court from conducting the hearing or rendering a final judgment.

(d) A guardian ad litem shall be appointed to protect the best interest of the child, except that the court, in its discretion, may waive this requirement when a parent executes a written voluntary release to terminate parental rights. The guardian ad litem fees shall be determined and assessed in the discretion of the court.

(2) Voluntary termination of parental rights by written voluntary release is governed by Section 93-15-111.

(3) In all cases involving termination of parental rights, a minor parent shall be served with process as an adult.

(4) The court may waive service of process if an adoptive child was born in a foreign country, put up for adoption in the birth country, and has been legally admitted into this country.

HISTORY:

Laws, 2016, ch. 431, § 5; Laws, 2017, ch. 372, § 2, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

A former § 93-15-107 [Laws, 1980, ch. 485, § 4 subd (1); Laws, 1998, ch. 516, § 11, eff from and after July 1, 1998; Repealed by Laws, 2016, ch. 431, § 23, effective April 18, 2016] related to termination of parental rights proceedings, necessary parties, the initiation of proceedings, and payment of costs. See above section for present similar provisions.

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, in (1)(a), added "Involuntary" at the beginning, and inserted "or person" and made a related change in the second sentence; deleted "nonresident" preceding "necessary party whose address" in (1)(b); in (1)(c), substituted "and any agency, institution or person holding custody of the child" for "any agency or institution holding custody of the child, and the child" in the first sentence, and inserted "who has been properly served" in the last sentence; in (1)(d), added the exception in the first sentence; and added (2) and redesignated former (2) and (3) as (3) and (4).

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1.-10. [Reserved for future use.]

II. Under Former Law.

11. In general.
12. Guardian ad litem.
13. Costs.

I. Under Current Law.

1.-10. [Reserved for future use.]

II. Under Former Law.

11. In general.

In situation where adoption necessarily meant that natural father's parental rights would be terminated, appointment of guardian ad litem was made mandatory by statute governing termination of parental rights. E.M.C. v. S.V.M., 695 So. 2d 576, 1997 Miss. LEXIS 236 (Miss. 1997).

Appointment of guardian ad litem is mandatory in termination of parental rights proceedings, and guardian ad litem should be someone who is unbiased and independent of natural parent to insure protection for the child's best interests. E.M.C. v. S.V.M., 695 So. 2d 576, 1997 Miss. LEXIS 236 (Miss. 1997).

Failure to appoint guardian ad litem for child was reversible error, even though proceeding was referred to as adoption rather than for termination of parental rights, as complaint for adoption specifically alleged that natural father had abandoned child under statutory provision dealing with termination of parental rights for unfit parents; adoption and termination of parental rights proceedings were not separable under the circumstances and appointment of guardian ad litem was mandatory. E.M.C. v. S.V.M., 695 So. 2d 576, 1997 Miss. LEXIS 236 (Miss. 1997).

Miss Code § 93-15-107, which requires appointment of a guardian ad litem to protect the interest of a child in a termination of parental rights proceeding, is clearly mandatory and not permissive. Luttrell v. Kneisly, 427 So. 2d 1384, 1983 Miss. LEXIS 2500 (Miss. 1983).

The chancellor erred in terminating the parental rights of a mother in her children where the mother had not abandoned the children, there was no evidence that she was mentally unfit to rear and train them, and the state had failed to show by a preponderance of the evidence that she was morally or otherwise unfit to rear and train them; the parental rights of the father in the same children were improperly terminated by another chancellor who had conducted a hearing prior to the hearing concerning the mother's parental rights where the procedure of two hearings violated the requirement of § 93-15-7 [repealed] that all evidence be presented before the termination of parental rights. Millien v. State, 408 So. 2d 71, 1981 Miss. LEXIS 2468 (Miss. 1981).

Prior to statutory revision, an order terminating parental rights in four of five children would be reversed where, although a strong case was presented that the severely retarded mother was mentally unfit to rear the children, the proof was not sufficient to show that the father was mentally unfit for this task and where the proof showed that the parents had visited with the children while in foster care, loved the children, were concerned about their welfare and wanted custody of the children. Also, no justifiable reason was given for the arbitrary decision to terminate parental rights in the four youngest children but not in the oldest child. Reyer v. Harrison County Dep't of Public Welfare, 404 So. 2d 1023, 1981 Miss. LEXIS 2192 (Miss. 1981).

12. Guardian ad litem.

Chancellor erred in denying a mother's request to terminate the father's parental rights because, while the chancellor appointed a guardian ad litem (GAL) to represent the child's interests, the chancellor made no mention of the GAL's various findings and recommendations, the bulk of which favored terminating the father's parental rights, and erroneously believed that a pending adoption petition was necessary before termination could be considered. Farthing v. McGee, 158 So. 3d 1223, 2015 Miss. App. LEXIS 71 (Miss. Ct. App. 2015).

Father's argument that a guardian ad litem did not adequately perform her obligations, under Miss. Code Ann. § 93-15-107, was without merit because (1) the father had not shown that the guardian ad litem was incompetent or inadequately informed; (2) the father had not shown that the guardian ad litem acted other than in the best interests of the child; (3) the father failed to take advantage of his opportunities to have supplemental meetings with the guardian ad litem, evidencing a lack of desire to initiate a relationship with his child of tender years; and (4) there were no allegations that the child was not well cared for by the mother or that his health and welfare were lacking in any way. R.L. v. G.F., 973 So. 2d 322, 2008 Miss. App. LEXIS 50 (Miss. Ct. App. 2008).

In the proceeding upon the mother's petition to modify a prior joint custody order and terminate the father's parental rights, the chancellor erred in failing to appoint a guardian ad litem to represent the child's interests because Miss. Code Ann. § 93-15-107(1) clearly and unambiguously mandated that a guardian ad litem be appointed to protect the interest of a child in a termination of parental rights proceeding. Heffner v. Rensink, 938 So. 2d 917, 2006 Miss. App. LEXIS 708 (Miss. Ct. App. 2006).

Trial court erred in terminating father's parental rights by failing to state the reasons for not adopting the guardian as litem's recommendation Gunter v. Gray, 876 So. 2d 315, 2004 Miss. LEXIS 774 (Miss. 2004).

Termination of parental rights case was remanded for the guardian ad litem to conduct an investigation and make recommendations where the record as to the guardian ad litem's role in determining what was in the best interest of the children was lacking; there was nothing in the record to indicate that the guardian ever talked privately with the children, no independent report was presented to the trial court during the termination hearing or prior to the judge's decision, and the guardian did not testify at the hearing, but only limited himself to the cross-examination of other witnesses. D. J. L. v. Bolivar County Dep't of Human Servs., 824 So. 2d 617, 2002 Miss. LEXIS 258 (Miss. 2002).

A chancellor is not required to appoint a guardian ad litem to protect the interest of the child in an uncontested adoption proceeding which necessarily involves the termination of parental rights. J. C. v. In re R.Y., 797 So. 2d 209, 2001 Miss. LEXIS 47 (Miss. 2001).

The court vacated an order terminating parental rights and remanded the matter for further proceedings where the guardian ad litem appointed to represent the minor children failed to personally interview the children and offer an independent recommendation to the chancellor, where the sole reason the guardian ad litem did not personally interview the children was that he was informed by the therapist for one of the children and by the children's social worker that such contact would not be in the children's best interest. M. J. S. H. S. v. Yalobusha County Dep't of Human Servs., 782 So. 2d 737, 2001 Miss. LEXIS 85 (Miss. 2001).

13. Costs.

The court properly ordered the Department of Human Services and the natural parents of the children at issue to pay 60 percent and 40 percent, respectively, of the costs of a guardian ad litem and a special investigator in an action commenced by the natural mother's brother and his wife for termination of parental rights and adoption of the children, even though the action was dismissed on motion by the natural parents: (1) the likelihood of recovery from the plaintiffs was extremely remote in light of their finances, (2) the children were in the legal custody of the department, and (3) the natural father was on the verge of the receipt of a substantial sum of money as award for personal injuries received in past employment. Mississippi Dep't of Human Servs. v. W.A. (In re: K.M. J.), 758 So. 2d 402, 2000 Miss. LEXIS 61 (Miss. 2000).

It was not necessary to appoint a guardian ad litem in an adoption proceeding where the natural mother was killed in an automobile accident and the natural father surrendered his parental rights and consented to the adoption by separate instrument. S.R. v. P.L.H. (In re D.T.H.), 748 So. 2d 853, 1999 Miss. App. LEXIS 543 (Miss. Ct. App. 1999).

OPINIONS OF THE ATTORNEY GENERAL

When the Department of Human Services (DHS) calls an expert witness in a parental termination case, the expense incurred would be the responsibility of the department; however, if an expert witness is sought on the motion of the guardian ad litem or the court, and the court so orders, any expert witness fee or expense would be borne by the county, not by DHS. .

RESEARCH REFERENCES

ALR.

Attorneys' fee awards in parent-nonparent child custody case. 45 A.L.R.4th 212.

Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights. 92 A.L.R.5th 379.

Am. Jur.

59 Am. Jur. 2d, Parent and Child §§ 42, 43.

CJS.

67A C.J.S., Parent §§ 31 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-15-109. Surrender of a child to the Department of Child Protection Services or a home.

(1) A parent may accomplish the surrender of a child to the Department of Child Protection Services or to a home by:

(a) Delivering the child to the Department of Child Protection Services or the home;

(b) Executing an affidavit of a written agreement that names the child and which vests in the Department of Child Protection Services or the home the exclusive custody, care and control of the child; and

(c) Executing a written voluntary release as set forth in Section 93-15-111(2).

(2) If a child has been surrendered to a home or other agency operating under the laws of another state, and the child is delivered into the custody of a petitioner or home within this state, the execution of consent by the nonresident home or agency shall be sufficient.

(3) Nothing in this section prohibits the delivery and surrender of a child to an emergency medical services provider pursuant to Sections 43-15-201 through 43-15-209.

HISTORY:

Laws, 2016, ch. 431, § 6, eff from and after passage (approved Apr. 18, 2016); Laws, 2017, ch. 372, § 3, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

A former § 93-15-109 [Laws, 1980, ch. 485, § 4(2); Laws, 1984, ch. 318; Laws, 1996, ch. 396, § 2, eff from and after July 1, 1996; Repealed by Laws, 2016, ch. 431, § 23, effective April 18, 2016] provided that if there is clear and convincing proof that the parent or parents are within the grounds requiring termination of parental rights, the court could proceed to terminate the rights of the parent or parents. For present provisions relating to the standard of proof of grounds for termination, see §§ 93-15-115 through 93-15-119.

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, substituted "Department of Child Protection Services" for "Department of Human Services" everywhere it appears.

Cross References —

Effect on adoption proceedings of termination of parental rights, see § 93-17-7.

Authority of courts to impose fee for any court-ordered home study relating to child custody matters, see § 93-17-12.

JUDICIAL DECISIONS

1. In general.

Even where a chancellor finds one or more grounds which justify termination of parental rights, nothing in the law requires the chancellor to do so; rather, Miss. Code Ann. § 93-15-109 provides that if the chancellor is satisfied by clear and convincing proof that grounds justifying termination of parental rights exist then the court may terminate all the parental rights of the parent or parents. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424, 2009 Miss. LEXIS 599 (Miss. 2009).

Where a father had been paying child support, he occasionally exercised visitation, and he expressed a desire to have a relationship with his child, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(b) based on a lack of clear and convincing evidence of abandonment. A.C.W. v. J.C.W., 957 So. 2d 1042, 2007 Miss. App. LEXIS 399 (Miss. Ct. App. 2007).

Where the clear and convincing evidence showed that a mother's parents were interfering with a father's visitation rights, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(f) based on the erosion of the parent/child relationship. A.C.W. v. J.C.W., 957 So. 2d 1042, 2007 Miss. App. LEXIS 399 (Miss. Ct. App. 2007).

Chancellor did not err in awarding custody of a child to a paternal aunt where there was ample evidence presented to show that the child's mother had led an unstable life, including the use of illegal narcotics, for an extended period of time and that her attention to the welfare of her child appeared to be of secondary interest to her. Loomis v. Bugg, 872 So. 2d 694, 2004 Miss. App. LEXIS 376 (Miss. Ct. App. 2004).

Termination of the mother's parental rights was appropriate because her ongoing behavior of choosing to remain on runaway status prevented her from maintaining a bond with the child; it was impossible to return the child to her custody when she avoided the Department of Human Services and the burden of proof under Miss. Code Ann. § 93-15-109 was met. In the Interest of C.B.Y., 936 So. 2d 974, 2006 Miss. App. LEXIS 617 (Miss. Ct. App. 2006).

Where, as a result of a felonious child abuse conviction, contact was disallowed between the father and the children while the father was incarcerated in the Penitentiary, the Youth Court was not obligated to hold a parental rights hearing because the father's parental rights were not terminated. F.L.W. v. State (In the Interest of V.L.W), 751 So. 2d 1033, 1999 Miss. LEXIS 390 (Miss. 1999).

Inheritance laws of Mississippi, where decedent's estate was located, rather than law of Louisiana, pursuant to which decedent's natural child was adopted, applied in determining whether child was wrongful death beneficiary. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

A chancellor was not manifestly wrong in refusing to terminate a father's parental rights, even though the father had killed the child's mother, where there was no abandonment of the child by her father and the father had made 5 $100 payments in support of his daughter. Veselits v. Cruthirds, 548 So. 2d 1312, 1989 Miss. LEXIS 430 (Miss. 1989).

The standard of proof in action to terminate parental rights, under statute, requires that the chancellor must be satisfied by all of the evidence that the proof is clear and convincing that the grounds for termination are present. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

That portion of § 93-15-109 allowing parental rights termination to be decreed based upon a preponderance of the evidence standard is deficient and unconstitutional, since the standard of proof in an action for termination of parental rights must be "clear and convincing" in accordance with a mandate of the United States Supreme Court. Natural Father v. United Methodist Children's Home, 418 So. 2d 807, 1982 Miss. LEXIS 2118 (Miss. 1982).

In an action regarding parental rights termination, the Mississippi Supreme Court would consider the question regarding the constitutionality of the standard of proof required by § 93-15-109 authorizing parental rights termination, despite the fact that such question was not raised at the trial level, where the basic issue involved the rights and destiny of small children. Natural Father v. United Methodist Children's Home, 418 So. 2d 807, 1982 Miss. LEXIS 2118 (Miss. 1982).

The chancellor erred in terminating the parental rights of a mother in her children where the mother had not abandoned the children, there was no evidence that she was mentally unfit to rear and train them, and the state had failed to show by a preponderance of the evidence that she was morally or otherwise unfit to rear and train them; the parental rights of the father in the same children were improperly terminated by another chancellor who had conducted a hearing prior to the hearing concerning the mother's parental rights where the procedure of two hearings violated the requirement of § 93-15-7 that all evidence be presented before the termination of parental rights. Millien v. State, 408 So. 2d 71, 1981 Miss. LEXIS 2468 (Miss. 1981).

OPINIONS OF THE ATTORNEY GENERAL

There is no statutory requirement for the appointment of counsel to an indigent parent in a termination of parental rights proceeding. 2005 Miss. Op. Att'y Gen. 461.

RESEARCH REFERENCES

ALR.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision. 59 A.L.R.3d 1337.

Natural parent's parental rights as affected by consent to child's adoption by other natural parent. 37 A.L.R.4th 724.

Parent's mental deficiency as factor in termination of parental rights. 1 A.L.R.5th 469.

Sufficiency of evidence to establish parent's knowledge or allowance of child's sexual abuse by another under statute permitting termination of parental rights for "allowing" or "knowingly allowing" such abuse to occur. 53 A.L.R.5th 499.

Am. Jur.

59 Am. Jur. 2d, Parent and Child §§ 40, 41, 45.

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 25 et seq. (proof of physical neglect – malnutrition and lack of adequate clothing); §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition); §§ 72 et seq. (proof of medical neglect – parent's refusal to consent to blood transfusion during surgery for alleviation of facial disfigurement).

CJS.

67A C.J.S., Parent §§ 31 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

1982 Mississippi Supreme Court Review: Miscellaneous: Termination of Parental Rights. 53 Miss L. J. 187, March, 1983.

§ 93-15-111. Termination by written voluntary release.

(1) The court may accept the parent's written voluntary release if it meets the following minimum requirements:

(a) Is signed under oath and dated at least seventy-two (72) hours after the birth of the child;

(b) States the parent's full name, the relationship of the parent to the child, and the parent's address;

(c) States the child's full name, date of birth, time of birth if known, and place of birth as indicated on the birth certificate;

(d) Identifies the governmental agency or home to which the child has been surrendered, if any;

(e) States the parent's consent to adoption of the child and waiver of service of process for any future adoption proceedings;

(f) Acknowledges that the termination of the parent's parental rights and that the subsequent adoption of the child may significantly affect, or even eliminate, the parent's right to inherit from the child under the laws of Descent and Distribution (Chapter 1, Title 91, Mississippi Code of 1972);

(g) Acknowledges that all provisions of the written voluntary release were entered into knowingly, intelligently, and voluntarily; and

(h) Acknowledges that the parent is entitled to consult an attorney regarding the parent's parental rights.

(2) The court's order accepting the parent's written voluntary release terminates all of the parent's parental rights to the child, including, but not limited to, the parental right to control or withhold consent to an adoption. If the court does not accept the parent's written voluntary release, then any interested person, or any agency, institution or person holding custody of the child, may commence involuntary termination of parental rights proceedings under Section 93-15-107.

HISTORY:

Laws, 2016, ch. 431, § 7; Laws, 2017, ch. 372, § 4, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

A former § 93-15-111 [Laws, 1980, ch. 485, § 4 subd 3, eff from and after July 1, 1980; Repealed by Laws, 2016, ch. 431, § 23, effective April 18, 2016] related to the placement of the child after termination of parental rights in the custody of a suitable person, institution or agency and adoption. For present similar provisions, see § 93-15-131.

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, deleted (1), which read: "A parent or an interested person may petition the court to accept a parent's written voluntary release that relinquishes all of the parent's parental rights to the child" and redesignated former (2) as (1); in (1), deleted "execution of a" following "may accept the parent's" in the introductory paragraph, deleted "for service of process in the proceedings to terminate parental rights" from the end of (b), and inserted "time of birth if known" in (c); deleted former (3), which related to the manner in which a mentally competent parent could relinquish parental rights to a child, waive service of process or consent to be joined as co-petitioner in termination of parental rights proceeding, and redesignated former (4) as (2); and added the last sentence of (2).

Cross References —

Authority of courts to impose fee for any court-ordered home study relating to child custody matters, see § 93-17-12.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1.-10. [Reserved for future use.]

II. Under Former Law.

11. In general.
12. Voluntary release.
13. Moral unfitness; generally.
14. Mental unfitness.

I. Under Current Law.

1.-10. [Reserved for future use.]

II. Under Former Law.

11. In general.

The statute does not provide for the court to be bound by the Department of Human Services's consent or the lack thereof to the adoption of a child in its custody. L.W. v. C.W.B., 762 So. 2d 323, 2000 Miss. LEXIS 168 (Miss. 2000).

Chancellor's finding that best interest of minor child would be served by termination of parental rights of natural parents, and his adoption by petitioners, was supported by evidence showing that the natural parents were mentally and morally unfit to rear and train child, and further showing improvement in child during time he was in home of petitioner. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

12. Voluntary release.

Chancery court's judgment terminating a mother's parental rights was valid because the mother waived service of process by voluntarily signing a surrender and release form; the language the county department of human services used in the surrender and release form conformed with the requirements of the statute since it specified that signing the document would result in a waiver of service of process and further notice of any court proceedings regarding the child. Simmons v. Harrison Cty. Dep't of Human Servs., 228 So. 3d 347, 2017 Miss. App. LEXIS 582 (Miss. Ct. App. 2017).

Rules of civil procedure clearly defer to Mississippi's statutory provisions for matters concerning termination of parental rights and adoption; when a chancellor is faced with matters concerning the termination of parental rights or adoption, the controlling body of law is the statute rather than the rules of civil procedure. Simmons v. Harrison Cty. Dep't of Human Servs., 228 So. 3d 347, 2017 Miss. App. LEXIS 582 (Miss. Ct. App. 2017).

Clerical error made to a child's date of birth had no effect on the mother's voluntary surrender of her parental rights and waiver of service of process because the mother acknowledged her intent to surrender her parental rights when she signed the document. Simmons v. Harrison Cty. Dep't of Human Servs., 228 So. 3d 347, 2017 Miss. App. LEXIS 582 (Miss. Ct. App. 2017).

Under Miss. Code. Ann. § 93-15-103(2), a signed consent relinquishing parental rights to facilitate the adoption of a child by certain individuals should not be interpreted as a termination of parental rights against all other individuals. A.D.R. v. J.L.H., 994 So. 2d 177, 2008 Miss. LEXIS 575 (Miss. 2008).

A natural mother's age of minority at the time of her joining an adoption petition did not render the adoption void in light of Miss. Code Ann. §§ 93-15-103 and 93-17-7, which were to be construed in pari materia. C.T. v. R.D.H., 843 So. 2d 690, 2003 Miss. LEXIS 201 (Miss. 2003).

In accordance with § 93-17-7 and §§ 93-15-101 through 93-15-111, a written voluntary release, or consent by the parent, terminates the parental rights and, thereafter, no objection to the adoption from the natural parent may be sustained. Grafe v. Olds, 556 So. 2d 690, 1990 Miss. LEXIS 20 (Miss. 1990).

Whether a natural parent's consent to adoption may be withdrawn must be determined on a case-by-case basis in timely fashion without unnecessary delay in the proceedings, always keeping in mind that the best interest of the child is paramount. Grafe v. Olds, 556 So. 2d 690, 1990 Miss. LEXIS 20 (Miss. 1990).

13. Moral unfitness; generally.

Grandmother who sought to have parent's parental rights terminated failed to prove abandonment or any of the grounds under Miss. Code Ann. § 93-15-103, and the appellate court was not inclined to terminate a parent's rights merely because the mother happened to work as a stripper. Further, where the chancellor found that the grandmother had frequent visitation, including overnight visitation, with the children, and that the parents had not unreasonably withheld visitation, given concerns about the grandmother's boyfriend, the chancellor properly declined to impose court-ordered visitation. Hillman v. Vance, 910 So. 2d 43, 2005 Miss. App. LEXIS 34 (Miss. Ct. App. 2005).

Evidence did not establish that a father was mentally, morally, or otherwise unfit to raise a child where the only evidence offered to show that he was unfit was one allegedly abusive incident between the father and the mother. S.N.C. v. J.R.D., 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

Chancellor was not manifestly in error when he found neither abandonment nor such immoral conduct as to make natural father of child unfit, where: father had been behind in child support payments; had been arrested for possession of marijuana with intent to deliver; and had cohabited with someone not his spouse; constant arrearages in child support payments do not constitute abandonment or desertion under statutory definition, and that was only evidence of desertion in case; there was no evidence that father had ever exposed daughter to illegal or immoral conduct during visits, and at time of hearing father was out of school and held good job; commission of crime alone was insufficient to find him morally unfit to rear and train child, especially where rehabilitation was evident; and, cohabitation by custodial parent in itself is insufficient to modify custody order absent showing of substantial detrimental effect; same rule applies in adoption cases. In Interest of J.D., 512 So. 2d 684, 1987 Miss. LEXIS 2738 (Miss. 1987).

Chancellor's finding that best interest of minor child would be served by termination of parental rights of natural parents, and his adoption by petitioners, was supported by evidence showing that the natural parents were mentally and morally unfit to rear and train child, and further showing improvement in child during time he was in home of petitioner. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

Where a statute is repealed by a new statute which substantially reenacts provisions of the prior statute simultaneously with the repeal, the operation of the original statute is not interrupted by the repeal as to an action which was filed and pending before the effective date of the new legislation. Thus, a suit to terminate the parental rights of a natural father instituted on June 30, 1980, was controlled by the provisions of § 93-15-1, et seq., although that statute was repealed by § 93-15-101, et seq., which became effective the following day, July 1, 1980. The trial court correctly terminated the parental rights of the natural father on the grounds that he had abandoned the child and was "morally unfit" where the evidence established that he had suggested to the natural mother that she have an abortion, he had refused to contribute to the expense of prenatal care, he had demanded that the natural mother not use his name in applying for welfare assistance, he had terminated his relationship with the natural mother after being informed that she was pregnant, he had left the decision regarding the child's destiny entirely up to the mother, and a month prior to the baby's birth, he had advised the mother that he would surrender the child for adoption, and where the evidence also established that the father, a married man separated from his wife, had entered into an adulterous affair with the natural mother, a teenage girl. Doe v. Attorney W., 410 So. 2d 1312, 1982 Miss. LEXIS 1882 (Miss. 1982).

14. Mental unfitness.

Termination of the mother's parental rights was inappropriate because, although her mental illness affected her ability to care for her child, there was no clear and convincing evidence proving that the mother's condition made her unable to assume minimally, acceptable care of the child under Miss. Code Ann. § 93-15-103(3)(e)(i). Psychiatric reports indicated that the mother's insight and judgment were good; her attitude was cooperative; and her motivation for ongoing treatment was good. J.J. v. Smith, 31 So. 3d 1271, 2010 Miss. App. LEXIS 147 (Miss. Ct. App. 2010).

The mental unfitness of a mother to raise her child was not established where the record revealed a complete and total absence of any substantive evidence supporting the conclusion that the mother suffered from any mental short-comings sufficient in degree to warrant a termination of her parental rights. N. E. v. L. H., 761 So. 2d 956, 2000 Miss. App. LEXIS 281 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child. 99 A.L.R.3d 268.

Attorneys' fee awards in parent-nonparent child custody case. 45 A.L.R.4th 212.

Child custody and visitation rights of person infected with AIDS. 86 A.L.R.4th 211.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 69-155.

59 Am. Jur. 2d, Parent and Child § 49.

19 Am. Jur. Pl & Pr Forms (Rev), Parent and Child, Form 51 (judgment or decree declaring minor child free from custody and control of father); Form 52 (judgment or decree making child ward of court and awarding custody to grandparents).

22 Am. Jur. Trials, Child Custody Litigation §§ 1 et seq.

CJS.

2 C.J.S., Adoption of Persons §§ 45 et seq.

67A C.J.S., Parent §§ 31 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-15-113. Conduct of hearing for involuntary termination of parental rights; counsel for parent.

(1) A hearing on the involuntary termination of parental rights shall be conducted without a jury and in accordance with the Mississippi Rules of Evidence. The court may exclude the child from the hearing if the court determines that the exclusion of the child from the hearing is in the child's best interest.

(2)(a) At the beginning of the involuntary termination of parental rights hearing, the court shall determine whether all necessary parties are present and identify all persons participating in the hearing; determine whether the notice requirements have been complied with and, if not, determine whether the affected parties intelligently waived compliance with the notice requirements; explain to the parent the purpose of the hearing, the standard of proof required for terminating parental rights, and the consequences if the parent's parental rights are terminated. The court shall also explain to the parent:

(i) The right to counsel;

(ii) The right to remain silent;

(iii) The right to subpoena witnesses;

(iv) The right to confront and cross-examine witnesses; and

(v) The right to appeal, including the right to a transcript of the proceedings.

(b) The court shall then determine whether the parent before the court is represented by counsel. If the parent wishes to retain counsel, the court shall continue the hearing for a reasonable time to allow the parent to obtain and consult with counsel of the parent's own choosing. If an indigent parent does not have counsel, the court shall determine whether the parent is entitled to appointed counsel under the Constitution of the United States, the Mississippi Constitution of 1890, or statutory law and, if so, appoint counsel for the parent and then continue the hearing for a reasonable time to allow the parent to consult with the appointed counsel. The setting of fees for court-appointed counsel and the assessment of those fees are in the discretion of the court.

HISTORY:

Laws, 2016, ch. 431, § 8; Laws, 2017, ch. 372, § 5, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, rewrote the last sentence of (1), which read: "The court may exclude the attendance of the child from the hearing with the consent of the child's guardian ad litem or legal counsel."

§ 93-15-115. Involuntary termination when child in care and custody or under the supervision of the Department of Child Protection Services pursuant to youth court proceedings and reasonable efforts for reunification are required; standard of proof.

When reasonable efforts for reunification are required for a child who is in the custody of, or under the supervision of, the Department of Child Protection Services pursuant to youth court proceedings, the court hearing a petition under this chapter may terminate the parental rights of a parent if, after conducting an evidentiary hearing, the court finds by clear and convincing evidence that:

(a) The child has been adjudicated abused or neglected;

(b) The child has been in the custody and care of, or under the supervision of, the Department of Child Protection Services for at least six (6) months, and, in that time period, the Department of Child Protection Services has developed a service plan for the reunification of the parent and the child;

(c) A permanency hearing, or a permanency review hearing, has been conducted pursuant to the Uniform Rules of Youth Court Practice and the court has found that the Department of Child Protection Services, or a licensed child caring agency under its supervision, has made reasonable efforts over a reasonable period to diligently assist the parent in complying with the service plan but the parent has failed to substantially comply with the terms and conditions of the plan and that reunification with the abusive or neglectful parent is not in the best interests of the child; and

(d) Termination of the parent's parental rights is appropriate because reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome based on one or more of the grounds set out in Section 93-15-119 or 93-15-121.

HISTORY:
Laws, 2016, ch. 431, § 9; Laws, 2017, ch. 372, § 6, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —
Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —
The 2017 amendment, effective March 20, 2017, substituted "Department of Child Protection Services" for "Department of Human Services" everywhere it appears; and in (d), substituted "reunification" for "future contacts" and made a related change, substituted "grounds set out" for "factors set out," and inserted "93-15-119 or."

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. In general.

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. In general.
Where the clear and convincing evidence showed that a mother's parents were interfering with a father's visitation rights, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(f) based on the erosion of the parent/child relationship. A.C.W. v. J.C.W., 957 So. 2d 1042, 2007 Miss. App. LEXIS 399 (Miss. Ct. App. 2007).

Chancellor did not err in awarding custody of a child to a paternal aunt where there was ample evidence presented to show that the child's mother had led an unstable life, including the use of illegal narcotics, for an extended period of time and that her attention to the welfare of her child appeared to be of secondary interest to her. Loomis v. Bugg, 872 So. 2d 694, 2004 Miss. App. LEXIS 376 (Miss. Ct. App. 2004).

§ 93-15-117. Involuntary termination when child in care and custody or under supervision of the Department of Child Protection Services pursuant to youth court proceedings and reasonable efforts for reunification are not required; standard of proof.

When reasonable efforts for reunification are not required, a court hearing a petition under this chapter may terminate the parental rights of a parent if, after conducting an evidentiary hearing, the court finds by clear and convincing evidence:

(a) That the child has been adjudicated abused or neglected;

(b) That the child has been in the custody and care of, or under the supervision of, the Department of Child Protection Services for at least sixty (60) days and the Department of Child Protection Services is not required to make reasonable efforts for the reunification of the parent and the child pursuant to Section 43-21-603(7)(c) of the Mississippi Youth Court Law;

(c) That a permanency hearing, or a permanency review hearing, has been conducted pursuant to the Uniform Rules of Youth Court Practice and the court has found that reunification with the abusive or neglectful parent is not in the best interests of the child; and

(d) That termination of the parent's parental rights is appropriate because reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome based on one or more of the following grounds:

(i) The basis for bypassing the reasonable efforts for reunification of the parent and child under Section 43-21-603(7)(c) is established by clear and convincing evidence; or

(ii) Any ground listed in Section 93-15-119 or 93-15-121 is established by clear and convincing evidence.

HISTORY:

Laws, 2016, ch. 431, § 10; Laws, 2017, ch. 372, § 7, eff from and after passage (approved Mar. 20, 2017).

Amendment Notes —

The 2017 amendment, effective March 20, 2017, substituted "Department of Child Protection Services" for "Department of Human Services" everywhere it appears; and in (d), substituted "reunification" for "future contacts" and made a related change in the introductory paragraph, and inserted "93-15-119 or" in (ii).

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. In general.

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. In general.

Where the clear and convincing evidence showed that a mother's parents were interfering with a father's visitation rights, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(f) based on the erosion of the parent/child relationship. A.C.W. v. J.C.W., 957 So. 2d 1042, 2007 Miss. App. LEXIS 399 (Miss. Ct. App. 2007).

Chancellor did not err in awarding custody of a child to a paternal aunt where there was ample evidence presented to show that the child's mother had led an unstable life, including the use of illegal narcotics, for an extended period of time and that her attention to the welfare of her child appeared to be of secondary interest to her. Loomis v. Bugg, 872 So. 2d 694, 2004 Miss. App. LEXIS 376 (Miss. Ct. App. 2004).

The standard of proof in action to terminate parental rights, under statute, requires that the chancellor must be satisfied by all of the evidence that the proof is clear and convincing that the grounds for termination are present. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

That portion of § 93-15-109 allowing parental rights termination to be decreed based upon a preponderance of the evidence standard is deficient and unconstitutional, since the standard of proof in an action for termination of parental rights must be "clear and convincing" in accordance with a mandate of the United States Supreme Court. Natural Father v. United Methodist Children's Home, 418 So. 2d 807, 1982 Miss. LEXIS 2118 (Miss. 1982).

In an action regarding parental rights termination, the Mississippi Supreme Court would consider the question regarding the constitutionality of the standard of proof required by § 93-15-109 authorizing parental rights termination, despite the fact that such question was not raised at the trial level, where the basic issue involved the rights and destiny of small children. Natural Father v. United Methodist Children's Home, 418 So. 2d 807, 1982 Miss. LEXIS 2118 (Miss. 1982).

The chancellor erred in terminating the parental rights of a mother in her children where the mother had not abandoned the children, there was no evidence that she was mentally unfit to rear and train them, and the state had failed to show by a preponderance of the evidence that she was morally or otherwise unfit to rear and train them; the parental rights of the father in the same children were improperly terminated by another chancellor who had conducted a hearing prior to the hearing concerning the mother's parental rights where the procedure of two hearings violated the requirement of § 93-15-7 that all evidence be presented before the termination of parental rights. Millien v. State, 408 So. 2d 71, 1981 Miss. LEXIS 2468 (Miss. 1981).

§ 93-15-119. Involuntary termination in chancery court for reasons of abandonment, desertion, or parental unfitness to raise the child; standard of proof.

(1) A court hearing a petition under this chapter may terminate the parental rights of a parent when, after conducting an evidentiary hearing, the court finds by clear and convincing evidence:

(a)(i) That the parent has engaged in conduct constituting abandonment or desertion of the child, as defined in Section 93-15-103, or is mentally, morally, or otherwise unfit to raise the child, which shall be established by showing past or present conduct of the parent that demonstrates a substantial risk of compromising or endangering the child's safety and welfare; and

(ii) That termination of the parent's parental rights is appropriate because reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome; or

(b) That a parent has committed against the other parent a sexual act that is unlawful under Section 97-3-65 or 97-3-95, or under a similar law of another state, territory, possession or Native American tribe where the offense occurred, and that the child was conceived as a result of the unlawful sexual act. A criminal conviction of the unlawful sexual act is not required to terminate the offending parent's parental rights under this paragraph (b).

(2) An allegation of desertion may be fully rebutted by proof that the parent, in accordance with the parent's means and knowledge of the mother's pregnancy or the child's birth, either:

(a) Provided financial support, including, but not limited to, the payment of consistent support to the mother during her pregnancy, contributions to the payment of the medical expenses of the pregnancy and birth, and contributions of consistent support of the child after birth; frequently and consistently visited the child after birth; and is now willing and able to assume legal and physical care of the child; or

(b) Was willing to provide financial support and to make visitations with the child, but reasonable attempts to do so were thwarted by the mother or her agents, and that the parent is now willing and able to assume legal and physical care of the child.

(3) The court shall inquire as to the military status of an absent parent before conducting an evidentiary hearing under this section.

HISTORY:

Laws, 2016, ch. 431, § 11; Laws, 2017, ch. 372, § 8, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, deleted "chancery" preceding "court hearing" in the introductory paragraph of (1); rewrote former (1)(a), which read: "That the parent has engaged in conduct constituting abandonment or desertion of the child or is mentally, morally, or otherwise unfit to raise the child. The court shall inquire as to the military status of any absent parent. Proof that a parent is mentally, morally, or otherwise unfit to raise the child shall be established by showing past or present conduct of the parent that demonstrates a substantial risk of compromising or endangering the child's safety and welfare; and," and redesignated it (1)(a)(i); rewrote former (b), which read: "That termination of the parent's parental rights is appropriate because future contacts between the parent and child are not desirable toward obtaining a satisfactory permanency outcome based on one or more of the factors set out in Section 93-15-121," and redesignated it (1)(a)(ii); added (1)(b); and added (3).

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. Abandonment or neglect.
12. Clear and convincing proof.
13. Mental unfitness.
14. Moral unfitness; generally.

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. Abandonment or neglect.

Chancellor properly terminated a father's parental rights because he had not seen his daughter in three years, had not made any serious efforts to do so, failed to pay any child support for approximately two years, and only began to pay once the mother filed her termination action. Fuller v. Weidner, 147 So. 3d 380, 2014 Miss. App. LEXIS 498 (Miss. Ct. App. 2014).

There was credible proof to support the chancellor's decision to terminate a mother's parental rights pursuant to this section. The chancellor specifically found that the mother was a drug addict and was unlikely to change in the foreseeable future, was unwilling to care for her children because of her drug addiction, and had repeatedly failed to comply with court orders regarding her rehabilitation, including entering a drug and alcohol rehabilitation program. Owens v. Owens, 169 So. 3d 925, 2014 Miss. App. LEXIS 335 (Miss. Ct. App. 2014).

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as the parent had not visited or communicated with the child in almost five years and had not financially supported her for more than four years. Barnes v. McGee, 178 So. 3d 801, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. 2013).

Chancery court had the authority to terminate the parental rights of the natural parents, pursuant to Miss. Code Ann. §§ 93-17-7 and 93-15-103, because credible, clear, and convincing evidence supported a finding of a substantial erosion of the parent/child relationship in that the parents had limited contact with their child after leaving the infant child in the care of relatives, who after three years wished to adopt the child. In re Adoption of H.H.O.W., 109 So. 3d 1102, 2013 Miss. App. LEXIS 99 (Miss. Ct. App. 2013).

Chancery court's order to terminate a mother's parental rights on the ground of abandonment under Miss. Code Ann. § 93-15-103(3)(b) (2004) was not supported by substantial credible evidence as the uncontroverted testimony established that the mother visited with her daughter during until February 2006, and termination proceedings were filed one year later. Further, during that year, hte mother actively pursued her right to visitation with the daughter by filing proceedings with the chancery court. L.O. v. G.V., 37 So. 3d 1248, 2010 Miss. App. LEXIS 315 (Miss. Ct. App. 2010).

In evaluating custody, the trial court focused on the father's desire to have custody of the child, but the undisputed record revealed that for two and a half years, the father had no contact with the child; further, the father provided no financial support, nor did he send any birthday or Christmas cards or gifts to the child. As a matter of law the father's actions (or lack thereof) during the two and a half years before the mother's death constituted desertion; because the evidence of desertion was clear, the trial court erred in awarding custody to the natural father without an on-the-record analysis of the child's best interests utilizing the Albright factors. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424, 2009 Miss. LEXIS 599 (Miss. 2009).

Termination of the father's parental rights was appropriate pursuant to Miss. Code Ann. § 93-15-103(3)(b) because he had not seen his son since 1999 and had not paid for any child support since 2002. The finding that the father had made no contact with the child for a period of one year satisfied the statutory requirement under § 93-15-103(3)(b) to terminate the father's parental rights and the consideration of the Albright factors determined that termination was in the child's best interest. M.H. v. D.A., 17 So. 3d 610, 2009 Miss. App. LEXIS 555 (Miss. Ct. App. 2009).

Grounds for termination of parental rights were not established by clear and convincing evidence because, under Miss. Code Ann. § 93-15-109, the youth court erred in failing to consider all the relevant evidence; under Miss. Code Ann. § 93-15-103(3)(h), the prior adjudication of neglect did not determine that reunification was not in children's best interests. A.B. v. Lauderdale County Dep't of Human Servs., 13 So. 3d 1263, 2009 Miss. LEXIS 299 (Miss. 2009).

Termination of a mother's parental rights under Miss. Code Ann. § 93-15-103(3)(h) was supported by clear and convincing evidence because the children had been adjudicated neglected and the mother was unable to provide a stable home environment for the children due to unemployment and health issues, including bipolar affective disorder and depression. J.C.N.F. v. Stone County Dep't of Human Servs., 996 So. 2d 762, 2008 Miss. LEXIS 603 (Miss. 2008).

Youth court did not err in terminating parents' rights because the parents failed to eliminate prior behavior identified by a child caring agency and the court; among other things, the mother admitted to having used drugs while she was pregnant with her third child, and the father was arrested on drug charges and was not present during the current termination of parental rights proceedings. The children had been previously removed but not even six months after they regained custody after the children had been previously removed, a social worker saw the three young children inside the home, but she did not see an adult; one of the children's diapers was saturated with urine and feces, and the mother was found in bed, dazed. A.B. v. Lauderdale County Dep't of Human Servs., 14 So. 3d 51, 2008 Miss. App. LEXIS 365 (Miss. Ct. App. 2008), rev'd, 13 So. 3d 1263, 2009 Miss. LEXIS 299 (Miss. 2009).

Chancellor did not improperly apply Miss. Code Ann. § 93-15-103(3)(b) in terminating a father's parental rights with respect to his son because (1) it was clear that the decision to terminate the father's parental rights was predicated on more than the father's failure to pay child support, though failure to support the child was material to the chancellor's ruling; (2) the chancellor found that the father failed to maintain contact with his child for a period of approximately two years and ten months; (3) the father testified that he had not seen his child in more than two years; and (4) even if the mother refused to allow the father's visits, the father never took any steps toward enforcing his rights under the custody and visitation agreement. R.L. v. G.F., 973 So. 2d 322, 2008 Miss. App. LEXIS 50 (Miss. Ct. App. 2008).

"Neglect" is not a label that is placed upon a parent, but a label that is placed upon a child, and according to Miss. Code Ann. § 43-21-105(*l*), a child may be adjudicated neglected if that child's parent, guardian or custodian or any person responsible for his care or support, neglects or refuses, when able so to do, to provide for him proper and necessary care or support, or medical, surgical, or other care necessary for his well-being or who, for any reason, lacks the care necessary for his health, morals or well-being; there is nothing in the language of Miss. Code Ann. § 93-15-103(3)(h), or in the language of Miss. Code Ann. § 43-21-105(*l*) which requires that an adjudication of neglect be made specifically with respect to the parent whose rights are being terminated. Indeed, the language of the neglect statute defines a "neglected child" – not a "neglecting parent" – and defines a "neglected child" in such a way that both parents have the responsibility to insure that a child is not being neglected, regardless of who the custodial parent is; in other words, if a child is being neglected by the custodial parent, that child is also being neglected by the non-custodial parent if that parent fails to remedy the situation when he or she is able to do so. In re A.M.A., 986 So. 2d 999, 2007 Miss. App. LEXIS 818 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), cert. denied, 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

Minor child could be found neglected, regardless of who the custodial parent was, if the non-custodial parent failed to remedy the situation when he or she was able to do so, and a non-custodial father, knowing that the children's mother opposed taking one of the children to see a doctor, allowed the child to remain with the mother, untreated, for 10 additional days before taking the child back to see a doctor and because of that delay, the child's bones began healing incorrectly. In addition to the medical neglect, the father was undoubtedly aware of the living conditions that his children were forced to endure, as he had lived at the very same residence in the past, he had undoubtedly witnessed the continuing nature of the living conditions when he came for his regular visits with the children, and according to the language of the "neglected child" statute, Miss. Code Ann. § 43-21-105(a), the children were neglected for purposes of Miss. Code Ann. §93-15-103(3)(h) as much because of the father's in action as they were because of anything the mother did or did not do. In re A.M.A., 986 So. 2d 999, 2007 Miss. App. LEXIS 818 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), cert. denied, 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

A mother had her child taken out of her custody previously, but the adjudication of neglect was not enough to sober the mother because similar incidents continued to occur, and the child was formally adjudicated neglected twice and one time the parties agreed to a consent judgment under the agreement that the mother had a drug problem that had to be addressed; therefore, the youth court's adjudication of neglect was supported by clear and convincing evidence and termination of her parental rights was appropriate. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

Lauderdale County Department of Human Services made numerous attempts to aid the mother in regaining custody of her child, consistently from March 2004 until July 2005, however each time the mother regained custody or visitation with the child, she would abuse drugs and/or leave the child for extended periods in the care of relatives, which ultimately placed the responsibility of the child's best interest with the youth court; that cycle continued for over two years until the mother was incarcerated, and thus termination of her parental rights was appropriate. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

Termination of the mother's parental rights was proper because: (1) the mother neglected and abandoned her child; (2) she had a history of drug abuse; (3) she was unable to complete the youth court's requirements to regain custody; (4) she was presently incarcerated; (5) there was little evidence that the mother was capable of providing stability and long-term care for the child; and (6) reunification with the mother was not in the child's best interest. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

At least nine months prior to the termination of parental rights hearing the mother presumably was in contact with the child for court ordered joint counseling; thus, the youth court improperly found that termination was proper under Miss. Code Ann. § 93-15-103(3)(b) because she had contact with her child within the last year. However, while Miss. Code Ann. § 93-15-103(3)(b) was not an applicable ground for termination, the youth court's determination to terminate the mother's parental rights was sufficiently supported with the application of the other listed grounds; thus, any error was harmless error. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

Where a father had been paying child support, he occasionally exercised visitation, and he expressed a desire to have a relationship with his child, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(b) based on a lack of clear and convincing evidence of abandonment. A.C.W. v. J.C.W., 957 So. 2d 1042, 2007 Miss. App. LEXIS 399 (Miss. Ct. App. 2007).

Chancellor did not commit manifest error in terminating a biological father's parental rights to his minor child in an adoption proceeding pursuant to Miss. Code Ann. § 93-15-103(3)(b), where the biological father had absented himself from the child's life for a period of at least two years. W.A.S. v. A.L.G., 949 So. 2d 31, 2007 Miss. LEXIS 33 (Miss. 2007).

Mother's four children were found to be neglected, and they were removed from the family home; the mother's parental rights were properly terminated because, among other things, the mother tested positive for cocaine and marijuana, and the mother failed to comply with a reunification plan. In re S.T.M.M., 942 So. 2d 266, 2006 Miss. App. LEXIS 840 (Miss. Ct. App. 2006).

Termination of the mother's parental rights was appropriate under Miss. Code Ann. § 93-15-103(3)(e) because the mother's ongoing behavior of choosing to remain on runaway status prevented her from maintaining a bond with the child; it was impossible to return the child to her custody when she avoided the Department of Human Services. In the Interest of C.B.Y., 936 So. 2d 974, 2006 Miss. App. LEXIS 617 (Miss. Ct. App. 2006).

Even though the trial court erred in finding that the mother abandoned her child, since the record did not show that she had manifested her severance of all ties with the child, the error was harmless as the trial court properly found parental rights could be terminated on other proper statutory grounds. The record reflected that the mother had not been totally absent from the child's life for any significant period of time, as she continually exercised her visitation rights. In re Adoption of a Minor Child, 931 So. 2d 566, 2006 Miss. LEXIS 111 (Miss. 2006).

Trial court erred in terminating father's parental rights where there was testimony that the father communicated with the children and exercised his visitation rights up to the time of his incarceration. Furthermore, there was an effort by him to have his mother granted visitation rights in which he would have been able to have contact with his children while she had them; therefore, the father did not abandon his children once he was incarcerated. Gunter v. Gray, 876 So. 2d 315, 2004 Miss. LEXIS 774 (Miss. 2004).

Clear and convincing evidence did not establish abandonment of a child by his mother where no evidence, either pro or con, was presented concerning any parental contributions the mother made to the rearing of the child, either in the form of monetary support or in the form of basic nurturance, and there were no specific questions put to the witnesses on the ground of abandonment. N. E. v. L. H., 761 So. 2d 956, 2000 Miss. App. LEXIS 281 (Miss. Ct. App. 2000).

The Court of Appeals did not err when it reversed the chancery court's termination of a mother's parental rights because the Court of Appeals, while acknowledging that there had been a substantial erosion of the relationship between the mother and her children and that the parent-child relationship in question was not a good one, found that the substantial burden of proof necessary for termination had not been met. M.L.B. v. S.L.J., 806 So. 2d 1023, 2000 Miss. LEXIS 93 (Miss. 2000).

Evidence did not establish that a father had abandoned his child without contact for a year; even though the father's contacts with the child were minimal, the evidence showed that the father did maintain ties to the child and did not relinquish all parental claims to the child. S.N.C. v. J.R.D., 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

The natural mother and stepfather failed to establish that the natural father deserted or abandoned the child at issue where there was conflicting evidence as to how long the natural father went without seeing his child, and the natural father testified that he saw the child on several occasions through his mother and by visiting her secretly at her babysitters, that he sent a letter with a poem, and that he bought Christmas gifts that he had attempted to give to the child. In re M. L. W., 755 So. 2d 558, 2000 Miss. App. LEXIS 89 (Miss. Ct. App. 2000).

The evidence was insufficient to show a settled purpose of the natural father to forego all parental rights and relinquish all parental claim to the minor child where, inter alia, he visited his daughter four or five times since the parties divorced and there was continued contact through frequent telephone calls. S.N.C. v. J.R.D., 1999 Miss. App. LEXIS 45 (Miss. Ct. App. Feb. 9, 1999), aff'd, 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

The evidence was sufficient to support a finding that a mother had abandoned and deserted her minor children, where the mother had only seen the children 2 times between January of 1986 when she left them with their father and the time of the trial in January of 1990, the mother did not contribute any financial assistance during that time, the mother did not send birthday cards or Christmas gifts to the children and ignored other events in the children's lives, the children thought of and referred to their aunt, with whom they were living, as their mother, and though the older child knew who the mother was when she saw her, the younger child did not know the mother at all as the mother had left when the younger child was 6 months old. Natural Mother v. Paternal Aunt, 583 So. 2d 614, 1991 Miss. LEXIS 386 (Miss. 1991).

A chancellor was not manifestly wrong in refusing to terminate a father's parental rights, even though the father had killed the child's mother, where there was no abandonment of the child by her father and the father had made 5 $100 payments in support of his daughter. Veselits v. Cruthirds, 548 So. 2d 1312, 1989 Miss. LEXIS 430 (Miss. 1989).

Chancellor was not manifestly in error when he found neither abandonment nor such immoral conduct as to make natural father of child unfit, where: father had been behind in child support payments; had been arrested for possession of marijuana with intent to deliver; and had cohabited with someone not his spouse; constant arrearages in child support payments do not constitute abandonment or desertion under statutory definition, and that was only evidence of desertion in case; there was no evidence that father had ever exposed daughter to illegal or immoral conduct during visits, and at time of hearing father was out of school and held good job; commission of crime alone was insufficient to find him morally unfit to rear and train child, especially where rehabilitation was evident; and, cohabitation by custodial parent in itself is insufficient to modify custody order absent showing of substantial detrimental effect; same rule applies in adoption cases. In Interest of J.D., 512 So. 2d 684, 1987 Miss. LEXIS 2738 (Miss. 1987).

In a proper case, where the proof is clear and convincing, there may be constructive abandonment and desertion of a minor child. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

Claim that natural mother has deserted child for purposes of adoption statute (§ 93-17-5) will be considered in context of statutory proviso (§ 93-15-103) authorizing termination of parental rights on ground of desertion. Bryant v. Cameron, 473 So. 2d 174, 1985 Miss. LEXIS 2157 (Miss. 1985).

Parental rights are properly terminated when, after parents are given considerable opportunity and warning that they must change lifestyle, parents fail to provide children with most basic necessities for healthy life which are well within capabilities of parents if they were so inclined. Adams v. Powe, 469 So. 2d 76, 1985 Miss. LEXIS 1995 (Miss. 1985).

In an action in which a natural mother and her new husband petitioned for adoption of her minor children over objection of their natural father, petitioners failed to prove by clear and convincing evidence that the father had abandoned his children, or was unfit, within the meaning of §§ 93-17-7 and 93-15-103(3), where, although he was living in an adulterous relationship at the time of the divorce, he had subsequently married his second wife, where, although he was over $7,000 in arrears in court ordered child support, he proved that he was unable to make the support payments or purge himself of contempt, and where, although there had been few visits between him and the children, he had not so totally shown that he wished to relinquish all parental claims to the children as to justify a finding of abandonment or desertion. Petit v. Holifield, 443 So. 2d 874, 1984 Miss. LEXIS 1568 (Miss. 1984).

A natural mother's parental rights were improperly terminated, where she established beyond peradventure that she had attempted to establish a suitable home for the return of her children, that she had continually made efforts to remain in touch with her children despite barriers imposed by their geographic location and constant interference by many well-intentioned people, and where the proof wholly failed to establish that she had abandoned her children and was further insufficient to establish, by clear and convincing proof, an extreme and deep-seated antipathy by the child toward her or some other substantial erosion of the parent and child relationship which was caused, at least in part, by the mother's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate or prolonged imprisonment. De La Oliva v. Lowndes County Dep't of Public Welfare, 423 So. 2d 1328, 1982 Miss. LEXIS 2384 (Miss. 1982).

12. Clear and convincing proof.

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as the parent had not visited or communicated with the child in almost five years and had not financially supported the child for more than four years. Barnes v. McGee, 178 So. 3d 801, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. 2013).

Termination of the mother's parental rights was inappropriate because, although her mental illness affected her ability to care for her child, there was no clear and convincing evidence under Miss. Code Ann. § 93-15-109 proving that the mother's condition made her unable to assume minimally, acceptable care of the child under Miss. Code Ann. § 93-15-103(3)(e)(i). Psychiatric reports indicated that the mother's insight and judgment were good; her attitude was cooperative; and her motivation for ongoing treatment was good. J.J. v. Smith, 31 So. 3d 1271, 2010 Miss. App. LEXIS 147 (Miss. Ct. App. 2010).

13. Mental unfitness.

Termination of the mother's parental rights was inappropriate because, although her mental illness affected her ability to care for her child, there was no clear and convincing evidence proving that the mother's condition made her unable to assume minimally, acceptable care of the child under Miss. Code Ann. § 93-15-103(3)(e)(i). Psychiatric reports indicated that the mother's insight and judgment were good; her attitude was cooperative; and her motivation for ongoing treatment was good. J.J. v. Smith, 31 So. 3d 1271, 2010 Miss. App. LEXIS 147 (Miss. Ct. App. 2010).

The mental unfitness of a mother to raise her child was not established where the record revealed a complete and total absence of any substantive evidence supporting the conclusion that the mother suffered from any mental short-comings sufficient in degree to warrant a termination of her parental rights. N. E. v. L. H., 761 So. 2d 956, 2000 Miss. App. LEXIS 281 (Miss. Ct. App. 2000).

14. Moral unfitness; generally.

Grandmother who sought to have parent's parental rights terminated failed to prove abandonment or any of the grounds under Miss. Code Ann. § 93-15-103, and the appellate court was not inclined to terminate a parent's rights merely because the mother happened to work as a stripper. Further, where the chancellor found that the grandmother had frequent visitation, including overnight visitation, with the children, and that the parents had not unreasonably withheld visitation, given concerns about the grandmother's boyfriend, the chancellor properly declined to impose court-ordered visitation. Hillman v. Vance, 910 So. 2d 43, 2005 Miss. App. LEXIS 34 (Miss. Ct. App. 2005).

Evidence did not establish that a father was mentally, morally, or otherwise unfit to raise a child where the only evidence offered to show that he was unfit was one allegedly abusive incident between the father and the mother. S.N.C. v. J.R.D., 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

Chancellor was not manifestly in error when he found neither abandonment nor such immoral conduct as to make natural father of child unfit, where: father had been behind in child support payments; had been arrested for possession of marijuana with intent to deliver; and had cohabited with someone not his spouse; constant arrearages in child support payments do not constitute abandonment or desertion under statutory definition, and that was only evidence of desertion in case; there was no evidence that father had ever exposed daughter to illegal or immoral conduct during visits, and at time of hearing father was out of school and held good job; commission of crime alone was insufficient to find him morally unfit to rear and train child, especially where rehabilitation was evident; and, cohabitation by custodial parent in itself is insufficient to modify custody order absent showing of substantial detrimental effect; same rule applies in adoption cases. In Interest of J.D., 512 So. 2d 684, 1987 Miss. LEXIS 2738 (Miss. 1987).

Chancellor's finding that best interest of minor child would be served by termination of parental rights of natural parents, and his adoption by petitioners, was supported by evidence showing that the natural parents were mentally and morally unfit to rear and train child, and further showing improvement in child during time he was in home of petitioner. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

Where a statute is repealed by a new statute which substantially reenacts provisions of the prior statute simultaneously with the repeal, the operation of the original statute is not interrupted by the repeal as to an action which was filed and pending before the effective date of the new legislation. Thus, a suit to terminate the parental rights of a natural father instituted on June 30, 1980, was controlled by the provisions of § 93-15-1, et seq., although that statute was repealed by § 93-15-101, et seq., which became effective the following day, July 1, 1980. The trial court correctly terminated the parental rights of the natural father on the grounds that he had abandoned the child and was "morally unfit" where the evidence established that he had suggested to the natural mother that she have an abortion, he had refused to contribute to the expense of prenatal care, he had demanded that the natural mother not use his name in applying for welfare assistance, he had terminated his relationship with the natural mother after being informed that she was pregnant, he had left the decision regarding the child's destiny entirely up to the mother, and a month prior to the baby's birth, he had advised the mother that he would surrender the child for adoption, and where the evidence also established that the father, a married man separated from his wife, had entered into an adulterous affair with the natural mother, a teenage girl. Doe v. Attorney W., 410 So. 2d 1312, 1982 Miss. LEXIS 1882 (Miss. 1982).

§ 93-15-121. Grounds for termination.

Any of the following, if established by clear and convincing evidence, may be grounds for termination of the parent's parental rights if reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome:

(a) The parent has been medically diagnosed by a qualified mental health professional with a severe mental illness or deficiency that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, makes the parent unable or unwilling to provide an adequate permanent home for the child;

(b) The parent has been medically diagnosed by a qualified health professional with an extreme physical incapacitation that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, prevents the parent, despite reasonable accommodations, from providing minimally acceptable care for the child;

(c) The parent is suffering from habitual alcoholism or other drug addiction and has failed to successfully complete alcohol or drug treatment;

(d) The parent is unwilling to provide reasonably necessary food, clothing, shelter, or medical care for the child; reasonably necessary medical care does not include recommended or optional vaccinations against childhood or any other disease;

(e) The parent has failed to exercise reasonable visitation or communication with the child;

(f) The parent's abusive or neglectful conduct has caused, at least in part, an extreme and deep-seated antipathy by the child toward the parent, or some other substantial erosion of the relationship between the parent and the child;

(g) The parent has committed an abusive act for which reasonable efforts to maintain the children in the home would not be required under Section 43-21-603, or a series of physically, mentally, or emotionally abusive incidents, against the child or another child, whether related by consanguinity or affinity or not, making future contacts between the parent and child undesirable; or

(h)(i) The parent has been convicted of any of the following offenses against any child:

1. Rape of a child under Section 97-3-65;
2. Sexual battery of a child under Section 97-3-95(c);
3. Touching a child for lustful purposes under Section 97-5-23;
4. Exploitation of a child under Sections 97-5-31 through 97-5-37;
5. Felonious abuse or battery of a child under Section 97-5-39(2);
6. Carnal knowledge of a step or adopted child or a child of a cohabitating partner under Section 97-5-41; or
7. Human trafficking of a child under Section 97-3-54.1; or

(ii) The parent has been convicted of:

1. Murder or voluntary manslaughter of another child of the parent;
2. Aiding, abetting, attempting, conspiring or soliciting to commit murder or voluntary manslaughter of the child or another child of the parent; or
3. A felony assault that results in the serious bodily injury to the child or another child of the parent.

HISTORY:

Laws, 2016, ch. 431, § 12; Laws, 2017, ch. 372, § 9, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, in the introductory paragraph, added "Any of" at the beginning, deleted "factors" preceding "if established," and substituted "reunification" for "future contacts" and made a related stylistic change; deleted "as reasonably directed by the court" from the end of (c); and added (h)(i)7 and made a related stylistic change.

JUDICIAL DECISIONS

ANALYSIS

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I. Under Current Law.

1-20. [Reserved for future use.]

II. Under Former Law.

21. Generally.

Chancery court erred in terminating a mother's parental rights on the grould that she had no contact with the child because the father, at time, did not answer his phone and had changed both his phone number and his address without notifying the mother, and the mother spent extended periods of time in drug treatments in an effort to get clean; thus, there was not clear and convincing evidence showing that the mother made no contact with the child for over one year. Doe v. Doe, — So. 3d —, 2017 Miss. App. LEXIS 62 (Miss. Ct. App. Feb. 7, 2017).

Chancery court erred in terminating a mother's parental rights because there was not sufficient credible evidence to show that the mother was a drug addict unlikely to change within a reasonable time such that she was unable to assume minimally acceptable care of the child; the record evidenced the mother's efforts at rehabilitation and attempts to stay in contact with her son. Doe v. Doe, — So. 3d —, 2017 Miss. App. LEXIS 62 (Miss. Ct. App. Feb. 7, 2017).

Statute does not address a loss of custody, but it deals with a removal from the home; a restriction of custody and visitation does not constitute a removal from the home. Doe v. Doe, — So. 3d —, 2017 Miss. App. LEXIS 62 (Miss. Ct. App. Feb. 7, 2017).

Chancery court erred in terminating a mother's parental rights because it incorrectly applied the statute in determining its prerequisites had been met; the child had not been removed from the home of his natural parents, but the mother's custody and visitation were restricted due to substance abuse, the mother made attempts to visit with the child, had entered rehabilitation programs, and had been clean of illegal drugs for six months, and the father and his wife had full custody of the child. Doe v. Doe, — So. 3d —, 2017 Miss. App. LEXIS 62 (Miss. Ct. App. Feb. 7, 2017).

There is no language indicating retroactive intent, but rather, the effective-date provision for the statutes governing termination of parental rights as amended in the 2016 legislative session specifically states: “This act shall take effect and be in force from and after its passage [approved April 18, 2016]”; accordingly, the court of appeals applied the version of the statute in effect at the time, which, contained the three prerequisites. Doe v. Doe, — So. 3d —, 2017 Miss. App. LEXIS 62 (Miss. Ct. App. Feb. 7, 2017).

Chancellor's decision to grant the adoption over a father's objection was supported by substantial credible evidence because the father's parents never took any legal action requesting custody of the children, and they made no effort to visit the children for almost six years; accordingly, the chancellor correctly concluded that the only options available were granting the adoption or denying the adoption and keeping the children in the legal custody of the adoptive parents. Blakeney v. McRee, 188 So. 3d 1154, 2016 Miss. LEXIS 87 (Miss. 2016).

This section should be read as follows: the court shall consider the grounds for termination of parental rights if either (1) the child has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time because returning to the home would be damaging to the child or (2a) the parent is unable or unwilling to care for the child, (2b) relatives are not appropriate or are unavailable, and (2c) adoption is in the best interest of the child. Hall v. Jackson Cnty. Dep't of Human Servs. (In the Interest of B.A.H.), 225 So. 3d 1220, 2016 Miss. App. LEXIS 37 (Miss. Ct. App. 2016).

Enumerated grounds for termination of the father's parental rights under this section were not applicable, because the children remained in the custody of the natural mother, there was no evidence a relative was unavailable to care for the children since the mother sought to retain custody, and there was no evidence that adoption was in the best interest of the children. Pritchett v. Pritchett, 161 So. 3d 1106, 2015 Miss. App. LEXIS 185 (Miss. Ct. App. 2015).

Chancellor erred in denying a mother's request to terminate the father's parental rights because, while the chancellor appointed a guardian ad litem (GAL) to represent the child's interests, the chancellor made no mention of the GAL's various findings and recommendations, the bulk of which favored terminating the father's parental rights, and erroneously believed that a pending adoption petition was necessary before termination could be considered. Farthing v. McGee, 158 So. 3d 1223, 2015 Miss. App. LEXIS 71 (Miss. Ct. App. 2015).

Decision terminating a father's parental rights was proper, as testimony of the parties and witnesses, as well as a guardian ad litem's report and recommendation, supported a finding that the mother proved at least one of the grounds enumerated in the termination statute by clear and convincing evidence; the father acknowledged that the father had suffered from an alcohol addiction since 2005. Chism v. Bright, 152 So. 3d 324, 2013 Miss. App. LEXIS 284 (Miss. Ct. App. 2013), rev'd, 152 So. 3d 318, 2014 Miss. LEXIS 598 (Miss. 2014).

Even if the procedural bar in Miss. Code Ann. § 93-17-15 was inapplicable to an action by former parents to set aside the adoption of their child or terminate the adoptive parent's parental rights under Miss. Code Ann. § 93-15-103, the former parents' action failed because no evidence existed to support the adoptive parents' claims; the guardian ad litem testified there was no evidence the adoptive parent was unfit. In re A Child: C.K. & K.K. v. N.F., 53 So. 3d 870, 2011 Miss. App. LEXIS 68 (Miss. Ct. App. 2011).

Because the voluntary termination of a father's parental rights under Miss. Code Ann. § 93-15-103(3)(a) extinguished his obligation to pay child support, a mother and child were not able to later recover support after 1984; however, a chancellor did not err by setting an eight percent interest rate on the amounts due prior to this date under Miss. Code Ann. § 75-17-7. Beasnett v. Arledge, 934 So. 2d 345, 2006 Miss. App. LEXIS 528 (Miss. Ct. App. 2006).

Miss. Code Ann. § 93-15-103(3), which lists the grounds for termination of parental rights, is helpful in selecting the factors a court should consider in deciding whether a natural parent is otherwise unfit for taking care of his children. Brown v. Wiley (In re Brown), 902 So. 2d 604, 2004 Miss. App. LEXIS 1082 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 337 (Miss. 2005).

Granting durable legal custody to a foster parent does not give her any greater rights than those of a foster parent. Barnett v. Oathout, 883 So. 2d 563, 2004 Miss. LEXIS 1227 (Miss. 2004).

In a proceeding by a natural mother and a stepfather to terminate the parental rights of the natural father and to adopt the child at issue, an incident of alleged abuse of the mother by the natural father was not admissible as the incident did not involve the child. S.N.C. v. J.R.D., 1999 Miss. App. LEXIS 45 (Miss. Ct. App. Feb. 9, 1999), aff'd, 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

Failure to appoint guardian ad litem for child was reversible error, even though proceeding was referred to as adoption rather than for termination of parental rights, as complaint for adoption specifically alleged that natural father had abandoned child under statutory provision dealing with termination of parental rights for unfit parents; adoption and termination of parental rights proceedings were not separable under the circumstances and appointment of guardian ad litem was mandatory. E.M.C. v. S.V.M., 695 So. 2d 576, 1997 Miss. LEXIS 236 (Miss. 1997).

In a proceeding for termination of parental rights and adoption, the trial court properly refused to hear the natural mother's petition for writ of habeas corpus in which she alleged that a prior court order awarding custody of the children to their aunt was void, which would be construed as an amendment to the natural mother's original answer, where the mother sought to amend her pleading a mere 2 days before trial. Since the adoption proceeding not only determined the best interests of the children, but also who should have custody, there was no need for the trial court to address the habeas application; by addressing and granting the petition for adoption, the trial court necessarily adjudicated custody anew. Natural Mother v. Paternal Aunt, 583 So. 2d 614, 1991 Miss. LEXIS 386 (Miss. 1991).

A mother whose parental rights were terminated under § 93-15-103(3)(e) on the ground that there was a "substantial erosion of the relationship" between her and 2 of her children failed to show that the statute was unconstitutionally vague, since a person of common intelligence should have been aware that the result of a factual situation such as the mother's could well be the termination of one's parental rights. If the statute were more specific, then the cases in which it could be applied could be so drastically reduced as to make it ineffective in protecting the children it was meant to serve. Vance v. Lincoln County Dep't of Public Welfare, 582 So. 2d 414, 1991 Miss. LEXIS 360 (Miss. 1991).

A mother whose parental rights were terminated failed to show that § 93-15-103 violated her right to equal protection under the Fourteenth Amendment on the ground that a proportionally higher number of blacks' parental rights are terminated than are whites', since the statute is racially neutral on its face and there was no evidence that the purpose of the statute was anything other than the protection of the children of Mississippi. Vance v. Lincoln County Dep't of Public Welfare, 582 So. 2d 414, 1991 Miss. LEXIS 360 (Miss. 1991).

22. Pleadings.

When the adoptive parents' petition and agreed pretrial order, which raised additional issues of fact, was read in connection with the statutory requirements of Miss. Code Ann. § 93-15-103 and Miss. Code Ann. § 93-17-7, it was readily apparent that the adoptive parents had sufficiently pleaded allegations that, if proven, would entitle them to terminate the mother's parental rights and adopt her child. Therefore, the trial court did not commit manifest error in finding that the pleadings and the pretrial order, taken together, satisfied a claim for relief sufficient to defeat the mother's Miss. R. Civ. P. 12(b)(6) motion. In re Adoption of a Minor Child, 931 So. 2d 566, 2006 Miss. LEXIS 111 (Miss. 2006).

23. Abandonment or neglect.

Chancellor properly terminated a father's parental rights because he had not seen his daughter in three years, had not made any serious efforts to do so, failed to pay any child support for approximately two years, and only began to pay once the mother filed her termination action. Fuller v. Weidner, 147 So. 3d 380, 2014 Miss. App. LEXIS 498 (Miss. Ct. App. 2014).

There was credible proof to support the chancellor's decision to terminate a mother's parental rights pursuant to this section. The chancellor specifically found that the mother was a drug addict and was unlikely to change in the foreseeable future, was unwilling to care for her children because of her drug addiction, and had repeatedly failed to comply with court orders regarding her rehabilitation, including entering a drug and alcohol rehabilitation program. Owens v. Owens, 169 So. 3d 925, 2014 Miss. App. LEXIS 335 (Miss. Ct. App. 2014).

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as the parent had not visited or communicated with the child in almost five years and had not financially supported her for more than four years. Barnes v. McGee, 178 So. 3d 801, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. 2013).

Chancery court had the authority to terminate the parental rights of the natural parents, pursuant to Miss. Code Ann. §§ 93-17-7 and 93-15-103, because credible, clear, and convincing evidence supported a finding of a substantial erosion of the parent/child relationship in that the parents had limited contact with their child after leaving the infant child in the care of relatives, who after three years wished to adopt the child. In re Adoption of H.H.O.W., 109 So. 3d 1102, 2013 Miss. App. LEXIS 99 (Miss. Ct. App. 2013).

Chancery court's order to terminate a mother's parental rights on the ground of abandonment under Miss. Code Ann. § 93-15-103(3)(b) (2004) was not supported by substantial credible evidence as the uncontroverted testimony established that the mother visited with her daughter during until February 2006, and termination proceedings were filed one year later. Further, during that year, hte mother actively pursued her right to visitation with the daughter by filing proceedings with the chancery court. L.O. v. G.V., 37 So. 3d 1248, 2010 Miss. App. LEXIS 315 (Miss. Ct. App. 2010).

In evaluating custody, the trial court focused on the father's desire to have custody of the child, but the undisputed record revealed that for two and a half years, the father had no contact with the child; further, the father provided no financial support, nor did he send any birthday or Christmas cards or gifts to the child. As a matter of law the father's actions (or lack thereof) during the two and a half years before the mother's death constituted desertion; because the evidence of desertion was clear, the trial court erred in awarding custody to the natural father without an on-the-record analysis of the child's best interests utilizing the Albright factors. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424, 2009 Miss. LEXIS 599 (Miss. 2009).

Termination of the father's parental rights was appropriate pursuant to Miss. Code Ann. § 93-15-103(3)(b) because he had not seen his son since 1999 and had not paid for any child support since 2002. The finding that the father had made no contact with the child for a period of one year satisfied the statutory requirement under § 93-15-103(3)(b) to terminate the father's parental rights and the consideration of the Albright factors determined that termination was in the child's best interest. M.H. v.

D.A., 17 So. 3d 610, 2009 Miss. App. LEXIS 555 (Miss. Ct. App. 2009).

Grounds for termination of parental rights were not established by clear and convincing evidence because, under Miss. Code Ann. § 93-15-109, the youth court erred in failing to consider all the relevant evidence; under Miss. Code Ann. § 93-15-103(3)(h), the prior adjudication of neglect did not determine that reunification was not in children's best interests. A.B. v. Lauderdale County Dep't of Human Servs., 13 So. 3d 1263, 2009 Miss. LEXIS 299 (Miss. 2009).

Termination of a mother's parental rights under Miss. Code Ann. § 93-15-103(3)(h) was supported by clear and convincing evidence because the children had been adjudicated neglected and the mother was unable to provide a stable home environment for the children due to unemployment and health issues, including bipolar affective disorder and depression. J.C.N.F. v. Stone County Dep't of Human Servs., 996 So. 2d 762, 2008 Miss. LEXIS 603 (Miss. 2008).

Youth court did not err in terminating parents' rights because the parents failed to eliminate prior behavior identified by a child caring agency and the court; among other things, the mother admitted to having used drugs while she was pregnant with her third child, and the father was arrested on drug charges and was not present during the current termination of parental rights proceedings. The children had been previously removed but not even six months after they regained custody after the children had been previously removed, a social worker saw the three young children inside the home, but she did not see an adult; one of the children's diapers was saturated with urine and feces, and the mother was found in bed, dazed. A.B. v. Lauderdale County Dep't of Human Servs., 14 So. 3d 51, 2008 Miss. App. LEXIS 365 (Miss. Ct. App. 2008), rev'd, 13 So. 3d 1263, 2009 Miss. LEXIS 299 (Miss. 2009).

Chancellor did not improperly apply Miss. Code Ann. § 93-15-103(3)(b) in terminating a father's parental rights with respect to his son because (1) it was clear that the decision to terminate the father's parental rights was predicated on more than the father's failure to pay child support, though failure to support the child was material to the chancellor's ruling; (2) the chancellor found that the father failed to maintain contact with his child for a period of approximately two years and ten months; (3) the father testified that he had not seen his child in more than two years; and (4) even if the mother refused to allow the father's visits, the father never took any steps toward enforcing his rights under the custody and visitation agreement. R.L. v. G.F., 973 So. 2d 322, 2008 Miss. App. LEXIS 50 (Miss. Ct. App. 2008).

"Neglect" is not a label that is placed upon a parent, but a label that is placed upon a child, and according to Miss. Code Ann. § 43-21-105(*l*), a child may be adjudicated neglected if that child's parent, guardian or custodian or any person responsible for his care or support, neglects or refuses, when able so to do, to provide for him proper and necessary care or support, or medical, surgical, or other care necessary for his well-being or who, for any reason, lacks the care necessary for his health, morals or well-being; there is nothing in the language of Miss. Code Ann. § 93-15-103(3)(h), or in the language of Miss. Code Ann. § 43-21-105(*l*) which requires that an adjudication of neglect be made specifically with respect to the parent whose rights are being terminated. Indeed, the language of the neglect statute defines a "neglected child" – not a "neglecting parent" – and defines a "neglected child" in such a way that both parents have the responsibility to insure that a child is not being neglected, regardless of who the custodial parent is; in other words, if a child is being neglected by the custodial parent, that child is also being neglected by the non-custodial parent if that parent fails to remedy the situation when he or she is able to do so. In re A.M.A., 986 So. 2d 999, 2007 Miss. App. LEXIS 818 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), cert. denied, 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

Minor child could be found neglected, regardless of who the custodial parent was, if the non-custodial parent failed to remedy the situation when he or she was able to do so, and a non-custodial father, knowing that the children's mother opposed taking one of the children to see a doctor, allowed the child to remain with the mother, untreated, for 10 additional days before taking the child back to see a doctor and because of that delay, the child's bones began healing incorrectly. In addition to the medical neglect, the father was undoubtedly aware of the living conditions that his children were forced to endure, as he had lived at the very same residence in the past, he had undoubtedly witnessed the continuing nature of the living conditions when he came for his regular visits with the children, and according to the language of the "neglected child" statute, Miss. Code Ann. § 43-21-105(a), the children were neglected for purposes of Miss. Code Ann. §93-15-103(3)(h) as much because of the father's in action as they were because of anything the mother did or did not do. In re A.M.A., 986 So. 2d 999, 2007 Miss. App. LEXIS 818 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), cert. denied, 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

A mother had her child taken out of her custody previously, but the adjudication of neglect was not enough to sober the mother because similar incidents continued to occur, and the child was formally adjudicated neglected twice and one time the parties agreed to a consent judgment under the agreement that the mother had a drug problem that had to be addressed; therefore, the youth court's adjudication of neglect was supported by clear and convincing evidence and termination of her parental rights was appropriate. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

Lauderdale County Department of Human Services made numerous attempts to aid the mother in regaining custody of her child, consistently from March 2004 until July 2005, however each time the mother regained custody or visitation with the child, she would abuse drugs and/or leave the child for extended periods in the care of relatives, which ultimately placed the responsibility of the child's best interest with the youth court; that cycle continued for over two years until the mother was incarcerated, and thus termination of her parental rights was appropriate. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

Termination of the mother's parental rights was proper because: (1) the mother neglected and abandoned her child; (2) she had a history of drug abuse; (3) she was unable to complete the youth court's requirements to regain custody; (4) she was presently incarcerated; (5) there was little evidence that the mother was capable of providing stability and long-term care for the child; and (6) reunification with the mother was not in the child's best interest. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

At least nine months prior to the termination of parental rights hearing the mother presumably was in contact with the child for court ordered joint counseling; thus, the youth court improperly found that termination was proper under Miss. Code Ann. § 93-15-103(3)(b) because she had contact with her child within the last year. However, while Miss. Code Ann. § 93-15-103(3)(b) was not an applicable ground for termination, the youth court's determination to terminate the mother's parental rights was sufficiently supported with the application of the other listed grounds; thus, any error was harmless error. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

Where a father had been paying child support, he occasionally exercised visitation, and he expressed a desire to have a relationship with his child, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(b) based on a lack of clear and convincing evidence of abandonment. A.C.W. v. J.C.W., 957 So. 2d 1042, 2007 Miss. App. LEXIS 399 (Miss. Ct. App. 2007).

Chancellor did not commit manifest error in terminating a biological father's parental rights to his minor child in an adoption proceeding pursuant to Miss. Code Ann. § 93-15-103(3)(b), where the biological father had absented himself from the child's life for a period of at least two years. W.A.S. v. A.L.G., 949 So. 2d 31, 2007 Miss. LEXIS 33 (Miss. 2007).

Mother's four children were found to be neglected, and they were removed from the family home; the mother's parental rights were properly terminated because, among other things, the mother tested positive for cocaine and marijuana, and the mother failed to comply with a reunification plan. In re S.T.M.M., 942 So. 2d 266, 2006 Miss. App. LEXIS 840 (Miss. Ct. App. 2006).

Termination of the mother's parental rights was appropriate under Miss. Code Ann. § 93-15-103(3)(e) because the mother's ongoing behavior of choosing to remain on runaway status prevented her from maintaining a bond with the child; it was impossible to return the child to her custody when she avoided the Department of Human Services. In the Interest of C.B.Y., 936 So. 2d 974, 2006 Miss. App. LEXIS 617 (Miss. Ct. App. 2006).

Even though the trial court erred in finding that the mother abandoned her child, since the record did not show that she had manifested her severance of all ties with the child, the error was harmless as the trial court properly found parental rights could be terminated on other proper statutory grounds. The record reflected that the mother had not been totally absent from the child's life for any significant period of time, as she continually exercised her visitation rights. In re Adoption of a Minor Child, 931 So. 2d 566, 2006 Miss. LEXIS 111 (Miss. 2006).

Trial court erred in terminating father's parental rights where there was testimony that the father communicated with the children and exercised his visitation rights up to the time of his incarceration. Furthermore, there was an effort by him to have his mother granted visitation rights in which he would have been able to have contact with his children while she had them; therefore, the father did not abandon his children once he was incarcerated. Gunter v. Gray, 876 So. 2d 315, 2004 Miss. LEXIS 774 (Miss. 2004).

Clear and convincing evidence did not establish abandonment of a child by his mother where no evidence, either pro or con, was presented concerning any parental contributions the mother made to the rearing of the child, either in the form of monetary support or in the form of basic nurturance, and there were no specific questions put to the witnesses on the ground of abandonment. N. E. v. L. H., 761 So. 2d 956, 2000 Miss. App. LEXIS 281 (Miss. Ct. App. 2000).

The Court of Appeals did not err when it reversed the chancery court's termination of a mother's parental rights because the Court of Appeals, while acknowledging that there had been a substantial erosion of the relationship between the mother and her children and that the parent-child relationship in question was not a good one, found that the substantial burden of proof necessary for termination had not been met. M.L.B. v. S.L.J., 806 So. 2d 1023, 2000 Miss. LEXIS 93 (Miss. 2000).

Evidence did not establish that a father had abandoned his child without contact for a year; even though the father's contacts with the child were minimal, the evidence showed that the father did maintain ties to the child and did not relinquish all parental claims to the child. S.N.C. v. J.R.D., 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

The natural mother and stepfather failed to establish that the natural father deserted or abandoned the child at issue where there was conflicting evidence as to how long the natural father went without seeing his child, and the natural father testified that he saw the child on several occasions through his mother and by visiting her secretly at her babysitters, that he sent a letter with a poem, and that he bought Christmas gifts that he had attempted to give to the child. In re M. L. W., 755 So. 2d 558, 2000 Miss. App. LEXIS 89 (Miss. Ct. App. 2000).

The evidence was insufficient to show a settled purpose of the natural father to forego all parental rights and relinquish all parental claim to the minor child where, inter alia, he visited his daughter four or five times since the parties divorced and there was continued contact through frequent telephone calls. S.N.C. v. J.R.D., 1999 Miss. App. LEXIS 45 (Miss. Ct. App. Feb. 9, 1999), aff'd, 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

The evidence was sufficient to support a finding that a mother had abandoned and deserted her minor children, where the mother had only seen the children 2 times between January of 1986 when she left them with their father and the time of the trial in January of 1990, the mother did not contribute any financial assistance during that time, the mother did not send birthday cards or Christmas gifts to the children and ignored other events in the children's lives, the children thought of and referred to their aunt, with whom they were living, as their mother, and though the older child knew who the mother was when she saw her, the younger child did not know the mother at all as the mother had left when the younger child was 6 months old. Natural Mother v. Paternal Aunt, 583 So. 2d 614, 1991 Miss. LEXIS 386 (Miss. 1991).

A chancellor was not manifestly wrong in refusing to terminate a father's parental rights, even though the father had killed the child's mother, where there was no abandonment of the child by her father and the father had made 5 $100 payments in support of his daughter. Veselits v. Cruthirds, 548 So. 2d 1312, 1989 Miss. LEXIS 430 (Miss. 1989).

Chancellor was not manifestly in error when he found neither abandonment nor such immoral conduct as to make natural father of child unfit, where: father had been behind in child support payments; had been arrested for possession of marijuana with intent to deliver; and had cohabited with someone not his spouse; constant arrearages in child support payments do not constitute abandonment or desertion under statutory definition, and that was only evidence of desertion in case; there was no evidence that father had ever exposed daughter to illegal or immoral conduct during visits, and at time of hearing father was out of school and held good job; commission of crime alone was insufficient to find him morally unfit to rear and train child, especially where rehabilitation was evident; and, cohabitation by custodial parent in itself is insufficient to modify custody order absent showing of substantial detrimental effect; same rule applies in adoption cases. In Interest of J.D., 512 So. 2d 684, 1987 Miss. LEXIS 2738 (Miss. 1987).

In a proper case, where the proof is clear and convincing, there may be constructive abandonment and desertion of a minor child. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

Claim that natural mother has deserted child for purposes of adoption statute (§ 93-17-5) will be considered in context of statutory proviso (§ 93-15-103) authorizing termination of parental rights on ground of desertion. Bryant v. Cameron, 473 So. 2d 174, 1985 Miss. LEXIS 2157 (Miss. 1985).

Parental rights are properly terminated when, after parents are given considerable opportunity and warning that they must change lifestyle, parents fail to provide children with most basic necessities for healthy life which are well within capabilities of parents if they were so inclined. Adams v. Powe, 469 So. 2d 76, 1985 Miss. LEXIS 1995 (Miss. 1985).

In an action in which a natural mother and her new husband petitioned for adoption of her minor children over objection of their natural father, petitioners failed to prove by clear and convincing evidence that the father had abandoned his children, or was unfit, within the meaning of §§ 93-17-7 and 93-15-103(3), where, although he was living in an adulterous relationship at the time of the divorce, he had subsequently married his second wife, where, although he was over $7,000 in arrears in court ordered child support, he proved that he was unable to make the support payments or purge himself of contempt, and where, although there had been few visits between him and the children, he had not so totally shown that he wished to relinquish all parental claims to the children as to justify a finding of abandonment or desertion. Petit v. Holifield, 443 So. 2d 874, 1984 Miss. LEXIS 1568 (Miss. 1984).

A natural mother's parental rights were improperly terminated, where she established beyond peradventure that she had attempted to establish a suitable home for the return of her children, that she had continually made efforts to remain in touch with her children despite barriers imposed by their geographic location and constant interference by many well-intentioned people, and where the proof wholly failed to establish that she had abandoned her children and was further insufficient to establish, by clear and convincing proof, an extreme and deep-seated antipathy by the child toward her or some other substantial erosion of the parent and child relationship which was caused, at least in part, by the mother's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate or prolonged imprisonment. De La Oliva v. Lowndes County Dep't of Public Welfare, 423 So. 2d 1328, 1982 Miss. LEXIS 2384 (Miss. 1982).

24. Erosion of parent/child relationship.

There was sufficient proof that there had been a substantial erosion of the relationship between the mother and her children that was caused at least in part by the mother's actions where because of own choices she was unable to regain custody within a reasonable period of time, and this was especially damaging because the children were infants when they were placed in foster care and they now viewed their foster families as their real families, and there was not observable bond between the mother and her children. Hall v. Jackson Cnty. Dep't of Human Servs. (In the Interest of B.A.H.), 225 So. 3d 1220, 2016 Miss. App. LEXIS 37 (Miss. Ct. App. 2016).

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as there had been a substantial erosion of the relationship between the parent and the child, which was caused at least in part by the parent's serious neglect, prolonged and unreasonable absence, and unreasonable failure to visit or communicate. Barnes v. McGee, 178 So. 3d 801, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. 2013).

Chancery court's order to terminate a mother's parental rights based upon the daughter's deep-seated antipathy towards her under § 93-15-103(3)(f) was in the best interests of the daughter as the evidence showed that the daughter was angry at her mother and that introducing the mother back into the daughter's life could adversely affect the daughter if it was not done properly through the use of therapy and support groups. The mother's history indicated that she was resistant to such approaches. L.O. v. G.V., 37 So. 3d 1248, 2010 Miss. App. LEXIS 315 (Miss. Ct. App. 2010).

Where the clear and convincing evidence showed that a mother's parents were interfering with a father's visitation rights, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(f) based on the erosion of the parent¢hild relationship. A.C.W. v. J.C.W., 957 So. 2d 1042, 2007 Miss. App. LEXIS 399 (Miss. Ct. App. 2007).

Termination of the mother's parental rights was inappropriate under the Termination of Rights of Unfit Parents Law because the county's evidence did not overcome the strong presumption of retaining parental rights in the mother's favor; there was a failure to show an extreme and deep-seated antipathy by the child toward the parent or any other substantial erosion of the relationship between the two as required pursuant to Miss. Code Ann. § 93-15-103(3)(f). In re V.M.S., 938 So. 2d 829, 2006 Miss. LEXIS 530 (Miss. 2006).

Department of Human Services (DHS) removed the mother's three children from her home after her husband was charged with raping their 11-year-old daughter. After the mother breached an agreement with the DHS by failing to attend parenting and counseling classes, and continued to have contact with her husband after his conviction, there was a substantial erosion of the relationship between the mother and the children, constituting grounds for termination of her parental rights pursuant to Miss. Code Ann. § 93-15-103(3)(f)(1972). May v. Harrison County Dep't of Human Servs., 883 So. 2d 74, 2004 Miss. LEXIS 1013 (Miss. 2004).

Evidence supported a determination that there had been a substantial erosion of the parent-child relationship, notwithstanding the parents' contention that they had continuously sought and exercised visitation, but were restricted by court order to only limited, supervised visitation, where the court found (1) that this was the worst case of child abuse ever to pass before his bench, (2) that the child had bonded with her foster parents and considered them to be her parents, and (3) that it would be detrimental for the child to be removed from her foster parents' care. G.Q.A. v. Harrison County Dep't of Human Servs., 771 So. 2d 331, 2000 Miss. LEXIS 214 (Miss. 2000).

Evidence was insufficient to support the termination of a mother's parental rights on the ground of a substantial erosion of the relationship between her and the minor children caused, at least in part, by her serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with the minor children; although her visits with her children were very infrequent, it was not shown that she wished to relinquish all parental claims to the children constituting an abandonment of her children, and her conduct did not imply a conscious disregard of all the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship. M.L.B. v. S.L.J., 1999 Miss. App. LEXIS 299 (Miss. Ct. App. May 18, 1999), aff'd, 806 So. 2d 1023, 2000 Miss. LEXIS 93 (Miss. 2000).

The evidence was sufficient to support a finding of a "substantial erosion of the relationship" between a mother, who was incarcerated for murder and armed robbery, and 2 of her children, where a social worker testified that there was indifference at best on the part of the children towards the mother, a psychologist concurred in this opinion, one of the children testified that he had not seen his mother for 5 years though he had written to her and talked with her on the phone, he seemed indifferent to the possibility that his mother's parental rights might be terminated and he seemed anxious to be adopted by someone, and the other child seemed to have no memory of her mother as she was 2 years old when they were separated. Vance v. Lincoln County Dep't of Public Welfare, 582 So. 2d 414, 1991 Miss. LEXIS 360 (Miss. 1991).

A mother whose parental rights were terminated under § 93-15-103(3)(e) on the ground that there was a "substantial erosion of the relationship" between her and 2 of her children failed to show that the statute was unconstitutionally vague, since a person of common intelligence should have been aware that the result of a factual situation such as the mother's could well be the termination of one's parental rights. If the statute were more specific, then the cases in which it could be applied could be so drastically reduced as to make it ineffective in protecting the children it was meant to serve. Vance v. Lincoln County Dep't of Public Welfare, 582 So. 2d 414, 1991 Miss. LEXIS 360 (Miss. 1991).

25. Commission of crime by or imprisonment of parent.

Chancery court did not err in granting an adoption because clear and convincing evidence supported a finding that the father was unfit to rear and train his children since he was sentenced to life imprisonment and continued to exhibit threatening and violent behavior; the father's past and present conduct would pose a risk of substantial harm to the physical, mental or emotional health of his children, and the passage of time evinced a substantial erosion of the parent-child relationship. Blakeney v. McRee, 188 So. 3d 1154, 2016 Miss. LEXIS 87 (Miss. 2016).

Chancery court did not err in terminating a father's parental rights to his three children where his abuse of one child under Miss. Code Ann. § 93-15-103(3)(c) (Rev. 2004) was sufficient to terminate his parental rights to all three children, it was of no matter that the child the father was convicted of abusing under Miss. Code Ann. § 97-5-39(2) (Rev. 2006) may not have been his biological son, and the chancellor properly considered all of the factors listed in Miss. Code Ann. § 97-15-103 (Rev. 2004). H.D.H. v. Prentiss County Dep't of Human Servs., 979 So. 2d 6, 2008 Miss. App. LEXIS 189 (Miss. Ct. App. 2008).

Although a father's appeal was dismissed for lack of jurisdiction because his notice of appeal was untimely, the court alternatively found that termination of parental rights (TPR) of the father could not be based solely on his incarceration, and TPR was not proper pursuant to either Miss. Code Ann. § 93-15-103(3)(b), (3)(d), or (3)(e) because there was not substantial evidence to support the grounds apart from circumstances solely attributable to the father's incarceration, nor was TPR proper pursuant to § 93-15-103(3)(f) as the record contained insufficient evidence that the relationship between the father and his children had substantially eroded; however, TPR was proper pursuant to § 93-15-103(3)(h) because all three requirements of the provision were met: the children had been adjudicated neglected prior to the father's incarceration, custody had been transferred prior to his incarceration, and it was determined that reunification would not have been in the best interests of the children at two reviews, although the reviews occurred after the father's incarceration. In re A.M.A., 986 So. 2d 999, 2007 Miss. App. LEXIS 818 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), cert. denied, 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

Imprisonment of a parent, and the resulting conditions, can be rightfully considered as a significant factor when determining whether parental rights may be terminated. Vance v. Lincoln County Dep't of Public Welfare, 582 So. 2d 414, 1991 Miss. LEXIS 360 (Miss. 1991).

The termination of a mother's parental rights, in part because of her criminal acts and resulting imprisonment, did not amount to cruel and unusual punishment since the termination of her parental rights was a separate matter from that of her criminal conviction, and the action for termination of parental rights was not brought to further punish the mother, but was a reasonable exercise of the State's legitimate interest in providing for the welfare of the children. Vance v. Lincoln County Dep't of Public Welfare, 582 So. 2d 414, 1991 Miss. LEXIS 360 (Miss. 1991).

26. Sexual abuse.

The evidence was sufficient to support a chancellor's decision to terminate a mother's parental rights to 2 of her children under § 93-15-103(3)(b), where 2 of her children had been subjected to numerous incidents of sexual abuse by different adults and there was evidence of the mother's knowledge of, or participation in, the sexual abuse of these children, even though there was no evidence of abuse of one of the children involved in the case and the greatest and most unfortunate victim was a third child who was not involved in the case, since the treatment of the third child permeated and infected the other 2 children; no mother should be permitted to have custody or control of any children if she permits one child to be molested. Carson v. Natchez Children's Home, 580 So. 2d 1248, 1991 Miss. LEXIS 304 (Miss. 1991).

Section 93-15-103(3)(b) is sufficient to encompass child sexual abuse without explicitly stating that a parent's complicity was shown in considerably more than an isolated incident. Thus, a mother's parental rights were properly terminated under the statute even though there was no showing that she had been guilty of a "series" of incidents. Carson v. Natchez Children's Home, 580 So. 2d 1248, 1991 Miss. LEXIS 304 (Miss. 1991).

27. Moral unfitness; generally.

Grandmother who sought to have parent's parental rights terminated failed to prove abandonment or any of the grounds under Miss. Code Ann. § 93-15-103, and the appellate court was not inclined to terminate a parent's rights merely because the mother happened to work as a stripper. Further, where the chancellor found that the grandmother had frequent visitation, including overnight visitation, with the children, and that the parents had not unreasonably withheld visitation, given concerns about the grandmother's boyfriend, the chancellor properly declined to impose court-ordered visitation. Hillman v. Vance, 910 So. 2d 43, 2005 Miss. App. LEXIS 34 (Miss. Ct. App. 2005).

Evidence did not establish that a father was mentally, morally, or otherwise unfit to raise a child where the only evidence offered to show that he was unfit was one allegedly abusive incident between the father and the mother. S.N.C. v. J.R.D., 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

Chancellor was not manifestly in error when he found neither abandonment nor such immoral conduct as to make natural father of child unfit, where: father had been behind in child support payments; had been arrested for possession of marijuana with intent to deliver; and had cohabited with someone not his spouse; constant arrearages in child support payments do not constitute abandonment or desertion under statutory definition, and that was only evidence of desertion in case; there was no evidence that father had ever exposed daughter to illegal or immoral conduct during visits, and at time of hearing father was out of school and held good job; commission of crime alone was insufficient to find him morally unfit to rear and train child, especially where rehabilitation was evident; and, cohabitation by custodial parent in itself is insufficient to modify custody order absent showing of substantial detrimental effect; same rule applies in adoption cases. In Interest of J.D., 512 So. 2d 684, 1987 Miss. LEXIS 2738 (Miss. 1987).

Chancellor's finding that best interest of minor child would be served by termination of parental rights of natural parents, and his adoption by petitioners, was supported by evidence showing that the natural parents were mentally and morally unfit to rear and train child, and further showing improvement in child during time he was in home of petitioner. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

Where a statute is repealed by a new statute which substantially reenacts provisions of the prior statute simultaneously with the repeal, the operation of the original statute is not interrupted by the repeal as to an action which was filed and pending before the effective date of the new legislation. Thus, a suit to terminate the parental rights of a natural father instituted on June 30, 1980, was controlled by the provisions of § 93-15-1, et seq., although that statute was repealed by § 93-15-101, et seq., which became effective the following day, July 1, 1980. The trial court correctly terminated the parental rights of the natural father on the grounds that he had abandoned the child and was "morally unfit" where the evidence established that he had suggested to the natural mother that she have an abortion, he had refused to contribute to the expense of prenatal care, he had demanded that the natural mother not use his name in applying for welfare assistance, he had terminated his relationship with the natural mother after being informed that she was pregnant, he had left the decision regarding the child's destiny entirely up to the mother, and a month prior to the baby's birth, he had advised the mother that he would surrender the child for adoption, and where the evidence also established that the father, a married man separated from his wife, had entered into an adulterous affair with the natural mother, a teenage girl. Doe v. Attorney W., 410 So. 2d 1312, 1982 Miss. LEXIS 1882 (Miss. 1982).

28. Mental unfitness.

Termination of the mother's parental rights was inappropriate because, although her mental illness affected her ability to care for her child, there was no clear and convincing evidence proving that the mother's condition made her unable to assume minimally, acceptable care of the child under Miss. Code Ann. § 93-15-103(3)(e)(i). Psychiatric reports indicated that the mother's insight and judgment were good; her attitude was cooperative; and her motivation for ongoing treatment was good. J.J. v. Smith, 31 So. 3d 1271, 2010 Miss. App. LEXIS 147 (Miss. Ct. App. 2010).

The mental unfitness of a mother to raise her child was not established where the record revealed a complete and total absence of any substantive evidence supporting the conclusion that the mother suffered from any mental short-comings sufficient in degree to warrant a termination of her parental rights. N. E. v. L. H., 761 So. 2d 956, 2000 Miss. App. LEXIS 281 (Miss. Ct. App. 2000).

29. Series of abusive incidents.

Substantial evidence supported the determination that an 18-month-old child was subjected to a series of abusive incidents where the evidence showed that she was intentionally burned with hot water, that medical treatment was withheld until her condition deteriorated to the point that a terrible odor emitted from her body due to serious infection, and that she suffered from malnutrition, notwithstanding the parents' contention that the burn was caused by accident, that the mother genuinely believed that the child was healing, and that failure to properly nourish the child was a by-product of doctor's orders that the child be fed only small amounts of food at frequent intervals to keep her from vomiting. G.Q.A. v. Harrison County Dep't of Human Servs., 771 So. 2d 331, 2000 Miss. LEXIS 214 (Miss. 2000).

30. Failure to acknowledge abuse.

Termination of parental rights was appropriate where both parents refused to acknowledge the father's sexual abuse of the children at issue, the father failed to obtain counseling though the court-ordered program, and the mother failed to establish her own home independent of the father and work with the department of human services for the return of the children. S.R.B.R. v. Harrison County Dep't of Human Servs., 798 So. 2d 437, 2001 Miss. LEXIS 70 (Miss. 2001).

In light of the fact that the Family Court ordered counseling on the theory that the natural parents could rehabilitate themselves from their abusive conduct, the Family Court was not manifestly erroneous in terminating their parental rights for their failure to acknowledge their abuse and to participate in counseling. G.Q.A. v. Harrison County Dep't of Human Servs., 771 So. 2d 331, 2000 Miss. LEXIS 214 (Miss. 2000).

31. Failure to exercise visitation.

Termination of the parental rights of the mother was appropriate where (1) by the time of trial, the child had been in the custody of the appellee for six years, and the mother had only visited with him for a total of approximately 34 hours; and (2) the guardian ad litem opined that termination of the mother's parental rights was in the child's best interest. R.F. v. Lowndes County Dep't of Human Servs., 17 So. 3d 1133, 2009 Miss. App. LEXIS 585 (Miss. Ct. App. 2009).

32. Termination denied.

Potential adoptive parents failed to show that a father's parental rights to child should be terminated under Miss. Code Ann. § 93-15-103 where: (1) there was no evidence that the father had abused the child, or any of his other children; (2) there was no evidence that he had been convicted of a crime of sexual abuse involving children; (3) there was evidence that the father had attempted to give the child gifts but that the potential adoptive parents had consistently rebuffed his gestures; (4) the father attended many of his allowed visits with the child, as well as every legal proceeding; (5) although the father was self-employed but not working at the time of trial, there was testimony that he cared for his wife's children full-time; and (6) the father and his wife passed random drug tests. In re B.N.N., 928 So. 2d 197, 2006 Miss. App. LEXIS 274 (Miss. Ct. App. 2006).

33. Termination proper.

Mother's parental rights were properly terminated because, even with the extended deadline granted by the trial court, the mother failed to make progress on the terms of a service agreement, and because of the mother's inability to achieve reunification within a reasonable amount of time, continued drug use, and failure to eliminate identified harmful behaviors, and the substantial erosion of the parent/child relationship. The termination also served the children's best interests as they had bonded and were doing well with their foster family. C.S.H. v. Lowndes Cty. Dep't of Human Servs., 246 So. 3d 908, 2018 Miss. App. LEXIS 212 (Miss. Ct. App. 2018).

Termination of the mother's and the father's parental rights was proper because the mother had been responsible for a series of abusive incidents concerning both children as she had repeatedly exposed the children to her drug lifestyle and neglected them as a result; both children had been with a Christian group home for at least one year and the parents had failed to exercise reasonable visitation with the children; the parents exhibited ongoing behavior that prevented placing the children back home; and there had been a substantial erosion of the relationship between the parents and the children. Adams v. Tupelo Children's Mansion, Inc., 185 So. 3d 1070, 2016 Miss. App. LEXIS 56 (Miss. Ct. App. 2016).

Termination of the mother's and the father's parental rights was proper as they removed the children from their home by placing them in the physical custody of a Christian group home; when an individual from the group home went to pick up one of the children to return her to the group home, the parent's house was in disrepair and there was dog feces throughout the house; the guardian ad litem (GAL) described the home as being in a decrepit condition and that it would likely be unapproved for placement of children by any licensed agency; the GAL stated that the family was living in abject poverty, without finances to provide for the children; and ample evidence was presented to show adoption would be in the best interest of the children. Adams v. Tupelo Children's Mansion, Inc., 185 So. 3d 1070, 2016 Miss. App. LEXIS 56 (Miss. Ct. App. 2016).

34. Standing.

Where the mother consented to adoption, the adoption was never finalized and the father was granted child custody; the chancery court erred by dismissing the mother's child custody complaint. The Supreme Court of Mississippi held that the mother should be given an opportunity to be heard because she had standing to challenge the father's custody. A.D.R. v. J.L.H., 994 So. 2d 177, 2008 Miss. LEXIS 575 (Miss. 2008).

35. Clear and convincing proof.

Chancellor's findings in support of a termination of parental rights were properly made by clear and convincing evidence because the chancellor's written order terminating parental rights stated the findings were based on clear and convincing evidence. J.F.G. v. Pearl River Cty. Dep't of Human Servs., — So. 3d —, 2017 Miss. App. LEXIS 348 (Miss. Ct. App. June 13, 2017).

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as the parent had not visited or communicated with the child in almost five years and had not financially supported the child for more than four years. Barnes v. McGee, 178 So. 3d 801, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. 2013).

Grounds for termination of parental rights were not established by clear and convincing evidence because, under Miss. Code Ann. § 93-15-109, the youth court erred in failing to consider all the relevant evidence; under Miss. Code Ann. § 93-15-103(3)(h), the prior adjudication of neglect did not determine that reunification was not in children's best interests. A.B. v. Lauderdale County Dep't of Human Servs., 13 So. 3d 1263, 2009 Miss. LEXIS 299 (Miss. 2009).

A mother had her child taken out of her custody previously, but the adjudication of neglect was not enough to sober the mother because similar incidents continued to occur, and the child was formally adjudicated neglected twice and one time the parties agreed to a consent judgment under the agreement that the mother had a drug problem that had to be addressed; therefore, the youth court's adjudication of neglect was supported by clear and convincing evidence and termination of her parental rights was appropriate. B.S.G. v. J.E.H., 958 So. 2d 259, 2007 Miss. App. LEXIS 402 (Miss. Ct. App. 2007).

36. Failure to comply with service plan.

There was credible evidence to support the trial court's finding that the mother's failure to comply with her service agreement prevented her children from being returned to her after more than a year in DHS custody where her boyfriend's continued drug use and her continued relationship and cohabitation with him was a violation of her service agreements, which required her to maintain a drug-free home for her children. Hall v. Jackson Cnty.

Dep't of Human Servs. (In the Interest of B.A.H.), 225 So. 3d 1220, 2016 Miss. App. LEXIS 37 (Miss. Ct. App. 2016).

37. Returning child to home not possible.

There was credible proof from which a rational trier of fact could have found that the children could not be returned to their mother within a reasonable time where she continued her relationship with her boyfriend despite the fact that he continued to use drugs and engage in criminal activity. Hall v. Jackson Cnty. Dep't of Human Servs. (In the Interest of B.A.H.), 225 So. 3d 1220, 2016 Miss. App. LEXIS 37 (Miss. Ct. App. 2016).

38. Failure to eliminate behaviors.

There was credible evidence to support the trial court's finding that, despite diligent efforts by DHS, the mother failed to eliminate behaviors that prevented the placement of her children in her home where she continued to cohabitate with her boyfriend even while he continued to use drugs. Hall v. Jackson Cnty. Dep't of Human Servs. (In the Interest of B.A.H.), 225 So. 3d 1220, 2016 Miss. App. LEXIS 37 (Miss. Ct. App. 2016).

RESEARCH REFERENCES

ALR.

Physical abuse of child by parent as ground for termination of parent's right to child. 53 A.L.R.3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child. 58 A.L.R.3d 1074.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 A.L.R.3d 417.

Standing of foster parent to seek termination of rights of foster child's natural parents. 21 A.L.R.4th 535.

Right of parent to regain custody of child after temporary conditional relinquishment of custody. 35 A.L.R.4th 61.

Visitation rights of homosexual or lesbian parent. 36 A.L.R.4th 997.

Attorneys' fee awards in parent-nonparent child custody case. 45 A.L.R.4th 212.

Child custody and visitation rights of person infected with AIDS. 86 A.L.R.4th 211.

Parent's mental deficiency as factor in termination of parental rights. 1 A.L.R.5th 469.

Parent's use of drugs as factor in award of custody of children, visitation rights, or termination of parental rights. 20 A.L.R.5th 534.

Mental health of contesting parent as factor in award of child custody. 53 A.L.R.5th 375.

Sufficiency of evidence to establish parent's knowledge or allowance of child's sexual abuse by another under statute permitting termination of parental rights for "allowing" or "knowingly allowing" such abuse to occur. 53 A.L.R.5th 499.

Parents' mental illness or mental deficiency as ground for termination of parental rights – Constitutional issues. 110 A.L.R.5th 579.

Parents' mental illness or mental deficiency as ground for termination of parental rights – General considerations. 113 A.L.R.5th 349.

Parents' mental illness or mental deficiency as ground for termination of parental rights – Effect on parenting ability and parental rights. 116 A.L.R.5th 559.

Parents' mental illness or mental deficiency as ground for termination of parental rights – Best interests analysis. 117 A.L.R.5th 349.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Issues concerning guardian ad litem and counsel. 118 A.L.R.5th 561.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Applicability of Americans With Disabilities Act. 119 A.L.R.5th 351.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Evidentiary issues. 122 A.L.R.5th 385.

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Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child. 99 A.L.R.3d 268.

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Child custody and visitation rights of person infected with AIDS. 86 A.L.R.4th 211.

AM. JUR.

2 Am. Jur. 2d, Adoption §§ 69-155.

59 Am. Jur. 2d, Parent and Child §§ 40, 41.

14 Am. Jur. Pl & Pr Forms (Rev), Incompetent Persons, Form 322.3 (complaint, petition, or declaration – to terminate parental rights of incompetent parent – by state department of human services and foster parents).

7 Am. Jur. Legal Forms 2d, Desertion and Nonsupport §§ 89:1 et seq.

2 Am. Jur. 2d, Adoption §§ 69-155.

59 Am. Jur. 2d, Parent and Child § 49.

19 Am. Jur. Pl & Pr Forms (Rev), Parent and Child, Form 51 (judgment or decree declaring minor child free from custody and control of father); Form 52 (judgment or decree making child ward of court and awarding custody to grandparents).

22 Am. Jur. Trials, Child Custody Litigation §§ 1 et seq.

CJS.

2 C.J.S., Adoption of Persons §§ 48 et seq.

67A C.J.S., Parent §§ 31 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

1989 Mississippi Supreme Court Review: Termination of Parental Rights. 59 Miss. L. J. 896, Winter, 1989.

CJS.

2 C.J.S., Adoption of Persons §§ 45 et seq.

67A C.J.S., Parent §§ 31 et seq.

§ 93-15-123. Court discretion not to terminate.

Notwithstanding any other provision of this chapter, the court may exercise its discretion not to terminate the parent's parental rights in a proceeding under this chapter if the child's safety and welfare will not be compromised or endangered and terminating the parent's parental right is not in the child's best interests based on one or more of the following factors:

(a) The Department of Child Protection Services has documented compelling and extraordinary reasons why terminating the parent's parental rights would not be in the child's best interests;

(b) There is a likelihood that continuing reasonable efforts for achieving reunification will be successful;

(c) Terminating the parent's parental rights would inappropriately relieve the parent of the parent's financial or support obligations to the child; or

(d) The child is being cared for by the other parent, or a relative, guardian, or custodian, in a residence not occupied by the abusive or neglectful parent and terminating the parent's parental rights would not expedite the process for obtaining a satisfactory permanency outcome.

HISTORY:

Laws, 2016, ch. 431, § 13; Laws, 2017, ch. 372, § 10, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, substituted "Department of Child Protection Services" for "Department of Human Services" in (a).

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. In general.

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former Law.

11. In general.

Even where a chancellor finds one or more grounds which justify termination of parental rights, nothing in the law requires the chancellor to do so; rather, Miss. Code Ann. § 93-15-109 provides that if the chancellor is satisfied by clear and convincing proof that grounds justifying termination of parental rights exist then the court may terminate all the parental rights of the parent or parents. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424, 2009 Miss. LEXIS 599 (Miss. 2009).

§ 93-15-125. Compliance with Indian Child Welfare Act.

In any proceeding under this chapter, where the court knows or has reason to know that an Indian child is involved, the court must comply with the Indian Child Welfare Act (25 USCS Section 1901 et seq.) in regard to notice, appointment of counsel, examination of reports or other documents, remedial services and rehabilitation programs, and other protections the act provides. Additionally, no termination of parental rights may be ordered in the proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the Indian child by the parent is likely to result in serious emotional or physical damage to the Indian child.

HISTORY:

Laws, 2016, ch. 431, § 14, eff from and after passage (approved Apr. 18, 2016).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

§ 93-15-127. Effect on another parent's rights.

Termination under this chapter of a parent's parental rights does not affect the parental rights of another parent.

HISTORY:

Laws, 2016, ch. 431, § 15, eff from and after passage (approved Apr. 18, 2016).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Cross References —

Petition for determination of rights in proposed adoption of natural child, see § 93-17-6.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former § 93-17-9.

11. In general.
12. Effect of consent.

I. Under Current Law.

1-10. [Reserved for future use.]

II. Under Former § 93-17-9.

11. In general.

Consent to adoption does not irrevocably terminate parental rights generally, or otherwise subjugate them with respect to individuals other than the intended adopting individuals. A.D.R. v. J.L.H., 994 So. 2d 177, 2008 Miss. LEXIS 575 (Miss. 2008).

Absent a showing by the parent or parents establishing either fraud, duress, or undue influence by clear and convincing evidence, surrenders executed in strict compliance with the safeguard provision of § 93-17-9 are irrevocable. C.C. I. v. Natural Parents, 398 So. 2d 220, 1981 Miss. LEXIS 2007 (Miss. 1981).

12. Effect of consent.

Where the mother consented to adoption, the adoption was never finalized and the father was granted child custody; the chancery court erred by dismissing the mother's child custody complaint. The Supreme Court of Mississippi held that the mother should be given an opportunity to be heard because she had standing; Miss. Code Ann. § 93-17-9 did not prevent her from challenging the father's custody. A.D.R. v. J.L.H., 994 So. 2d 177, 2008 Miss. LEXIS 575 (Miss. 2008).

RESEARCH REFERENCES

ALR.

Natural parent's parental rights as affected by consent to child's adoption by other natural parent. 37 A.L.R.4th 724.

§ 93-15-129. Petitions involving sexual abuse or serious bodily injury treated as preference case.

In any case where a child has been removed from the custody and care of the parent due to sexual abuse or serious bodily injury to the child, or is not living in the home of the offending parent, the court shall treat the petition for termination of parental rights as a preference case to be determined with all reasonable expedition.

HISTORY:

Laws, 2016, ch. 431, § 16, eff from and after passage (approved Apr. 18, 2016).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

§ 93-15-131. Post-judgment proceedings.

(1) If the court does not terminate the parent's parental rights, the custody and care of the child shall continue with the person, agency, or institution that is holding custody of the child at the time the judgment is rendered, or the court may grant custody to the parent whose rights were sought to be terminated if that is in the best interest of the child. If the Department of Child Protection Services has legal custody of the child, the court must conduct a permanency hearing and permanency review hearings as

required under the Mississippi Youth Court Law and the Mississippi Uniform Rules of Youth Court Practice.

(2) If the court terminates the parent's parental rights, the court shall place the child in the custody and care of the other parent or some suitable person, agency, or institution until an adoption or some other permanent living arrangement is achieved. No notice of adoption proceedings or any other subsequent proceedings pertaining to the custody and care of the child shall be given to a parent whose rights have been terminated.

HISTORY:

Laws, 2016, ch. 431, § 17; Laws, 2017, ch. 372, § 11, eff from and after passage (approved Mar. 20, 2017).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

Amendment Notes —

The 2017 amendment, effective March 20, 2017, substituted "Department of Child Protection Services" for "Department of Human Services" in (1).

§ 93-15-133. Review by Supreme Court.

Appeal from a final judgment on the termination of parental rights under this chapter shall be to the Supreme Court of Mississippi pursuant to the Mississippi Rules of Appellate Procedure.

HISTORY:

Laws, 2016, ch. 431, § 18, eff from and after passage (approved Apr. 18, 2016).

Editor's Notes —

Laws of 2016, ch. 431, effective April 18, 2016, § 2 provides:

"SECTION 2. Sections 3 through 18 of this act [codified as Sections 93-15-103 through 93-15-133] shall be codified in Chapter 15, Title 93, Mississippi Code of 1972, as the Mississippi Termination of Parental Rights Law to replace Sections 93-15-103 through 93-15-111, which are repealed in Section 23 of this act."

CHAPTER 16.

GRANDPARENTS' VISITATION RIGHTS

Sec.	
93-16-1.	Jurisdiction of court to grant grandparents visitation rights with minor child.
93-16-3.	Who may petition for visitation rights; when; court in which to file petition.
93-16-5.	Parties to proceeding; discretion of court in granting, enforcing, modifying or terminating rights.
93-16-7.	Application of chapter.

§ 93-16-1. Jurisdiction of court to grant grandparents visitation rights with minor child.

Any court of this state which is competent to decide child custody matters shall have jurisdiction to grant visitation rights with a minor child or children to the grandparents of such minor child or children as provided in this chapter.

HISTORY:

Laws, 1983, ch. 497, § 1; Laws, 1990, ch. 537, § 1, eff from and after July 1, 1990.

Cross References —

Child custody matters, generally, see §§ 43-21-101 et seq., § 93-5-23, §§ 93-15-101 et seq., §§ 93-17-1 et seq., §§ 93-27-101 et seq.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Chancery court had jurisdiction over the grandmother's petition for visitation where the mother and father testified that they were the child's parents, they were the two individuals who controlled the custody of the child, and there was no evidence that another man asserted any rights whatsoever as the child's parent. Lofton v. Lofton, 176 So. 3d 1184, 2015 Miss. App. LEXIS 537 (Miss. Ct. App. 2015).

Chancellor did not err in awarding visitation rights to a grandmother because the chancellor had the discretion to award the visitation rights, and the chancellor thoroughly analyzed the appropriate factors in making his decision. Ferguson v. Lewis, 31 So. 3d 5, 2009 Miss. App. LEXIS 249 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 157 (Miss. 2010).

The Mississippi Grandparents' Visitation Act, Miss. Code Ann. § 93-16-1 does not violate parents' due process rights because the trial court must make specfic findings that: (1) the grandparent has established a viable relationship with the grandchild, (2) that the custodial parents have unreasonably denied grandparent visitation, and (3) visitation between the grandparent and the grandchild would be in the best interest of the child before ordering grandparent visitation. Stacy v. Ross, 798 So. 2d 1275, 2001 Miss. LEXIS 300 (Miss. 2001).

Under common law principles, there were no legal rights of grandparents for visitation privileges with their grandchildren where the parents did not permit such communication. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

RESEARCH REFERENCES

ALR.

Grandparents' visitation rights. 90 A.L.R.3d 222.

Visitation rights of persons other than natural parents or grandparents. 1 A.L.R.4th 1270.

Validity of Grandparent Visitation Statutes. 86 A.L.R.6th 1.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation § 834.

59 Am. Jur. 2d, Parent and Child § 47.

CJS.

27B C.J.S., Divorce § 507.

Law Reviews.

1989 Mississippi Supreme Court Review: Visitation by Grandparents. 59 Miss. L. J. 899, Winter, 1989.

Practice References.

Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-16-3. Who may petition for visitation rights; when; court in which to file petition.

(1) Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies, either parent of the child's parents may petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the chancery court in the county in which the child resides, and seek visitation rights with the child.

(2) Any grandparent who is not authorized to petition for visitation rights pursuant to subsection (1) of this section may petition the chancery court and seek visitation rights with his or her grandchild, and the court may grant visitation rights to the grandparent, provided the court finds:

(a) That the grandparent of the child had established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child; and

(b) That visitation rights of the grandparent with the child would be in the best interests of the child.

(3) For purposes of subsection (2) of this section, the term "viable relationship" means a relationship in which the grandparents or either of them have voluntarily and in good faith supported the child financially in whole or in part for a period of not less than six (6) months before filing any petition for visitation rights with the child, the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year, or the child has been cared for by the grandparents or either of them over a significant period of time during the time the parent has been in jail or on military duty that necessitates the absence of the parent from the home.

(4) Any petition for visitation rights under subsection (2) of this section shall be filed in the county where an order of custody as to the child has previously been entered. If no custody order has been entered, then the grandparents' petition shall be filed in the county where the child resides or may be found. The court shall on motion of the parent or parents direct the grandparents to pay reasonable attorney's fees to the parent or parents in advance and prior to any hearing, except in cases in which the court finds that no financial hardship will be imposed upon the parents. The court may also direct the grandparents to pay reasonable attorney's fees to the parent or parents of the child and court costs regardless of the outcome of the petition.

HISTORY:

Laws, 1983, ch. 497, § 1; Laws, 1986, ch. 421, § 1; Laws, 1990, ch. 537, § 2; Laws, 1992, ch. 566, § 1; Laws, 2009, ch. 340, § 1, eff from and after July 1, 2009.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in a statutory reference near the beginning of (3) by changing "subsection (3)" to "subsection (2)." The Joint Committee ratified the correction at its July 22, 2010, meeting.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Attorney fees.
3. Visitation proper.
4. Constitutionality.

1. In general.

Absent a showing that the child's parents had unreasonably withheld visitation, there was no basis for a court to order grandparent visitation, and thus the grandmother's argument that she was entitled to additional visitation was without merit. Patrick v. Boyd, 198 So. 3d 436, 2016 Miss. App. LEXIS 174 (Miss. Ct. App. 2016).

This section does not include the term "great-grandparent." Therefore, two great-grandparents lacked standing and should not have been awarded visitation rights because they were not "grandparents" within the meaning of this section. The appellate court lacked authority to add words or meaning to a statute that was plain on its face. Lott v. Alexander, 134 So. 3d 369, 2014 Miss. App. LEXIS 127 (Miss. Ct. App. 2014).

Right to grandparent visitation is purely statutory and may only be considered if the grandparent meets certain statutory criteria, and the criteria in Mississippi's grandparent-visitation statute are important; by placing limitations on who may petition for visitation, the criteria keep a grandparent's statutory right to visitation from impermissibly encroaching on the parents' rights to rear their children as they see fit. Aydelott v. Quartaro, 124 So. 3d 97, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. 2013).

Broadening the limiting criterion of a "viable relationship" to grandparents who wish they had a viable relationship would render the grandparent-visitation statute unconstitutional because it would permit any grandparent to petition for visitation and not just those who meet the narrow circumstances under the statute. Aydelott v. Quartaro, 124 So. 3d 97, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. 2013).

Because the chancellor did not give the grandparent-visitation statute the necessary narrower reading, his explicit finding of a viable relationship and implicit finding of unreasonable denial of visitation failed to pass constitutional muster; the chancellor erred in weighing the grandparents' wishes into whether there was a viable relationship and never explicitly found the parents had unreasonably denied the grandparents visitation. Aydelott v. Quartaro, 124 So. 3d 97, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. 2013).

Chancellor erred in awarding grandparents visitation because they failed to show they met the criterion of the establishment of a viable relationship with their granddaughters; the chancellor erred in ignoring the grandparents' admissions and permitting contradictory testimony that they had contributed financially and had frequently visited the grandchildren because they never moved for withdrawal or amendment of their admissions. Aydelott v. Quartaro, 124 So. 3d 97, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. 2013).

Chancellor did not err in terminating a paternal grandfather's visitation with his 13-year-old grandchild under Miss. Code Ann. § 93-16-3(1) because even though the child's mother was the cause of the child's negative feelings toward the grandfather, it was in the child's best interest to cease visitation; the child was unhappy with the forced visitation and would rather visit him by choice. Vinson v. Vidal, 28 So. 3d 614, 2009 Miss. App. LEXIS 352 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 88 (Miss. 2010).

Grandmother's motion to intervene in a custody case to assert visitation rights was properly denied because she had no statutory right to visitation at the time the motion was made, as: (1) the chancery court had not awarded custody of the children to one parent; and (2) the grandmother offered no facts in her motion or at the hearing to demonstrate she had a viable relationship with the children and that she was being unreasonably denied visitation. D.C. v. D.C., 2008 Miss. LEXIS 124 (Miss. Feb. 28, 2008).

Grandmother who sought to have parent's parental rights terminated failed to prove abandonment or any of the grounds under Miss. Code Ann. § 93-15-103, and the appellate court was not inclined to terminate a parent's rights merely because the mother happened to work as a stripper. Further, where the chancellor found that the grandmother had frequent visitation, including overnight visitation, with the children, and that the parents had not unreasonably withheld visitation, given concerns about the grandmother's boyfriend, the chancellor properly declined to impose court-ordered visitation. Hillman v. Vance, 910 So. 2d 43, 2005 Miss. App. LEXIS 34 (Miss. Ct. App. 2005).

Trial court erred in granting visitation to the child's paternal grandparents, as the grandparents did not petition for visitation as required in Miss. Code Ann. § 93-16-3 and were never parties to the litigation. Givens v. Nicholson, 878 So. 2d 1073, 2004 Miss. App. LEXIS 703 (Miss. Ct. App. 2004).

The statute is constitutional as the factors that are required to be considered before awarding visitation under the statute specifically prohibit a chancellor from ordering visitation that would interfere with a parent's right to rear his or her children. Zeman v. Stanford, 789 So. 2d 798, 2001 Miss. LEXIS 130 (Miss. 2001).

Subsection (1) was the proper basis for an award of visitation rights to the maternal grandparents of the children where the father had been awarded sole custody of the children. Zeman v. Stanford, 789 So. 2d 798, 2001 Miss. LEXIS 130 (Miss. 2001).

Paternal grandparents of child had statutory right to visitation of child following father's death. Martin v. Coop, 693 So. 2d 912, 1997 Miss. LEXIS 169 (Miss. 1997).

Grandparent visitation statute, under which grandparents have statutory right to visitation after parent who is their child has died, does not deprive parents of their right to raise children by determining care, custody, and management of child, and thus does not violate due process clause. Martin v. Coop, 693 So. 2d 912, 1997 Miss. LEXIS 169 (Miss. 1997).

Order granting paternal grandparents of child visitation totaling 86 days per year in even-numbered years and 81 days per year in odd-numbered years following death of child's father was abuse of discretion, as grandparents had improperly been awarded same visitation as would have been awarded to noncustodial parent. Martin v. Coop, 693 So. 2d 912, 1997 Miss. LEXIS 169 (Miss. 1997).

While grandparents have statutory right to visitation with child after death of parent who is child of grandparents, grandparents do not stand in lieu of or in shoes of deceased parent, and visitation granted to grandparents should not be equivalent to that which would be granted to noncustodial parent unless circumstances overwhelmingly dictate that it should be. Martin v. Coop, 693 So. 2d 912, 1997 Miss. LEXIS 169 (Miss. 1997).

In determining amount of child visitation to which grandparents are entitled following death of parent who is child of grandparents, best interest of child must be polestar consideration, and visitation should be less than that which would be awarded to noncustodial parent, unless circumstances overwhelming dictate that that amount of visitation is in best interest of child, and that it would be harmful to child not to grant it. Martin v. Coop, 693 So. 2d 912, 1997 Miss. LEXIS 169 (Miss. 1997).

Factors to be considered by chancery court in determining grandparent visitation, with no one factor being weighed more heavily, include (1) amount of disruption extensive visitation will have on grandchild's life, (2) suitability of grandparents' home with respect to amount of supervision received by grandchild, (3) age of grandchild, (4) age and physical and mental health of grandparents, (5) emotional ties between grandparents and grandchild, (6) moral fitness of grandparents, (7) distance of grandparents' home from grandchild's home, (8) any undermining of parent's general discipline of grandchild, (9) employment of grandparents and responsibilities associated with it, and (10) willingness of grandparents to accept that rearing of child is parent's responsibility and that parent's manner of childrearing is not to be interfered with. Martin v. Coop, 693 So. 2d 912, 1997 Miss. LEXIS 169 (Miss. 1997).

Substantial basis for Chancellor's finding of viable relationship between minor child and his paternal grandparents, supporting grandparents' petition for visitation rights following parents' divorce, was provided by evidence that grandparents gave financial support to parents before parents' separation through use of grandparents' gas credit card and monetary support, and that grandparents regularly visited child both before and after parents' separation. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Substantial basis for Chancellor's finding that granting visitation rights to minor child's paternal grandparents was in child's best interest, supporting grandparents' petition for visitation rights following parents' divorce, was provided by evidence that child would have little exposure to his father, who was stationed away from home as member of United States Navy, but for child's contact with grandparents, who exchanged videotapes with father. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Granting paternal grandparents right to every-other-weekend visitation with their grandchild was not excessive, where primary basis was father's inability to exercise his parental visitation rights due to his being stationed away from home as member of United States Navy, and where the right was to be concurrent with any visitation exercised by father. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Natural grandparents have no common-law right of visitation with their grandchildren; such right must come from legislative enactment. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

Natural grandparents' statutory right to visit their grandchildren is not as comprehensive as parents' visitation rights. Settle v. Galloway, 682 So. 2d 1032, 1996 Miss. LEXIS 573 (Miss. 1996).

The Grandparents Visitation Rights Act did not apply to a maternal grandmother where the grandchildren had been adopted by their paternal grandmother, since the adoption terminated the parental rights of the children's father and the paternal grandmother was not a parent of the children when she adopted them. Whatever rights to visitation that the maternal grandmother may have acquired under the Grandparents Visitation Rights Act were terminated by the decree of adoption. Muse v. Hutchins, 559 So. 2d 1031, 1990 Miss. LEXIS 194 (Miss. 1990).

The grandparents' visitation statute envisions granting visitation rights to grandparents following adoption proceedings as well as proceedings limited purely to terminating parental rights. Hill v. Smith, 558 So. 2d 854 (Miss. 1990).

Natural grandparents have no common-law "right" of visitation with their grandchildren. Such right, if any, must come from a legislative enactment. Hill v. Smith, 558 So. 2d 854 (Miss. 1990).

The paternal grandparents of a child, who was adopted by the maternal grandparents, were excluded under the grandparents' visitation statute from seeking visitation rights with the child because neither of the legal adoptive parents was a natural parent of the child. Neither the chancery court nor the Supreme Court on its own has the authority to bestow visitation rights upon a grandparent. Hill v. Smith, 558 So. 2d 854 (Miss. 1990).

Under § 93-16-3 and § 93-16-7, an adoption by a step-parent after the termination of the rights of one of the natural parents does not terminate the visitation rights of the natural grandparents-the parents of the parent whose rights have been terminated. Howell v. Rogers, 551 So. 2d 904, 1989 Miss. LEXIS 460 (Miss. 1989).

By enacting Mississippi Code § 93-16-3 the legislature determined that the best interest of the child lies in termination of natural grandparents' visitation rights upon the child becoming adopted. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

The subsequent adoption of a child by a stepfather terminates the visitation rights of a paternal grandparent who had previously petitioned for, but had not yet obtained, court ordered visitation rights. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

An adoption of a child by a step-parent after the death of one of the natural parents terminates visitation rights of natural grandparents, except as to the natural parent who is the spouse of the adopting parent. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

2. Attorney fees.

Chancellor did not abuse his discretion in denying parents' request for attorney's fees because the chancellor found no financial hardship would result from their having to pay their own attorney's fees based on the parents' combined income and expenses left sufficient disposable income for travel and entertainment and extra vehicles, Aydelott v. Quartaro, 124 So. 3d 97, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. 2013).

After terminating a paternal grandfather's visitation with his grandchild, a chancellor did not err in awarding the child's mother attorney fees under Miss. Code Ann. § 93-16-3(4) because the mother did not have the ability to pay the fees; the mother testified that she had lost her home through foreclosure, worked at a low-paying job, and had trouble paying for the child's clothes. Vinson v. Vidal, 28 So. 3d 614, 2009 Miss. App. LEXIS 352 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 88 (Miss. 2010).

Trial court did not err in denying a mother's motion for attorney fees under Miss. Code Ann. § 93-16-3(4) after awarding visitation to a paternal grandmother because, although the mother stated that she was unemployed, her present husband testified that she had been a stay-at-home mom for the majority of their marriage. Solomon v. Robertson, 980 So. 2d 319, 2008 Miss. App. LEXIS 225 (Miss. Ct. App. 2008).

In a case involving grandparent visitation, adoptive parents were not entitled to recover attorney's fees because they offered no evidence tending to show any financial hardship. Woodell v. Parker, 860 So. 2d 781, 2003 Miss. LEXIS 752 (Miss. 2003).

The chancellor's decision not to award attorney fees to the parent in an action for grandparent visitation was not an abuse of discretion where the father earned a gross pay of over $5,000 per month and lived in a home worth in excess of $100,000, notwithstanding the father's assertion that he was supporting a pregnant wife, with five children living in his home, that he was working two jobs to make ends meet, and that he was receiving no financial assistance from the natural mother. Zeman v. Stanford, 789 So. 2d 798, 2001 Miss. LEXIS 130 (Miss. 2001).

3. Visitation proper.

Chancery court properly granted the grandparents visitation to their deceased son's children because, while the appellate court erred by instructing the chancellor to consider the best interest of the children only in the context of the amount of visitation after finding an entitlement to grandparent visitation, the chancellor, once determining that grandparent visitation was appropriate and in the children's best interests, applied and scrupulously weighed the case-law factors to determine the appropriate visitations that the grandparents should exercise with the children, carefully analyzed the statute, thereby performing the correct analytical process and properly applying the right procedural, evidentiary, and statutory principles. Smith v. Martin, 222 So. 3d 255, 2017 Miss. LEXIS 151 (Miss. 2017).

Chancery court properly awarded visitation of minor children to their paternal grandmother, when both children were wards of their maternal grandparents, who were appointed to children's co-guardians, because the maternal grandparents unreasonably denied visitation to the grandparent, the paternal grandparent voluntarily and in good faith supported the child financially and had frequent, including overnight, visitation with the children, and the award of visitation was in the children's best interest. Bolivar v. Waltman, 194 So. 3d 889, 2016 Miss. App. LEXIS 371 (Miss. Ct. App. 2016).

Chancellor did not abuse the chancellor's discretion by awarding grandparent visitation to grandparents after the death of one of the children's parents and the remarriage of the children's other parent, because substantial credible evidence supported the chancellor's finding that visitation was in the children's best interests. The chancellor did not exceed the chancellor's authority by ordering the parent and the parent's spouse, who had adopted the children, to participate in family counseling to facilitate a smooth visitation experience. Smith v. Martin, 202 So. 3d 263, 2016 Miss. App. LEXIS 110 (Miss. Ct. App. 2016), aff'd, 222 So. 3d 255, 2017 Miss. LEXIS 151 (Miss. 2017).

Chancellor properly granted visitation to a child's maternal grandparents because the chancellor, after considering the statutory factors and Martin v. Coop, 693 So. 2d 912, 916 (Miss. 1997), found, inter alia, that the grandparents had a close, loving, and viable relationship with the grandchild, had provided her some financial support, the grandchild visited them grandparents, at times staying overnight, awarding visitation would not disrupt the grandchild's life or undermine the father's parenting or discipline of his daughter, and the amount of visitation awarded–47 days a year–was not excessive. Eaves v. Gatlin, 194 So. 3d 171, 2015 Miss. App. LEXIS 624 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 1268, 2016 Miss. LEXIS 271 (Miss. 2016).

Chancellor did not err by finding that visitation with the grandmother was in the child's best interest where the evidence showed that the child was four, the grandmother was in good health and only 50 years old, they likely shared emotional ties, the grandmother lived only 10 miles from the child, the grandmother had worked in steady employment for the previous 10 years and rarely worked weekends, the chancellor found the evidence was insufficient to show that the grandmother was morally unfit, and she testified she would uphold the parents' reasonable discipline of the child and would not interfere with their parenting. Lofton v. Lofton, 176 So. 3d 1184, 2015 Miss. App. LEXIS 537 (Miss. Ct. App. 2015).

Evidence showed that the parents unreasonably denied their child's grandmother visitation where the mother changed her phone number and ceased communication, the grandmother was banished from the parents' apartment complex, and the grandmother testified that whenever she saw the child in town she was prevented from approaching her. Lofton v. Lofton, 176 So. 3d 1184, 2015 Miss. App. LEXIS 537 (Miss. Ct. App. 2015).

It was within a chancellor's discretion to award greater than usual grandparent visitation because the chancellor found that the grandparents had participated extensively in the life of their late son's child from when the child was approximately four and a half months old and the child's mother had a history of substance abuse, had neglected her children, and had surrendered the child, along with her two other illegitimate children, to her mother when she sought treatment for substance abuse. Arrington v. Thrash, 122 So. 3d 144, 2013 Miss. App. LEXIS 623 (Miss. Ct. App. 2013).

Chancellor did not err in awarding visitation rights to a grandmother because the chancellor had the discretion to award the visitation rights, and the chancellor thoroughly analyzed the appropriate factors in making his decision. Ferguson v. Lewis, 31 So. 3d 5, 2009 Miss. App. LEXIS 249 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 157 (Miss. 2010).

Trial court did not err in granting visitation rights to a paternal grandmother under Miss. Code Ann. § 93-16-3(1) after the child's parents were divorced where the trial court addressed the factors enumerated in Martin and determined that it was in the best interest of the child to have visitation with the grandmother. Solomon v. Robertson, 980 So. 2d 319, 2008 Miss. App. LEXIS 225 (Miss. Ct. App. 2008).

Chancery court owes no deference to the opinion of adoptive parents that visitation with paternal grandparents is not in the best interest of a minor child, and there is no requirement of a finding that a custodial parent is unfit before such visitation is proper; therefore, the chancery court properly awarded visitation to grandparents after examining the 10 applicable factors and finding that the child lived near the grandparents, the grandparents were in good health, one of the grandparents was at home to watch the child, and the grandparents had an established relationship with the child before visitation was denied. Woodell v. Parker, 860 So. 2d 781, 2003 Miss. LEXIS 752 (Miss. 2003).

4. Constitutionality.

Visitation was properly awarded to paternal grandparents because the Mississippi Grandparents' Visitation Statute, Miss. Code Ann. §§ 93-16-1 through 93-16-7 was not unconstitutional under United States Supreme Court law. Woodell v. Parker, 860 So. 2d 781, 2003 Miss. LEXIS 752 (Miss. 2003).

RESEARCH REFERENCES

ALR.

Grandparents' visitation rights. 90 A.L.R.3d 222.

Visitation rights of persons other than natural parents or grandparents. 1 A.L.R.4th 1270.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified. 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living. 71 A.L.R.5th 99.

Validity of Grandparent Visitation Statutes. 86 A.L.R.6th 1.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation § 834.

59 Am. Jur. 2d, Parent and Child § 47.

CJS.

27B C.J.S., Divorce § 507.

Law Reviews.

1989 Mississippi Supreme Court Review: Visitation by Grandparents. 59 Miss. L. J. 899, Winter, 1989.

§ 93-16-5. Parties to proceeding; discretion of court in granting, enforcing, modifying or terminating rights.

All persons required to be made parties in child custody proceedings or proceedings for the termination of parental rights shall be made parties to any proceeding in which a grandparent of a minor child or children seeks to obtain visitation rights with such minor child or children; and the court may, in its discretion, if it finds that such visitation rights would be in the best interest of the child, grant to a grandparent reasonable visitation rights with the child. Whenever visitation rights are granted to a grandparent, the court may issue such orders as shall be necessary to enforce such rights and may modify or terminate such visitation rights for cause at any time.

HISTORY:

Laws, 1983, ch. 497, § 1, eff from and after July 1, 1983.

Cross References —

Parties in youth court custody proceedings, see § 43-21-557.

Parties in proceeding to terminate parental rights, see § 93-15-107.

Parties in proceedings under Uniform Child Custody Act, see § 93-27-110.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Illustrative cases.

1. In general.

Chancellor did not err in awarding visitation rights to a grandmother because the chancellor had the discretion to award the visitation rights, and the chancellor thoroughly analyzed the appropriate factors in making his decision. Ferguson v. Lewis, 31 So. 3d 5, 2009 Miss. App. LEXIS 249 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 157 (Miss. 2010).

2. Illustrative cases.

Chancery court properly granted the grandparents visitation to their deceased son's children because, while the appellate court erred by instructing the chancellor to consider the best interest of the children only in the context of the amount of visitation after finding an entitlement to grandparent visitation, the chancellor, once determining that grandparent visitation was appropriate and in the children's best interests, applied and scrupulously weighed the case-law factors to determine the appropriate visitations that the grandparents should exercise with the children, carefully analyzed the statute, thereby performing the correct analytical process and properly applying the right procedural, evidentiary, and statutory principles. Smith v. Martin, 222 So. 3d 255, 2017 Miss. LEXIS 151 (Miss. 2017).

Chancery court had jurisdiction over the grandmother's petition for visitation where the mother and father testified that they were the child's parents, they were the two individuals who controlled the custody of the child, and there was no evidence that another man asserted any rights whatsoever as the child's parent. Lofton v. Lofton, 176 So. 3d 1184, 2015 Miss. App. LEXIS 537 (Miss. Ct. App. 2015).

Visitation was properly awarded to the paternal grandparents where they were originally awarded custody of the child upon the divorce of the parents, and custody was modified several years later to grant primary custody to the father, with visitation for both the mother and the paternal grandparents. Dearman v. Dearman, 811 So. 2d 308, 2001 Miss. App. LEXIS 27 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR.

Grandparents' visitation rights. 90 A.L.R.3d 222.

Visitation rights of persons other than natural parents or grandparents. 1 A.L.R.4th 1270.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified. 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living. 71 A.L.R.5th 99.

Validity of Grandparent Visitation Statutes. 86 A.L.R.6th 1.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation § 834.

59 Am. Jur. 2d, Parent and Child § 47.

CJS.

27B C.J.S., Divorce § 507.

§ 93-16-7. Application of chapter.

This chapter shall not apply to the granting of visitation rights to the natural grandparents of any child who has been adopted by order or decree of any court unless: (a) one (1) of the legal parents of such child is also a natural parent of such child; or (b) one (1) of the legal parents of such child was related to the child by blood or marriage prior to the adoption. This chapter shall apply to persons who become grandparents of a child by virtue of adoption.

HISTORY:

Laws, 1983, ch. 497, § 2; Laws, 1986, ch. 421, § 2; Laws, 1990, ch. 537, § 3, eff from and after July 1, 1990.

Cross References —

Adoption, generally, see §§ 93-17-1 et seq.

JUDICIAL DECISIONS

1. In general.

Paternal grandmother had standing to petition for visitation with her grandchild under Miss. Code Ann. § 93-16-7; the paternal grandmother and the parents were related to the child by blood prior to her adoption and the Legislature would not have given a natural grandparent standing to seek visitation if it considered natural grandparents to be strangers and intended for their visitation rights to be terminated. T. T. W. v. C. C., 839 So. 2d 501, 2003 Miss. LEXIS 94 (Miss. 2003).

The Grandparents Visitation Rights Act did not apply to a maternal grandmother where the grandchildren had been adopted by their paternal grandmother, since the adoption terminated the parental rights of the children's father and the paternal grandmother was not a parent of the children when she adopted them. Whatever rights to visitation that the maternal grandmother may have acquired under the Grandparents Visitation Rights Act were terminated by the decree of adoption. Muse v. Hutchins, 559 So. 2d 1031, 1990 Miss. LEXIS 194 (Miss. 1990).

The grandparents' visitation statute envisions granting visitation rights to grandparents following adoption proceedings as well as proceedings limited purely to terminating parental rights. Hill v. Smith, 558 So. 2d 854 (Miss. 1990).

The paternal grandparents of a child, who was adopted by the maternal grandparents, were excluded under the grandparents' visitation statute from seeking visitation rights with the child because neither of the legal adoptive parents was a natural parent of the child. Neither the chancery court nor the Supreme Court on its own has the authority to bestow visitation rights upon a grandparent. Hill v. Smith, 558 So. 2d 854 (Miss. 1990).

Under § 93-16-3 and § 93-16-7, an adoption by a step-parent after the termination of the rights of one of the natural parents does not terminate the visitation rights of the natural grandparents (the parents of the parent whose rights have been terminated). Howell v. Rogers, 551 So. 2d 904, 1989 Miss. LEXIS 460 (Miss. 1989).

The subsequent adoption of a child by a stepfather terminates the visitation rights of a paternal grandparent who had previously petitioned for, but had not yet obtained, court ordered visitation rights. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

The phrase "has been adopted" in Mississippi Code § 93-16-7 means: has been adopted at any time prior to the establishment by a court order of legal rights to visitation. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

A natural grandparent who had petition for but did not yet have court ordered visitation rights was not entitled to notice of subsequently filed adoption of grandchild. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

An adoption of a child by a step-parent after the death of one of the natural parents terminates visitation rights of natural grandparents, except as to the natural parent who is the spouse of the adopting parent. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

RESEARCH REFERENCES

ALR.

Grandparents' visitation rights. 90 A.L.R.3d 222.

Visitation rights of persons other than natural parents or grandparents. 1 A.L.R.4th 1270.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified. 69 A.L.R.5th 1.

Grandparent's visitation rights where child's parents are living. 71 A.L.R.5th 99.

Validity of Grandparent Visitation Statutes. 86 A.L.R.6th 1.

Am. Jur.

24A Am. Jur. 2d, Divorce and Separation § 834.

59 Am. Jur. 2d, Parent and Child § 47.

CJS.

27B C.J.S., Divorce § 507.

Law Reviews.

1989 Mississippi Supreme Court Review: Visitation by Grandparents. 59 Miss. L. J. 899, Winter, 1989.

CHAPTER 17.

ADOPTION, CHANGE OF NAME, AND LEGITIMATION OF CHILDREN

Article 1. In General. 93-17-1
Article 3. Adoption Supplemental Benefits Law. 93-17-51
Article 5. Interstate Agreements for Protection of Children Being Provided Adoption Assistance. 93-17-101
Article 7. Mississippi Adoption Confidentiality Act. 93-17-201
Article 9. Mississippi Registration of Foreign Adoptions Act. 93-17-301

ARTICLE 1.

IN GENERAL.

Sec.
93-17-1. Jurisdiction to alter names and legitimate offspring; legitimation by subsequent marriage.
93-17-3. Jurisdiction for adoption or readoption proceedings; who may be adopted; who may adopt; venue of adoption proceedings; certificate of child's condition; change of name; adoption by couples of same gender prohibited; completion of home study; compliance with Interstate Compact for Placement of Children and Indian Child Welfare Act.
93-17-5. Parties to adoption proceeding; consent of child.
93-17-6. Petition for determination of rights in proposed adoption of natural child; service of process in the adoption of a foreign born child.
93-17-7. Parental objection; causes for termination of parental rights.
93-17-8. Contested adoptions.
93-17-9. Repealed.
93-17-11. Investigation; interlocutory decree; appeal.
93-17-12. Authority of court to impose fee for court-ordered home study relating to child custody matters and in all adoptions.
93-17-13. Final decree and effect thereof; completion of home study before final decree entered.
93-17-14. Home study in international adoptions valid for 24 months.
93-17-15. Limitation on action to set aside final decree.
93-17-17. Grounds for setting aside proceedings limited.
93-17-19. Costs.
93-17-21. Revised birth certificate.
93-17-23. Re-adoption.
93-17-25. Proceedings and records confidential; use in court or administrative proceedings.
93-17-27. References to marital status of natural parents prohibited.
93-17-29. References to parents and child in docket entries and decrees.
93-17-31. Clerks to keep separate index, docket and minute books.

§ 93-17-1. Jurisdiction to alter names and legitimate offspring; legitimation by subsequent marriage.

(1) The chancery court or the chancellor in vacation, of the county of the residence of the petitioners shall have jurisdiction upon the petition of any person to alter the names of such person, to make legitimate any living offspring of the petitioner not born in wedlock, and to decree said offspring to be an heir of the petitioner.

(2) An illegitimate child shall become a legitimate child of the natural father if the natural father marries the natural mother and acknowledges the child.

HISTORY:

Codes, 1942, § 1269-01; Laws, 1955, Ex. ch. 34, § 1; Laws, 1981, ch. 529, § 5, eff from and after July 1, 1981.

Editor's Notes —

Laws of 2014, ch. 385, § 8 provides:

"SECTION 8. It is the intention of the Legislature and the codifier is so directed that Title 93, Chapter 17, be divided into Articles as follows: Article 1 beginning with Section 93-17-1; Article 3 beginning with Section 93-17-51; Article 5 beginning with Section 93-17-101; Article 7 beginning with Section 93-17-201; and Article 9 beginning with Section 93-17-301."

Cross References —

Bastardy proceedings generally, see §§ 93-9-1 et seq.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

In a proceeding upon a petition by a mother as next friend of her 11-year-old son to have his surname changed from that of his father from whom the mother was divorced to that of the mother's present husband with whom the child resided, the chancellor erred in granting the change of name over the objection of the boy's father who had shown affection for, and interest in the welfare of, the child. Marshall v. Marshall, 230 Miss. 719, 93 So. 2d 822, 1957 Miss. LEXIS 414 (Miss. 1957).

RESEARCH REFERENCES

ALR.

What amounts to recognition within statutes affecting the status or rights of illegitimates. 33 A.L.R.2d 705.

Right of adopted child to inherit from intestate natural grandparent. 60 A.L.R.3d 631.

Circumstances justifying grant or denial or petition to change adult's name. 79 A.L.R.3d 562.

Legitimation by marriage to natural father of child born during mother's marriage to another. 80 A.L.R.3d 219.

Rights and remedies of parents inter se with respect to the names of their children. 92 A.L.R.3d 1091.

Rights and obligations resulting from human artificial insemination. 83 A.L.R.4th 295.

Rights and remedies of parents inter se with respect to the names of their children. 40 A.L.R.5th 697.

"Wrongful adoption" causes of action against adoption agencies where children have or develop mental or physical problems that are misrepresented or not disclosed to adoptive parents. 74 A.L.R.5th 1.

Propriety, under § 287(a)(1) of Immigration and Nationality Act (8 USCS § 1357(a)(1)), of warrantless interrogation of alien, or person believed to be alien, as to alien's right to be or to remain in United States. 63 A.L.R. Fed. 180.

Am. Jur.

41 Am. Jur. 2d, Illegitimate Children §§ 131 et seq.

57 Am. Jur. 2d, Name §§ 17 et seq.

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Form 21.1 (names as pseudonyms).

5 Am. Jur. Pl & Pr Forms (Rev), Bastards, Form 12 (complaint, petition, or declaration for legitimation of child of void marriage against father and mother); Form 13 (complaint, petition, or declaration by putative father against mother for legitimation of child and correction of birth record following mother's refusal to marry petitioner).

18 Am. Jur. Pl & Pr Forms (Rev), Name, Forms 1 et seq. (changing family's name); Forms 11 et seq. (changing adult's name); Forms 31 et seq. (changing minor's name).

3A Am. Jur. Legal Forms 2d, Bastards §§ 40:31 et seq. (legitimation).

CJS.

65 C.J.S., Names §§ 21-28.

Law Reviews.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of

Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

1989 Mississippi Supreme Court Review: Visitation by Grandparents. 59 Miss. L. J. 899, Winter, 1989.

Practice References.

Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-17-3. Jurisdiction for adoption or readoption proceedings; who may be adopted; who may adopt; venue of adoption proceedings; certificate of child's condition; change of name; adoption by couples of same gender prohibited; completion of home study; compliance with Interstate Compact for Placement of Children and Indian Child Welfare Act.

(1) Except as otherwise provided in this section, a court of this state has jurisdiction over a proceeding for the adoption or readoption of a minor commenced under this chapter if:

(a) Immediately before commencement of the proceeding, the minor lived in this state with a parent, a guardian, a prospective adoptive parent or another person acting as parent, for at least six (6) consecutive months, excluding periods of temporary absence, or, in the case of a minor under six (6) months of age, lived in this state from soon after birth with any of those individuals and there is available in this state substantial evidence concerning the minor's present or future care;

(b) Immediately before commencement of the proceeding, the prospective adoptive parent lived in this state for at least six (6) consecutive months, excluding periods of temporary absence, and there is available in this state substantial evidence concerning the minor's present or future care;

(c) The agency that placed the minor for adoption is licensed in this state and it is in the best interest of the minor that a court of this state assume jurisdiction because:

(i) The minor and the minor's parents, or the minor and the prospective adoptive parent, have a significant connection with this state; and

(ii) There is available in this state substantial evidence concerning the minor's present or future care;

(d) The minor and the prospective adoptive parent are physically present in this state and the minor has been abandoned or it is necessary in an emergency to protect the minor because the minor has been subjected to or threatened with mistreatment or abuse or is otherwise neglected;

(e) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a) through (d), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to hear a petition for adoption of the minor, and it is in the best interest of the minor that a court of this state assume jurisdiction; or

(f) The child has been adopted in a foreign country, the agency that placed the minor for adoption is licensed in this state, and it is in the best interest of the child to be readopted in a court of this state having jurisdiction.

(2) A court of this state may not exercise jurisdiction over a proceeding for adoption of a minor if, at the time the petition for adoption is filed, a proceeding concerning the custody or adoption of the minor is pending in a court of another state exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction Act or this section unless the proceeding is stayed by the court of the other state.

(3) If a court of another state has issued a decree or order concerning the custody of a minor who may be the subject of a proceeding for adoption in this state, a court of this state may not exercise jurisdiction over a proceeding for adoption of the minor unless:

(a) The court of this state finds that the court of the state which issued the decree or order:

(i) Does not have continuing jurisdiction to modify the decree or order under jurisdictional prerequisites substantially in accordance with the Uniform Child Custody Jurisdiction Act or has declined to assume jurisdiction to modify the decree or order; or

(ii) Does not have jurisdiction over a proceeding for adoption substantially in conformity with subsection (1)(a) through (d) or has declined to assume jurisdiction over a proceeding for adoption; and

(b) The court of this state has jurisdiction over the proceeding.

(4) Any person may be adopted in accordance with the provisions of this chapter in termtime or in vacation by an unmarried adult or by a married person whose spouse joins in the petition. The adoption shall be by sworn petition filed in the chancery court of the county in which the adopting petitioner or petitioners reside or in which the child to be adopted resides or was born, or was found when it was abandoned or deserted, or in which the home is located to which the child has been surrendered by a person authorized to so do. The petition shall be accompanied by a doctor's or nurse practitioner's certificate showing the physical and mental condition of the child to be adopted and a sworn statement of all property, if any, owned by the child. In addition, the petition shall be accompanied by affidavits of the petitioner or petitioners stating the amount of the service fees charged by any adoption agencies or adoption facilitators used by the petitioner or petitioners and any other expenses paid by the petitioner or petitioners in the adoption process as of the time of filing the petition. If the doctor's or nurse practitioner's certificate indicates any abnormal mental or physical condition or defect, the condition or defect shall not, in the discretion of the chancellor, bar the adoption of the child if the adopting parent or parents file an affidavit stating full and complete knowledge of the condition or defect and stating a desire to adopt the child, notwithstanding the condition or defect. The court shall have the power to change the name of the child as a part of the adoption proceedings. The word "child" in this section shall be construed to refer to the person to be adopted, though an adult.

(5) Adoption by couples of the same gender is prohibited.

(6) No person may be placed in the home of or adopted by the prospective adopting parties before a court-ordered or voluntary home study is satisfactorily completed by a licensed adoption agency, a licensed, experienced social worker approved by the chancery court or by the Department of Human Services on the prospective adoptive parties if required by Section 93-17-11.

(7) No person may be adopted by a person or persons who reside outside the State of Mississippi unless the provisions of the Interstate Compact for Placement of Children (Section 43-18-1 et seq.) have been complied with. In such cases Forms 100A, 100B (if applicable) and evidence of Interstate Compact for Placement of Children approval shall be added to the permanent adoption record file within one (1) month of the placement, and a minimum of two (2) post-placement reports conducted by a licensed child-placing agency shall be provided to the Mississippi Department of Human Services Interstate Compact for Placement of Children office.

(8) No person may be adopted unless the provisions of the Indian Child Welfare Act (ICWA) have been complied with, if applicable. When applicable, proof of compliance shall be included in the court adoption file prior to finalization of the adoption. If not applicable, a written statement or paragraph in the petition for adoption shall be included in the adoption petition stating that the provisions of ICWA do not apply before finalization.

(9) The readoption of a child who has automatically acquired United States citizenship following an adoption in a foreign country and who possesses a Certificate of Citizenship in accordance with the Child Citizenship Act, CAA, Public Law 106-395, may be given full force and effect in a readoption proceeding conducted by a court of competent jurisdiction in this state by compliance with the Mississippi Registration of Foreign Adoptions Act, Article 9 of this chapter.

HISTORY:

Codes, 1942, § 1269-02; Laws, 1955, Ex. ch. 34, § 2; Laws, 1973, ch. 361, § 1; Laws, 1994, ch. 437, § 1; Laws, 2000, ch. 535, § 1; Laws, 2004, ch. 527, § 1; Laws, 2006, ch. 382, § 1; Laws, 2007, ch. 496, § 4; Laws, 2012, ch. 556, § 1; Laws, 2014, ch. 385, § 1, eff from and after July 1, 2014.

Editor's Notes —

The Uniform Child Custody Jurisdiction Act, referred to in this section, was repealed by § 39 of Chapter 519, Laws of 2004, effective July 1, 2004. For present similar provisions, see the Uniform Child Custody Jurisdiction and Enforcement Act, §§ 93-27-101 et seq.

Cross References —

Furnishing certified copy of adoption decree in connection with veterans affairs, see § 35-3-11.

Birth certificates generally, see §§ 41-57-1 et seq.

Mississippi Registration of Foreign Adoptions Act, see §§ 93-17-301 et seq.

Federal Aspects—

Indian Child Welfare Act, see 25 USCS § 1901 et seq.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2. Adoption—Jurisdiction of court.
3. —Termination of parental rights of natural parents.
4. —By foster parents.
5. —By married or unmarried adult.
6. —Requirement of doctor's certificate.
7. Appeal of order granting or denying adoption.

8.-10. [Reserved for future use].

II. UNDER FORMER LAW.

11. In general.

I. UNDER CURRENT LAW.

1. In general.

Nontraditional adoption order in which child's grandmother and boyfriend of child's deceased mother, who was not the child's biological father, were declared adoptive parents, with primary custody of the child being given to the grandmother and the boyfriend being given visitation rights, was affirmed as evidence showed that it was clearly in the best interest of the child. In re P. B. H v. J. H., 787 So. 2d 1268, 2001 Miss. LEXIS 161 (Miss. 2001).

Adoption laws have as a primary purpose the promotion of the welfare of the child rather than the gratification of the desire of the adoptive parents to enjoy the privileges of parenthood. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852, 1958 Miss. LEXIS 381 (Miss. 1958).

2. Adoption—Jurisdiction of court.

Chancery court had jurisdiction over an individual's petition to adopt a child even though the child had been the subject of a emergency custody order issued by a youth court in a different county because the adoption petition had to be filed in the chancery court. Neshoba County Dep't of Human Servs. v. Hodge, 919 So. 2d 1157, 2006 Miss. App. LEXIS 2 (Miss. Ct. App. 2006).

The failure of prospective adoptive parents to execute their counterclaim for adoption under oath at the time of filing did not deprive the chancery court of jurisdiction over the adoption proceeding where (1) the answer and affirmative defenses to the complaint for adoption and the counter complaint for adoption was prepared as one pleading and signed by their attorney, and (2) the record revealed that before testifying in support of the counterclaim, one prospective adoptive parent was placed under oath and swore the statements and allegations contained therein were true and correct. W. D. H. v. T. H. (In the Interest of J. D. H.), 734 So. 2d 187, 1999 Miss. App. LEXIS 6 (Miss. Ct. App. 1999).

Congress intended meaning of "domicile" under Indian Child Welfare Act of 1978 (ICWA) to be matter of uniform federal law and not matter of individual state law, although it is permissible to borrow state common-law principles to extent they are not inconsistent with objectives of congressional scheme; under general common-law principles, which indicate that domicile of illegitimate children follows that of mother, children in question were domiciled on reservation within meaning of relevant ICWA provisions, fact that the children were voluntarily surrendered by mother does not change result, because ICWA was intended in part to protect interests of the Indian community in retaining its children within its society, and tribal jurisdiction under ICWA thus not meant to be defeated by actions of individual members; and thus Chancery Court lacked jurisdiction over adoptions and its decree would be vacated. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29, 1989 U.S. LEXIS 1791 (U.S. 1989).

The Chancery Court had jurisdiction to hear an adoption action even though the Youth Court had previously assumed jurisdiction of the minors involved as neglected children; although the Youth Court's jurisdiction continued for the offense and for the purpose of the "neglected or abused" subject matter, the jurisdiction did not act to exclude the adoption proceeding in the Chancery Court, since it constituted a different subject matter. In re Petition of Beggiani, 519 So. 2d 1208, 1988 Miss. LEXIS 51 (Miss. 1988).

Once husband withdraws his name from a petition for adoption, wife, as sole petitioner and being legally married, is without standing to continue her efforts to adopt. In re Adoption of Baby Boy "B", 487 So. 2d 841, 1986 Miss. LEXIS 2453 (Miss. 1986).

Where applicants in an adoption proceeding failed to attach a doctor's certificate and instead requested that the chancellor order that the child be examined, the jurisdictional requirements of § 93-17-3 were not met, regardless of the applicants' good faith. In re Adoption of F.N.M., 459 So. 2d 254, 1984 Miss. LEXIS 1932 (Miss. 1984).

3. —Termination of parental rights of natural parents.

Chancellor's finding that best interest of minor child would be served by termination of parental rights of natural parents, and his adoption by petitioners, was supported by evidence showing that the natural parents were mentally and morally unfit to rear and train child, and further showing improvement in child during time he was in home of petitioner. G.M.R. v. H.E.S., 489 So. 2d 498, 1986 Miss. LEXIS 2467 (Miss. 1986).

The equal protection clause of the Fourteenth Amendment is violated by a state's statutory procedure whereby an unwed father is presumed to be unfit to raise his illegitimate children upon their mother's death, and may be deprived of the custody of his children, without a hearing as to his fitness, by the state's institution of dependency proceedings to declare the children wards of the state, whereas a hearing is extended to all other parents whose custody of their children is challenged. Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551, 1972 U.S. LEXIS 70 (U.S. 1972).

4. —By foster parents.

Where a licensing agreement between foster parents and the State of Mississippi, as well as state statutes, made clear the foster parent-child relationship was merely a temporary one, there could have been no expectation or entitlement on the part of the foster parents that a child placed in their home would remain permanently in their home. Therefore, the foster parents had no liberty or property interests which were entitled due process protection under the Fifth or Fourteenth Amendments. Crim v. Harrison, 552 F. Supp. 37, 1982 U.S. Dist. LEXIS 16303 (N.D. Miss. 1982).

5. —By married or unmarried adult.

Because a former adoptive mother's husband was both a legal custodian and a legal parent of a child, he was entitled to notice of a prospective adoptive mother's attempts to adopt; the prospective adoptive mother lacked standing to adopt the child because her petition did not include her spouse, as required by Miss. Code Ann. § 93-17-3(4). In re J.D.S., 953 So. 2d 1133, 2007 Miss. App. LEXIS 224 (Miss. Ct. App. 2007).

Once husband withdraws his name from a petition for adoption, wife, as sole petitioner and being legally married, is without standing to continue her efforts to adopt. In re Adoption of Baby Boy "B", 487 So. 2d 841, 1986 Miss. LEXIS 2453 (Miss. 1986).

6. —Requirement of doctor's certificate.

The late filing of a doctor's certificate cured any complaints that the Department of Human Services had concerning the fact that such a certificate was not filed with the petition for adoption. L.W. v. C.W.B., 762 So. 2d 323, 2000 Miss. LEXIS 168 (Miss. 2000).

A petition must be accompanied by a doctor's certificate and must also contain a sworn statement of all property. S.R. v. P.L.H. (In re D.T.H.), 748 So. 2d 853, 1999 Miss. App. LEXIS 543 (Miss. Ct. App. 1999).

The omission of the doctor's certificates and the statement of property from the counterclaim did not remove the chancery court's jurisdiction over the adoption proceedings where the chancellor found the counterclaim referred to Exhibits A and B as physician's certificates showing the physical and mental condition of the children at issue, numerous persons had inspected and copied the court file, the clerk could not state with certainty that the exhibits were not attached to the pleading when filed with the court, and no party was prejudiced by the reopening of the case to allow the attachment of the physician's certificates to the counterclaim. W. D. H. v. T. H. (In the Interest of J. D. H.), 734 So. 2d 187, 1999 Miss. App. LEXIS 6 (Miss. Ct. App. 1999).

Where applicants in an adoption proceeding failed to attach a doctor's certificate and instead requested that the chancellor order that the child be examined, the jurisdictional requirements of § 93-17-3 were not met, regardless of the applicants' good faith. In re Adoption of F.N.M., 459 So. 2d 254, 1984 Miss. LEXIS 1932 (Miss. 1984).

7. Appeal of order granting or denying adoption.

Final decree of adoption, coupled with lapse of more than 2 years time with no action taken, is sufficient to insulate decree from attack on grounds that requirements of § 93-17-3 had not been met, where problem areas asserted by person seeking to overturn adoption decree were not jurisdictional in the sense of § 93-17-17, because of provision in § 93-17-5 precluding such action after 6 months had passed following entry of decree. In re Adoption of F.N.M., 459 So. 2d 254, 1984 Miss. LEXIS 1932 (Miss. 1984).

8.-10. [Reserved for future use].

II. UNDER FORMER LAW.

11. In general.

In adoption proceedings, the welfare of the child is the primary consideration. Eggleston v. Landrum, 210 Miss. 645, 50 So. 2d 364, 1951 Miss. LEXIS 303 (Miss. 1951); Fowler v. Sutton, 222 Miss. 74, 75 So. 2d 438, 1954 Miss. LEXIS 620 (Miss. 1954).

Where evidence showed that the father of a twelve year old boy had deserted him, that the mother remarried, and was thereafter killed in a bus collision in 1950, that the boy had been living with his step-father since 1948, and that the personal preference of the boy was to live with his step-father, the step-father was entitled to an adoption decree as against the boy's maternal grandmother. Fowler v. Sutton, 222 Miss. 74, 75 So. 2d 438, 1954 Miss. LEXIS 620 (Miss. 1954).

The right to adopt a child or children did not exist at common law. Mayfield v. Braund, 217 Miss. 514, 64 So. 2d 713, 1953 Miss. LEXIS 460 (Miss. 1953).

A right of adoption exists soley by virtue of a statute which extends a privilege not an absolute right. Eggleston v. Landrum, 210 Miss. 645, 50 So. 2d 364, 1951 Miss. LEXIS 303 (Miss. 1951).

Petition for adoption and for custody of child brought by one claiming to be natural father of child is properly dismissed when mother and her lawful husband claim child is their legitimate child, since public policy and common decency are opposed to bastardizing of children born in wedlock against wishes and protest of their putative parents and no outsider will be permitted to attempt to prove bastardy. Graham v. Lee, 204 Miss. 416, 37 So. 2d 735, 1948 Miss. LEXIS 378 (Miss. 1948).

RESEARCH REFERENCES

ALR.

Religion as factor in adoption proceedings. 23 A.L.R.2d 701.

Necessity of securing consent of parents of illegitimate child to its adoption. 51 A.L.R.2d 497.

Applicability of res judicata to decrees or judgments in adoption proceedings. 52 A.L.R.2d 406.

Requirements as to residence or domicil of adoptee or adoptive parents for purposes of adoption. 33 A.L.R.3d 176.

Religion as factor in adoption proceedings. 48 A.L.R.3d 383.

Validity and enforcement of agreement by foster parents that they will not attempt to adopt foster child. 78 A.L.R.3d 770.

Age of prospective adoptive parent as factor in adoption proceedings. 84 A.L.R.3d 665.

Rights and remedies of parents inter se with respect to the names of their children. 92 A.L.R.3d 1091.

Modern status of law as to equitable adoption or adoption by estoppel. 97 A.L.R.3d 347.

Marital status of prospective adopting parents as factor in adoption proceedings. 2 A.L.R.4th 555.

Race as factor in adoption proceedings. 34 A.L.R.4th 167.

Marital or sexual relationship between parties as affecting right to adopt. 42 A.L.R.4th 776.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

Construction and application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. § 1901 et seq.) upon child custody determinations. 89 A.L.R.5th 195.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 21, 22 et seq., 207 et seq.

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Forms 1 et seq. (petition or application for adoption); Form 21.1 (names as pseudonyms); Forms 341 et seq. (adoption of adults).

18 Am. Jur. Proof of Facts 2d 531, Equitable Adoption.

CJS.

2 C.J.S., Adoption of Persons §§ 15 et seq., 22 et seq.

§ 93-17-5. Parties to adoption proceeding; consent of child.

(1) There shall be made parties to the proceeding by process or by the filing therein of a consent to the adoption proposed in the petition, which consent shall be duly sworn to or acknowledged and executed only by the following persons, but not before seventy-two (72) hours after the birth of the child:

(a) The parents, or parent, if only one (1) parent, though either be under the age of twenty-one (21) years;

(b) If both parents are dead, then any two (2) adult kin of the child within the third degree computed according to the civil law; if one of such kin is in possession of the child, he or she shall join in the petition or be made a party to the suit; or

(c) The guardian ad litem of an abandoned child, upon petition showing that the names of the parents of the child are unknown after diligent search and inquiry by the petitioners. In addition to the above, there shall be made parties to any proceeding to adopt a child, either by process or by the filing of a consent to the adoption proposed in the petition, the following:

(i) Those persons having physical custody of the child, except persons who are acting as foster parents as a result of placement with them by the Department of Human Services of the State of Mississippi.

(ii) Any person to whom custody of the child may have been awarded by a court of competent jurisdiction of the State of Mississippi.

(iii) The agent of the county Department of Human Services of the State of Mississippi that has placed a child in foster care, either by agreement or by court order.

(2) The consent may also be executed and filed by the duly authorized officer or representative of a home to whose care the child has been delivered. The child shall join the petition by the child's next friend.

(3) If consent is not filed, process shall be had upon the parties as provided by law for process in person or by publication, if they are nonresidents of the state or are not found therein after diligent search and inquiry, the court or chancellor in vacation may fix a date in termtime or in vacation to which process may be returnable and shall have power to proceed in termtime or vacation. In any event, if the child is more than fourteen (14) years of age, a consent to the adoption, sworn to or acknowledged by the child, shall also be required or personal service of process shall be had upon the child in the same manner and in the same effect as if the child were an adult.

HISTORY:

Codes, 1942, § 1269-03; Laws, 1955, Ex. ch. 34, § 3; Laws, 1964, ch. 309, §§ 1, 2; Laws, 1998, ch. 516, § 13; Laws, 1999, ch. 507, § 1; Laws, 2002, ch. 533, § 1; Laws, 2016, ch. 431, § 19, eff from and after passage (approved Apr. 18, 2016).

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. Jurisdiction of court.
2. Appointment of guardian ad litem.
3. Termination of parental rights for cause.
4. Consent to adopt.
5. Necessary parties to adoption.
6. Rights of unmarried natural father.
7. Rights of grandparents.

8.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

I. UNDER CURRENT LAW.

1. Jurisdiction of court.

Congress's intended meaning of "domicile" under Indian Child Welfare Act of 1978 (ICWA) to be matter of uniform federal law and not matter of individual state law, although it is permissible to borrow state common-law principles to extent they are not inconsistent with objectives of congressional scheme; under general common-law principles, which indicate that domicile of illegitimate children follows that of mother, children in question were domiciled on reservation within meaning of relevant ICWA provisions, fact that the children were voluntarily surrendered by mother does not change result, because ICWA was intended in part to protect interests of the Indian community in retaining its children within its society, and tribal jurisdiction under ICWA thus not meant to be defeated by actions of individual members; and thus Chancery Court lacked jurisdiction over adoptions and its decree would be vacated. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29, 1989 U.S. LEXIS 1791 (U.S. 1989).

2. Appointment of guardian ad litem.

In an adoption proceeding in which the grandparents sought to adopt their daughter's child, the court should have appointed a guardian ad litem who could advise the court as to the infant grandchild's best interests where the daughter, who was a minor, and the grandchild were living in the grandparents' home, since such a factual scenario affords too much opportunity for overreaching. In re Adoption of F.N.M., 459 So. 2d 254, 1984 Miss. LEXIS 1932 (Miss. 1984).

3. Termination of parental rights for cause.

Claim that natural mother has deserted child for purposes of adoption statute (§ 93-17-5) will be considered in context of statutory proviso (§ 93-15-103) authorizing termination of parental rights on ground of desertion. Bryant v. Cameron, 473 So. 2d 174, 1985 Miss. LEXIS 2157 (Miss. 1985).

Failure to give putative father notice of pending adoption proceedings did not deny him due process, despite the fact that the state had actual notice of his existence and whereabouts, where putative father had never established any custodial, personal or financial relationship with the child and had not taken advantage of statutory procedure by which he would have acquired the right to receive notice of the adoption, which involved mailing a postcard to the putative father registry. Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614, 1983 U.S. LEXIS 92 (U.S. 1983).

The equal protection clause of the Fourteenth Amendment is violated by a state's statutory procedure whereby an unwed father is presumed to be unfit to raise his illegitimate children upon their mother's death, and may be deprived of the custody of his children, without a hearing as to his fitness, by the state's institution of dependency proceedings to declare the children wards of the state, whereas a hearing is extended to all other parents whose custody of their children is challenged. Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551, 1972 U.S. LEXIS 70 (U.S. 1972).

4. Consent to adopt.

Chancellor had authority to rule on a father's petition to set aside an adoption based on fraud upon the court because the petition was an independent action; the father was not trying to establish his right to notice or object to ongoing adoption proceedings, but he was arguing to set aside a final adoption obtained through fraud. Doe v. Smith, 200 So. 3d 1028, 2016 Miss. LEXIS 397 (Miss. 2016).

When consent for a supposedly "uncontested" adoption is gained by intentionally concealing the identity of a known natural parent from the chancellor, a fraud is perpetrated upon the court; an intentional fraud aimed solely to circumvent a natural parent's statutorily mandated consent to an adoption undermines the effective administration of justice. Doe v. Smith, 200 So. 3d 1028, 2016 Miss. LEXIS 397 (Miss. 2016).

It was within the chancellor's discretion to set aside an adoption based on the mother's fraud because the heart of the mother's actions was designed to deceive the court by lying about and omitting material facts to trick the court into granting a supposed uncontested adoption; the mother knew who the child's father was, and she withheld the information from the court and all parties involved. Doe v. Smith, 200 So. 3d 1028, 2016 Miss. LEXIS 397 (Miss. 2016).

While it was undisputed that a child's biological father did not receive formal notice of the adoption of his son, this did not void the adoption of the son as, even if the father had received notice, he did not meet the standard of demonstrating a full commitment to the responsibilities of parenthood under Miss. Code Ann. § 93-17-5(3), which would have allowed him, as an unwed father, to object to the adoption. There was no evidence that the father provided support for the child, that he tried to visit with the child, or that he was now willing and able to assume physical care for the child. In re Adoption of a Minor Child v. M.J.W., 111 So. 3d 1243, 2013 Miss. App. LEXIS 150 (Miss. Ct. App. 2013).

Whether a natural parent's consent to adoption may be withdrawn must be determined on a case-by-case basis in timely fashion without unnecessary delay in the proceedings, always keeping in mind that the best interest of the child is paramount. Grafe v. Olds, 556 So. 2d 690, 1990 Miss. LEXIS 20 (Miss. 1990).

Informal agreement, between natural mother of child and persons seeking to adopt child, which does not comply with statutory adoption procedure, is unenforceable. Bryant v. Cameron, 473 So. 2d 174, 1985 Miss. LEXIS 2157 (Miss. 1985).

Prudence and careful legal draftsmanship suggests that any document entitled "waiver" be executed on a date following filing of the petition for adoption. While § 93-17-5, which deals with the parties and consent to adoption, contains no requirement that the consent be filed the day after the adoption petition is filed, § 13-3-71 [repealed], which deals with waiver of process, and Rule 4, Miss. R. Civ. P. require that the waiver be executed on a day following the filing of the petition. In re Adoption of F.N.M., 459 So. 2d 254, 1984 Miss. LEXIS 1932 (Miss. 1984).

Absent a showing by the parent or parents establishing either fraud, duress, or undue influence by clear and convincing evidence, surrenders executed in strict compliance with the safeguard provision of § 93-17-9 are irrevocable. C.C. I. v. Natural Parents, 398 So. 2d 220, 1981 Miss. LEXIS 2007 (Miss. 1981).

5. Necessary parties to adoption.

Decedent's daughter lacked statutory standing under Miss. Code Ann. § 93-17-7 to set aside 1984 adoption of two children by decedent's son, because she was not one of the natural parents of the adopted children, and therefore was not a necessary party to the original proceedings under Miss. Code Ann. § 93-17-5. Gartrell v. Gartrell, 27 So. 3d 388, 2009 Miss. LEXIS 621 (Miss. 2009).

Because a former adoptive mother's husband was both a legal custodian and a legal parent of a child, he was entitled to notice of a prospective adoptive mother's attempts to adopt; although the father was not named in the first adoption decree, he was a de facto party to such due to a chancery court's questioning of him, the recognition in the final decree that he was married to the former adoptive mother, and the fact that the child was taking his last name. In re J.D.S., 953 So. 2d 1133, 2007 Miss. App. LEXIS 224 (Miss. Ct. App. 2007).

Miss. Code Ann. § 93-17-5 did not mandate that the Mississippi Department of Human Services was a necessary party in the adoptive parents' action to terminate the mother's parental rights and to adopt the child, because the record did not reflect, and there was no proof, that the child was ever placed in foster care. In re Adoption of a Minor Child, 931 So. 2d 566, 2006 Miss. LEXIS 111 (Miss. 2006).

Where natural mother of an adopted child was a minor, the adoptee's maternal grandmother (who was also the child's former guardian) was not a necessary party to the adoption proceedings. C.T. v. R.D.H., 843 So. 2d 690, 2003 Miss. LEXIS 201 (Miss. 2003).

A natural grandparent who had petitioned for but did not yet have court ordered visitation rights was not entitled to notice of subsequently filed adoption of grandchild. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

The chancellor erred in dismissing applicants' petition for adoption of a minor on the ground that they lack standing due to their failure, under § 93-17-5, to first make application with the County Department of Public Welfare, since any defect in the service of process was cured by the filing of the Department's motion to dismiss. In re Adoption of F.N.M., 459 So. 2d 254, 1984 Miss. LEXIS 1932 (Miss. 1984).

Unmarried natural father's rights under due process and equal protection clauses are not violated by failure to give notice and opportunity to be heard before his child is adopted, where father has had no significant custodial, personal, or financial relationship with child. Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614, 1983 U.S. LEXIS 92 (U.S. 1983).

In an adoption proceeding in which the grandparents sought to adopt their daughter's child, the court should have appointed a guardian ad litem who could advise the court as to the infant grandchild's best interests where the daughter, who was a minor, and the grandchild were living in the grandparents' home, since such a factual scenario affords too much opportunity for overreaching. In re Adoption of F.N.M., 459 So. 2d 254, 1984 Miss. LEXIS 1932 (Miss. 1984).

Grandparents who were legal custodians of a child by court decree were necessary parties to a petition for adoption, but their status as kindred and legal custodians did not vest in them the prerogative of consenting to the adoption or withholding consent and thereby thwarting the adoption. Martin v. Putnam, 427 So. 2d 1373, 1983 Miss. LEXIS 2565 (Miss. 1983).

Where a mother of a child filed a sworn consent to the adoption of her child but her husband was not made a party to the adoption proceedings nor summoned because he told the attorneys that he was not the father of the child, in view of the presumption that a child born in wedlock is a legitimate child, the husband was a necessary party to the adoption proceedings in order for the court to decree an adoption of the child, and therefore, the decree of adoption was a nullity and could be attacked collaterally in a habeas corpus proceeding. Krohn v. Migues, 274 So. 2d 654, 1973 Miss. LEXIS 1598 (Miss. 1973).

6. Rights of unmarried natural father.

The chancellor should not have accepted the natural father's waiver of process where it was executed prior to the adoption complaint; a waiver of process should be executed on a date following the filing of the petition. S.R. v. P.L.H. (In re D.T.H.), 748 So. 2d 853, 1999 Miss. App. LEXIS 543 (Miss. Ct. App. 1999).

The statute could not be constitutionally applied to bar an unmarried father's right to be notified of or to withhold his consent to the adoption of his child where he made substantial and prompt attempts to establish a relationship with his child including filing a declaration of paternity, obtaining a permanent injunction against the mother and all others working with her to prohibit an adoption of the child, hiring private investigators to locate the mother, and mailing the permanent injunction to every vital statistics office in Mississippi as well as other states. Smith v. Malouf, 722 So. 2d 490, 1998 Miss. LEXIS 460 (Miss. 1998).

An unwed father had no statutory rights whatsoever with regard to his child's adoption since the statute, which requires that "parents" be made parties to the adoption proceedings, does not consider the father of an illegitimate child to be a "parent" for the purposes of the statute. Humphrey v. Pannell, 710 So. 2d 392, 1998 Miss. LEXIS 145 (Miss. 1998).

The statute is unconstitutional to the extent that the United States Supreme Court has held that a natural unwed father of an illegitimate child may, in certain circumstances, have a constitutional right to be notified of or to withhold his consent to, an adoption. Humphrey v. Pannell, 710 So. 2d 392, 1998 Miss. LEXIS 145 (Miss. 1998).

Unmarried natural father's rights under due process and equal protection clauses are not violated by failure to give notice and opportunity to be heard before his child is adopted, where father has had no significant custodial, personal, or financial relationship with child. Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614, 1983 U.S. LEXIS 92 (U.S. 1983).

The equal protection clause of the Fourteenth Amendment is violated by a state's statutory procedure whereby an unwed father is presumed to be unfit to raise his illegitimate children upon their mother's death, and may be deprived of the custody of his children, without a hearing as to his fitness, by the state's institution of dependency proceedings to declare the children wards of the state, whereas a hearing is extended to all other parents whose custody of their children is challenged. Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551, 1972 U.S. LEXIS 70 (U.S. 1972).

7. Rights of grandparents.

A natural grandparent who had petitioned for but did not yet have court ordered visitation rights was not entitled to notice of subsequently filed adoption of grandchild. Olson v. Flinn, 484 So. 2d 1015, 1986 Miss. LEXIS 2417 (Miss. 1986).

In an adoption proceeding in which the grandparents sought to adopt their daughter's child, the court should have appointed a guardian ad litem who could advise the court as to the infant grandchild's best interests where the daughter, who was a minor, and the grandchild were living in the grandparents' home, since such a factual scenario affords too much opportunity for overreaching. In re Adoption of F.N.M., 459 So. 2d 254, 1984 Miss. LEXIS 1932 (Miss. 1984).

Grandparents who were legal custodians of a child by court decree were necessary parties to a petition for adoption, but their status as kindred and legal custodians did not vest in them the prerogative of consenting to the adoption or withholding consent and thereby thwarting the adoption. Martin v. Putnam, 427 So. 2d 1373, 1983 Miss. LEXIS 2565 (Miss. 1983).

8.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

Chancery court of Pontotoc County, Mississippi, had full jurisdiction and authority to determine competency and capacity of each of petitioners in adoption proceeding, according to law of forum, and he did not err in failing to give full faith and credit to adjudication of insanity of child's mother in Tennessee, which may have been conclusive until there was an adjudication that sanity had been restored if adoption proceedings had been filed in Tennessee, since presumption of continuance of insanity is rebuttable one under law of Mississippi. Welch v. Welch, 208 Miss. 726, 45 So. 2d 353, 1950 Miss. LEXIS 291 (Miss. 1950).

Chancellor's finding that natural mother of child was legally competent to join in petition for adoption, supported by evidence, will be sustained for, although it is conclusively presumed in courts of this state that mother was non compos mentis at time she was so adjudicated by probate court in Tennessee, this conclusive presumption will not continue as against proof to contrary in courts of this state. Welch v. Welch, 208 Miss. 726, 45 So. 2d 353, 1950 Miss. LEXIS 291 (Miss. 1950).

Any proceeding to adopt a child without making presumptive father party to proceeding is invalid under due process provision of state and federal constitutions. Graham v. Lee, 204 Miss. 416, 37 So. 2d 735, 1948 Miss. LEXIS 378 (Miss. 1948).

Although the father or mother may be unfit to have custody of their child it cannot be adopted under statute by another without the consent of both of them. Roberts v. Cochran, 177 Miss. 546, 171 So. 6, 1936 Miss. LEXIS 265 (Miss. 1936).

Petition by grandparents joined by child's mother seeking to adopt child, which failed to allege that father of the child had given his consent to the adoption, as required by statute, held insufficient since requirement of statute is jurisdictional. Roberts v. Cochran, 177 Miss. 546, 171 So. 6, 1936 Miss. LEXIS 265 (Miss. 1936).

Petition which alleged failure of the father of child to contribute to its support and maintenance, held defective since it failed to allege that consent of father had been given to adoption. Roberts v. Cochran, 177 Miss. 546, 171 So. 6, 1936 Miss. LEXIS 265 (Miss. 1936).

RESEARCH REFERENCES

ALR.

Consent of natural parents as essential to adoption where parents are divorced. 47 A.L.R.2d 824.

What constitutes undue influence in obtaining a parent's consent to adoption of child. 50 A.L.R.3d 918.

Comment Note. – Right of natural parent to withdraw valid consent to adoption of child. 74 A.L.R.3d 421.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency. 74 A.L.R.3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency. 74 A.L.R.3d 527.

Admissibility of social worker's expert testimony on child custody issues. 1 A.L.R.4th 837.

Race as factor in adoption proceedings. 34 A.L.R.4th 167.

Necessity and sufficiency of consent to adoption by spouse of adopting parent. 38 A.L.R.4th 768.

Required parties in adoption proceedings. 48 A.L.R.4th 860.

Validity and construction of surrogate parenting agreement. 77 A.L.R.4th 70.

Validity of birth parent's "blanket" consent to adoption which fails to identify adoptive parents. 15 A.L.R.5th 1.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 21, 22 et seq., 69 et seq.

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Forms 161 et seq. (appointment of guardian); Forms 181 et seq. (consent to adoption); Forms 278, 279 (summons to appear at hearing);.

14 Am. Jur. Pl & Pr Forms (Rev), Infants, Form 36.2 (Request for and consent to appointment of guardian ad litem).

1 Am. Jur. Legal Forms 2d, Adoption, §§ 9:31 et seq. (consent to adoption).

8 Am. Jur. Proof of Facts 2d, Undue Influence in Obtaining Parent's Consent to Adoption of Child, §§ 11 et seq. (proof of undue influence in obtaining parental consent to adoption).

10 Am. Jur. Proof of Facts 2d, Relinquishment of Parental Claim to Child-Adoption Proceedings, §§ 5 et seq. (proof of relinquishment of parental claim to child).

18 Am. Jur. Proof of Facts 2d 531, Equitable Adoption.

23 Am. Jur. Proof of Facts 2d 163, Guardian's Arbitrary and Unreasonable Withholding of Consent to Adoption.

CJS.

2 C.J.S., Adoption of Persons §§ 48 et seq.

Law Reviews.

1982 Mississippi Supreme Court Review: Miscellaneous: Parental Objection to Adoption. 53 Miss. L. J. 181, March, 1983.

Rights of Unwed Fathers in Mississippi Adoptions, 21 Miss. C. L. Rev. 25, Fall, 2001.

§ 93-17-6. Petition for determination of rights in proposed adoption of natural child; service of process in the adoption of a foreign born child.

(1) Any person who would be a necessary party to an adoption proceeding under this chapter and any person alleged or claiming to be the father of a child born out of wedlock who is proposed for adoption or who has been determined to be such by any administrative or judicial procedure (the "alleged father") may file a petition for determination of rights as a preliminary pleading to a petition for adoption in any court which would have jurisdiction and venue of an adoption proceeding. A petition for determination of rights

may be filed at any time after the period ending thirty (30) days after the birth of the child. Should competing petitions be filed in two (2) or more courts having jurisdiction and venue, the court in which the first such petition was properly filed shall have jurisdiction over the whole proceeding until its disposition. The prospective adopting parents need not be a party to the petition. Where the child's biological mother has surrendered the child to a home for adoption, the home may represent the biological mother and her interests in this proceeding.

(2) The court shall set this petition for hearing as expeditiously as possible allowing not less than ten (10) days' notice from the service or completion of process on the parties to be served.

(3) The sole matter for determination under a petition for determination of rights is whether the alleged father is the natural father of the child based on Mississippi law governing paternity or other relevant evidence.

(4) If the court determines that the alleged father is not the natural father of the child, he shall have no right to object to an adoption under Section 93-17-7.

(5) If the court determines that the alleged father is the child's natural father and that he objects to the child's adoption, the court shall stay the adoption proceedings to allow the filing of a petition to determine whether the father's parental rights should be terminated pursuant to Section 93-15-119, or other applicable provision of the Mississippi Termination of Parental Rights Law.

(6) If a petition for the termination of parental rights is filed and, after an evidentiary hearing, the court does not terminate the father's parental rights, the court shall set the matter as a contested adoption as provided in Section 93-17-8.

(7) A petition for determination of rights may be used to determine the rights of alleged fathers whose identity is unknown or uncertain. In such cases the court shall determine what, if any, notice can be and is to be given those persons. Determinations of rights under the procedure of this section may also be made under a petition for adoption.

(8) Petitions for determination of rights shall be considered adoption cases and all subsequent proceedings such as a contested adoption under Section 93-17-8 and the adoption proceeding itself shall be portions of the same file.

(9) Service of process in the adoption of a foreign born child shall be governed by Section 93-15-107(3).

HISTORY:

Laws, 2002, ch. 533, § 2; Laws, 2005, ch. 426, § 2; Laws, 2016, ch. 431, § 20, eff from and after passage (approved Apr. 18, 2016).

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in subsection (9). The reference to "93-15-105(5)" was changed to "93-15-107(3)." The Joint Committee ratified the correction at its August 5, 2016, meeting.

Editor's Notes —

A former § 93-17-6 [Laws, 1998, ch. 516, § 14; Laws, 1999, ch. 507, § 2, eff from and after June 30, 1999], entitled "Petition for determination of rights," was repealed by Laws, 1999, ch. 507, § 2, eff from and after June 30, 1999.

Cross References —

Petition for termination of parental rights, generally, see § 93-15-105.

Petition for termination of parental rights, generally, see § 93-15-107.

JUDICIAL DECISIONS

ANALYSIS

1. Natural father's objection.
2. Consent to adopt.

1. Natural father's objection.

Chancellor did not err in setting aside the adoption of the adoptive parents' twins and awarding the twins to the biological father as the mother had consented to the adoption without the father's knowledge, and the father was willing and able to assume legal and physical care of the children, as provided by Miss. Code Ann. § 93-17-6(4)(b). K.B. v. J.G., 9 So. 3d 1124, 2009 Miss. LEXIS 267 (Miss. 2009).

Natural father was able to object to the adoption of his child because the natural father was led by the mother to believe that he was not the father of the child; upon learning that he was the father of the child, the natural father financially supported the child, gave gifts to the child, and took parenting classes. K.D.F. v. J.L.H., 933 So. 2d 971, 2006 Miss. LEXIS 286 (Miss. 2006).

2. Consent to adopt.

While it was undisputed that a child's biological father did not receive formal notice of the adoption of his son, this did not void the adoption of the son as, even if the father had received notice, he did not meet the standard of demonstrating a full commitment to the responsibilities of parenthood under Miss. Code Ann. § 93-17-5(3), which would have allowed him, as an unwed father, to object to the adoption. There was no evidence that the father provided support for the child, that he tried to visit with the child, or that he was now willing and able to assume physical care for the child. In re Adoption of a Minor Child v. M.J.W., 111 So. 3d 1243, 2013 Miss. App. LEXIS 150 (Miss. Ct. App. 2013).

RESEARCH REFERENCES

Law Reviews.

Rights of Unwed Fathers in Mississippi Adoptions, 21 Miss. C. L. Rev. 25, Fall, 2001.

§ 93-17-7. Parental objection; causes for termination of parental rights.

(1) No infant shall be adopted to any person if a parent whose parental rights have not been terminated under the Mississippi Termination of Parental Rights Law, after having been summoned, shall appear and object thereto before the making of a decree for adoption. A parent shall not be summoned in the adoption proceedings nor have the right to object thereto if the parental rights of the parent have been terminated by the procedure set forth in the Mississippi Termination of Parental Rights Law (Section 93-15-101 et seq.), and the termination shall be res judicata on the question of parental abandonment or unfitness in the adoption proceedings.

(2) No person, whether claiming to be the parent of the child or not, has standing to object to the adoption if:

(a) A final judgment for adoption that comports with all applicable state and federal laws has been entered by a court; and

(b) Notice to the parties of the action, whether known or unknown, has been made in compliance with Section 93-17-5.

HISTORY:

Codes, 1942, § 1269-09; Laws, 1955, Ex. ch. 34, § 9; Laws, 1968, ch. 323, § 1; Laws, 1980, ch. 485, § 6; Laws, 1986, ch. 379; Laws, 1998, ch. 516, § 15; Laws, 1999, ch. 507, § 3; Laws, 2002, ch. 533, § 3; Laws, 2016, ch. 431, § 21, eff from and after passage (approved Apr. 18, 2016).

Cross References —

Authority of courts to impose fee for any court-ordered home study relating to child custody matters, see § 93-17-12.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2. Jurisdiction of court.
3. Standing to challenge adoption.
4. Burden of proof.
5. Grounds for termination — Abandonment or desertion.
6. Grounds for termination — Substantial erosion of parent and child.
7. Grounds for termination — Emotional illness or mental deficiency.
8. Consent.
9. Illegal or immoral conduct.
10. Appeal.

11.-15. [Reserved for future use].

II. UNDER FORMER LAW.

16. In general.

I. UNDER CURRENT LAW.

1. In general.

Based upon Miss. Code Ann. § 93-17-7(1) (Rev. 2004), only a natural parent had a statutory right to object to the adoption of a child. The railroad company was not a natural parent of the children, and it therefore lacked standing to object to their adoption. D.C.S. v. J.F., 44 So. 3d 1006, 2009 Miss. App. LEXIS 714 (Miss. Ct. App. 2009), cert. dismissed, 2010 Miss. LEXIS 515 (Miss. Sept. 30, 2010).

Section 93-17-7 requires a definite adjudication that the welfare of the child will be promoted or enhanced by a proposed adoption. Ainsworth v. Natural Father, 414 So. 2d 417, 1982 Miss. LEXIS 2035 (Miss. 1982).

In an adoption proceeding courts will not find that a child has been abandoned by its natural parents unless such abandonment has been clearly proved. Local Assembly of Lord Jesus Christ v. Apostolic Church of Jesus Christ, 211 So. 2d 871, 1968 Miss. LEXIS 1286 (Miss. 1968).

2. Jurisdiction of court.

When the adoptive parents' petition and agreed pretrial order, which raised additional issues of fact, was read in connection with the statutory requirements of Miss. Code Ann. § 93-15-103 and Miss. Code Ann. § 93-17-7, it was readily apparent that the adoptive parents had sufficiently pleaded allegations that, if proven, would entitle them to terminate the mother's parental rights and adopt her child. Therefore, the trial court did not commit manifest error in finding that the pleadings and the pretrial order, taken together, satisfied a claim for relief sufficient to defeat the mother's Miss. R. Civ. P. 12(b)(6) motion. In re Adoption of a Minor Child, 931 So. 2d 566, 2006 Miss. LEXIS 111 (Miss. 2006).

Congress's intended meaning of "domicile" under Indian Child Welfare Act of 1978 (ICWA) to be matter of uniform federal law and not matter of individual state law, although it is permissible to borrow state common-law principles to extent they are not inconsistent with objectives of congressional scheme; under general common-law principles, which indicate that domicile of illegitimate children follows that of mother, children in question were domiciled on reservation within meaning of relevant ICWA provisions, fact that the children were voluntarily surrendered by mother does not change result, because ICWA was intended in part to protect interests of the Indian community in retaining its children within its society, and tribal jurisdiction under ICWA thus not meant to be defeated by actions of individual members; and thus Chancery Court lacked jurisdiction over adoptions and its decree would be vacated. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29, 1989 U.S. LEXIS 1791 (U.S. 1989).

3. Standing to challenge adoption.

Decedent's daughter lacked statutory standing under Miss. Code Ann. § 93-17-7 to set aside 1984 adoption of two children by decedent's son, because she was not one of the natural parents of the adopted children, and therefore was not a necessary party to the original proceedings under Miss. Code Ann. § 93-17-5. Gartrell v. Gartrell, 27 So. 3d 388, 2009 Miss. LEXIS 621 (Miss. 2009).

4. Burden of proof.

The burden of proof rests with the adoptive parents to establish that the adopted child's natural parents had abandoned or deserted such infant or are mentally or morally, or otherwise, unfit to rear and train it; and in the absence of such proof a decree of adoption will be reversed and custody of the child restored to its natural mother. Cook v. Conn, 267 So. 2d 296, 1972 Miss. LEXIS 1409 (Miss. 1972).

The burden of proof that the parent objecting to the adoption of his child has either abandoned or deserted the child, or is mentally or morally or otherwise unfit to rear and train it, is placed squarely on the parties petitioning for the child's adoption. Local Assembly of Lord Jesus Christ v. Apostolic Church of Jesus Christ, 211 So. 2d 871, 1968 Miss. LEXIS 1286 (Miss. 1968).

5. Grounds for termination — Abandonment or desertion.

Court properly terminated a seven-year-old child's parents' parental rights and allowed the child's adoption, as there was substantial evidence that the parents suffered from chemical dependency, the mother admitted that the mother never bought any food or clothes for the child, and the parents had never provided consistent individual care of the child. Little v. Norman, 119 So. 3d 382, 2013 Miss. App. LEXIS 457 (Miss. Ct. App. 2013).

Evidence did not establish that a father had abandoned his child without contact for a year; even though father's contacts with the child were minimal, the evidence showed that the father did maintain ties to the child and did not relinquish all parental claims to the child. S.N.C. v. J.R.D., 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

Chancellor's denial of a petition to adopt a child and to terminate the natural father's parental rights on the grounds of abandonment and unfitness was affirmed because the chancellor's findings of fact and determination were supported by credible evidence as the natural father was led by the mother to believe that he was not the father of the child. K.D.F. v. J.L.H., 933 So. 2d 971, 2006 Miss. LEXIS 286 (Miss. 2006).

The natural mother and stepfather failed to establish that the natural father deserted or abandoned the child at issue where there was conflicting evidence as to how long the natural father went without seeing his child, and the natural father testified that he saw the child on several occasions through his mother and by visiting her secretly at her babysitters, that he sent a letter with a poem, and that he bought Christmas gifts that he had attempted to give to the child. In re M. L. W., 755 So. 2d 558, 2000 Miss. App. LEXIS 89 (Miss. Ct. App. 2000).

The evidence was sufficient to support a finding that a mother had abandoned and deserted her minor children, where the mother had only seen the children 2 times between January of 1986 when she left them with their father and the time of the trial in January of 1990, the mother did not contribute any financial assistance during that time, the mother did not send birthday cards or Christmas gifts to the children and ignored other events in the children's lives, the children thought of and referred to their aunt, with whom they were living, as their mother, and though the older child knew who the mother was when she saw her, the younger child did not know the mother at all as the mother had left when the younger child was 6 months old. Natural Mother v. Paternal Aunt, 583 So. 2d 614, 1991 Miss. LEXIS 386 (Miss. 1991).

Chancellor was not manifestly in error when he found neither abandonment nor such immoral conduct as to make natural father of child unfit, where: father had been behind in child support payments; had been arrested for possession of marijuana with intent to deliver; and had cohabited with someone not his spouse; constant arrearages in child support payments do not constitute abandonment or desertion under statutory definition, and that was only evidence of desertion in case; there was no evidence that father had ever exposed daughter to illegal or immoral conduct during visits, and at time of hearing father was out of school and held good job; commission of crime alone was insufficient to find him morally unfit to rear and train child, especially where rehabilitation was evident; and, cohabitation by custodial parent in itself is insufficient to modify custody order absent showing of substantial detrimental effect; same rule applies in adoption cases. In Interest of J.D., 512 So. 2d 684, 1987 Miss. LEXIS 2738 (Miss. 1987).

In an action in which a natural mother and her new husband petitioned for adoption of her minor children over objection of their natural father, petitioners failed to prove by clear and convincing evidence that the father had abandoned his children, or was unfit, within the meaning of §§ 93-17-7 and 93-15-103(3), where, although he was living in an adulterous relationship at the time of the divorce, he had subsequently married his second wife, where, although he was over $7,000 in arrears in court ordered child support, he proved that he was unable to make the support payments or purge himself of contempt, and where, although there had been few visits between him and the children, he had not so totally shown that he wished to relinquish all parental claims to the children as to justify a finding of abandonment or desertion. Petit v. Holifield, 443 So. 2d 874, 1984 Miss. LEXIS 1568 (Miss. 1984).

A complete disregard for the welfare of a child of tender years over a period of more than three and one-half years, and a contumacious refusal to abide by a valid decree of support, with no effort to have it modified, amounts to desertion of the child within the meaning of § 93-17-7; moreover, such desertion results in forfeiture of parental rights whether or not there was an intent to relinquish them. Ainsworth v. Natural Father, 414 So. 2d 417, 1982 Miss. LEXIS 2035 (Miss. 1982).

In an adoption proceeding brought by a stepfather and a daughter's natural mother, the daughter's natural father could not be held to have abandoned the child within the purview of § 93-17-7, where the record did not reveal that he was either mentally or morally unfit, and there was no evidence of abandonment, other than constant arrearages in child support payments, some of which were explained by his inability to pay following injuries in an automobile accident. Miller v. Arrington, 412 So. 2d 1175 (Miss. 1982).

In an action by step-father seeking to adopt children of his wife's former marriage, the children's natural father who exhibited a callous indifference to the welfare of the children in contributing only paltry amounts of support and in visiting them only sporadically and who shot step-father during an altercation arising out of the natural father's visit to the children did not abandon children and was not mentally, morally, or otherwise unfit to rear and train them as required for adoption under § 93-17-7, even though step-father loved the children, provided for them, and was willing and anxious to educate and care for them. In re Yarber, 341 So. 2d 108, 1977 Miss. LEXIS 2263 (Miss. 1977).

Adoption of child by paternal relatives with whom she had been living, over divorced mother's objection, denied where there was substantial evidence of mother's present fitness to have custody, and that she had not deserted child on entrusting it to relatives. Schillereff v. Adamany, 240 Miss. 275, 127 So. 2d 392, 1961 Miss. LEXIS 459 (Miss. 1961).

6. Grounds for termination — Substantial erosion of parent and child.

Chancery court had the authority to terminate the parental rights of the natural parents, pursuant to Miss. Code Ann. §§ 93-17-7 and 93-15-103, because credible, clear, and convincing evidence supported a finding of a substantial erosion of the parent/child relationship in that the parents had limited contact with their child after leaving the infant child in the care of relatives, who after three years wished to adopt the child. In re Adoption of H.H.O.W., 109 So. 3d 1102, 2013 Miss. App. LEXIS 99 (Miss. Ct. App. 2013).

7. Grounds for termination — Emotional illness or mental deficiency.

Termination of the mother's parental rights was inappropriate because, although her mental illness affected her ability to care for her child, there was no clear and convincing evidence proving that the mother's condition made her unable to assume minimally, acceptable care of the child under Miss. Code Ann. § 93-15-103(3)(e)(i). Psychiatric reports indicated that the mother's insight and judgment were good; her attitude was cooperative; and her motivation for ongoing treatment was good. J.J. v. Smith, 31 So. 3d 1271, 2010 Miss. App. LEXIS 147 (Miss. Ct. App. 2010).

Trial court properly terminated the mother's parental rights under Miss. Code Ann. § 93-17-7(2)(c) on the ground that she suffered from an emotional illness or mental deficiency, and behavior or conduct disorder, because: (1) the mother was lacking in stability, discipline, purpose, ambition, and parental responsibility; (2) she had been largely unemployed and dependent on SSI disability since she left her parents' home; (3) she never finished high school or attempted to earn her GED; (4) she had given physical custody of her other child to a friend without having reclaimed her; (5) she had been hospitalized for mental and/or emotional problems three times, one of which involved a suicide attempt; (6) she was diagnosed with bipolar disorder and borderline personality disorder; and (7) she provided no significant care or support for the child. In re Adoption of a Minor Child, 931 So. 2d 566, 2006 Miss. LEXIS 111 (Miss. 2006).

8. Consent.

Termination of the father's parental rights over his objection was supported by findings that his status as a convicted sex-offender would adversely affect the children's social and extracurricular engagements, he had engaged in adulterous relationships with at least two different women, he made misrepresentations before the youth and chancery courts, and he chose to remain in Pennsylvania rather than move to Mississippi where his children were located, shirking responsibility for their support. Hartley v. Watts, — So. 3d —, 2017 Miss. LEXIS 78 (Miss. Mar. 2, 2017).

Chancellor did not err in setting aside the adoption of the adoptive parents' twins and awarding the twins to the biological father as the mother had consented to the adoption without the father's knowledge, and the father was willing and able to assume legal and physical care of the children, as provided by Miss. Code Ann. § 93-17-6(4)(b). K.B. v. J.G., 9 So. 3d 1124, 2009 Miss. LEXIS 267 (Miss. 2009).

A natural mother's age of minority at the time of her joining an adoption petition did not render the adoption void in light of Miss. Code Ann. §§ 93-15-103 and 93-17-7, which were to be construed in pari materia. C.T. v. R.D.H., 843 So. 2d 690, 2003 Miss. LEXIS 201 (Miss. 2003).

Whether a natural parent's consent to adoption may be withdrawn must be determined on a case-by-case basis in timely fashion without unnecessary delay in the proceedings, always keeping in mind that the best interest of the child is paramount. Grafe v. Olds, 556 So. 2d 690, 1990 Miss. LEXIS 20 (Miss. 1990).

In accordance with § 93-17-7 and §§ 93-15-101 through 93-15-111, a written voluntary release, or consent by the parent, terminates the parental rights and, thereafter, no objection to the adoption from the natural parent may be sustained. Grafe v. Olds, 556 So. 2d 690, 1990 Miss. LEXIS 20 (Miss. 1990).

9. Illegal or immoral conduct.

Chancery court did not err in granting an adoption because clear and convincing evidence supported a finding that the father was unfit to rear and train his children since he was sentenced to life imprisonment and continued to exhibit threatening and violent behavior; the father's past and present conduct would pose a risk of substantial harm to the physical, mental or emotional health of his children, and the passage of time evinced a substantial erosion of the parent-child relationship. Blakeney v. McRee, 188 So. 3d 1154, 2016 Miss. LEXIS 87 (Miss. 2016).

Objector had standing to attack an adoption of an adult where a law student developed a relationship with the deceased, had her adopt him, and then helped her compose a holographic will devising all of her property to him. Cupit v. Pluskat (In re Estate of Reid), 825 So. 2d 1, 2002 Miss. LEXIS 182 (Miss. 2002).

Evidence did not establish that a father was mentally, morally, or otherwise unfit to raise a child where the only evidence offered to show that he was unfit was one allegedly abusive incident between the father and the mother. S.N.C. v. J.R.D., 755 So. 2d 1077, 2000 Miss. LEXIS 21 (Miss. 2000).

Chancellor was not manifestly in error when he found neither abandonment nor such immoral conduct as to make natural father of child unfit, where: father had been behind in child support payments; had been arrested for possession of marijuana with intent to deliver; and had cohabited with someone not his spouse; constant arrearages in child support payments do not constitute abandonment or desertion under statutory definition, and that was only evidence of desertion in case; there was no evidence that father had ever exposed daughter to illegal or immoral conduct during visits, and at time of hearing father was out of school and held good job; commission of crime alone was insufficient to find him morally unfit to rear and train child, especially where rehabilitation was evident; and, cohabitation by custodial parent in itself is insufficient to modify custody order absent showing of substantial detrimental effect; same rule applies in adoption cases. In Interest of J.D., 512 So. 2d 684, 1987 Miss. LEXIS 2738 (Miss. 1987).

In an action in which a natural mother and her new husband petitioned for adoption of her minor children over objection of their natural father, petitioners failed to prove by clear and convincing evidence that the father had abandoned his children, or was unfit, within the meaning of §§ 93-17-7 and 93-15-103(3), where, although he was living in an adulterous relationship at the time of the divorce, he had subsequently married his second wife, where, although he was over $7,000 in arrears in court ordered child support, he proved that he was unable to make the support payments or purge himself of contempt, and where, although there had been few visits between him and the children, he had not so totally shown that he wished to relinquish all parental claims to the children as to justify a finding of abandonment or desertion. Petit v. Holifield, 443 So. 2d 874, 1984 Miss. LEXIS 1568 (Miss. 1984).

In a proceeding for the adoption of minor children by their maternal grandparents, the children's father, imprisoned for the murder of their mother, was correctly held to be unfit to have their custody awarded to him. Shoemake v. Davis, 216 So. 2d 420, 1968 Miss. LEXIS 1226 (Miss. 1968).

10. Appeal.

In a proceeding for termination of parental rights and adoption, the trial court properly refused to hear the natural mother's petition for writ of habeas corpus in which she alleged that a prior court order awarding custody of the children to their aunt was void, which would be construed as an amendment to the natural mother's original answer, where the mother sought to amend her pleading a mere 2 days before trial. Since the adoption proceeding not only determined the best interests of the children, but also who should have custody, there was no need for the trial court to address the habeas application; by addressing and granting the petition for adoption, the trial court necessarily adjudicated custody anew. Natural Mother v. Paternal Aunt, 583 So. 2d 614, 1991 Miss. LEXIS 386 (Miss. 1991).

11.-15. [Reserved for future use].

II. UNDER FORMER LAW.

16. In general.

In adoption proceedings involving a contest between natural parent and collateral relatives or others seeking adoption, the issue is not what is to the best interest of the children but it is whether the natural parent has abandoned and deserted the children and whether he is morally or mentally unfit to rear them. Mayfield v. Braund, 217 Miss. 514, 64 So. 2d 713, 1953 Miss. LEXIS 460 (Miss. 1953).

Where both the natural parent and the third person or persons are worthy, and there has been no abandonment of the child by the natural parent, the court will not deprive the natural parent of his child or children on the ground that the third person could supply to it more comforts and advantages than could be furnished by the natural parent. Mayfield v. Braund, 217 Miss. 514, 64 So. 2d 713, 1953 Miss. LEXIS 460 (Miss. 1953).

In adoption proceedings where a natural parent appeared and objected to the petition, it was incumbent upon the petitioners to meet the burden of proving that the natural parent had either abandoned or deserted the child or was mentally or morally unfit to rear and train it. Mayfield v. Braund, 217 Miss. 514, 64 So. 2d 713, 1953 Miss. LEXIS 460 (Miss. 1953).

"Abandonment" imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Wright v. Fitzgibbons, 198 Miss. 471, 21 So. 2d 709, 1945 Miss. LEXIS 216 (Miss. 1945).

When abandonment is shown to have existed, it becomes a judicial question whether it really has been terminated, or can be, consistently with the welfare of the child. Wright v. Fitzgibbons, 198 Miss. 471, 21 So. 2d 709, 1945 Miss. LEXIS 216 (Miss. 1945).

Where mother of bastard child appeared and objected to the adoption of the child by another, the mother's consent to the adoption previously given about five years prior thereto became ineffective, and, in order to sustain decree granting adoption petition, the evidence must have warranted trial court in finding that the child had been abandoned by the mother. Wright v. Fitzgibbons, 198 Miss. 471, 21 So. 2d 709, 1945 Miss. LEXIS 216 (Miss. 1945).

Where unmarried mother gave child shortly after its birth to another woman and her husband pursuant to an agreement whereby the latter were given absolute custody and control of the child and the mother consented to adoption proceedings thereafter to be instituted, and the mother concealed the fact that the child was hers, exercised no sort of control over the child, contributed nothing to and exhibited little, if any, interest in its welfare until just prior to institution of adoption proceedings, the court properly found that the mother had abandoned the child. Wright v. Fitzgibbons, 198 Miss. 471, 21 So. 2d 709, 1945 Miss. LEXIS 216 (Miss. 1945).

Where petitioner's husband did not join in petition for adoption of child pursuant to an agreement whereby child's mother consented to adoption by petitioner and a former husband, since divorced, naming of petitioner's present husband in the adoption decree as one of the adopting parents constituted reversible error, where child's mother testified that she was influenced in giving child to petitioner and her former husband by reason of her confidence in the latter, and where the trial court may have been influenced in rendering its decree by fact that it was giving the child to the petitioner and her present husband and not to the petitioner alone. Wright v. Fitzgibbons, 198 Miss. 471, 21 So. 2d 709, 1945 Miss. LEXIS 216 (Miss. 1945).

RESEARCH REFERENCES

ALR.

Annulment or vacation of adoption decree by adopting parent or natural parent consenting to adoption. 2 A.L.R.2d 887.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency. 74 A.L.R.3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency. 74 A.L.R.3d 527.

Parent's involuntary confinement, or failure to care for child as result thereof, as permitting adoption without parental consent. 78 A.L.R.3d 712.

Required parties in adoption proceedings. 48 A.L.R.4th 860.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

Natural Parent's Indigence as Precluding Finding That Failure to Support Child Waived Requirement of Consent to Adoption – Factors Other Than Employment Status. 84 A.L.R.5th 191.

Natural parent's indigence resulting from unemployment or underemployment as precluding finding that failure to support child waived requirement of consent to adoption. 83 A.L.R.5th 375.

Actions under 42 USCA § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCA §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 69 et seq.

1 Am. Jur. Pl & Pr Forms (Rev), Adoption, Forms 262, 263 (objections to adoption).

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Form 262.1 (answer – denial of consent or abandonment – by natural mother – consent not freely given); Form 262.2 (answer – denial of consent or abandonment – by natural father – consent not given).

1 Am. Jur. Legal Forms 2d, Adoption, § 9:40 (refusal to consent to adoption).

1 Am. Jur. Proof of Facts, Adoption, Proof No. 4 (circumstances rendering parental consent unnecessary – abandonment); Proof No. 5 (circumstances rendering parental consent unnecessary – unfitness).

10 Am. Jur. Proof of Facts 2d, Relinquishment of Parental Claim to Child-Adoption Proceedings, §§ 5 et seq. (proof of relinquishment of parental claim to child).

CJS.

2 C.J.S., Adoption of Persons §§ 48 et seq.

Law Reviews.

1982 Mississippi Supreme Court Review: Miscellaneous: Parental Objection to Adoption. 53 Miss. L. J. 181, March, 1983.

§ 93-17-8. Contested adoptions.

(1) Whenever an adoption becomes a contested matter, whether after a hearing on a petition for determination of rights under Section 93-17-6 or otherwise, the court:

(a) Shall, on motion of any party or on its own motion, issue an order for immediate blood or tissue sampling in accordance with the provisions of Section 93-9-21 et seq., if paternity is at issue. The court shall order an expedited report of such testing and shall hold the hearing resolving this matter at the earliest time possible.

(b) Shall appoint a guardian ad litem to represent the child. Such guardian ad litem shall be an attorney, however his duties are as guardian ad litem and not as attorney for the child. The reasonable costs of the guardian ad litem shall be taxed as costs of court. Neither the child nor anyone purporting to act on his behalf may waive the appointment of a guardian ad litem.

(c) Shall determine first whether or not the objecting parent is entitled to so object under the criteria of Section 93-17-7 and then shall determine the custody of the child in accord with the best interests of the child and the rights of the parties as established by the hearings and judgments.

(d) Shall schedule all hearings concerning the contested adoption as expeditiously as possible for prompt conclusion of the matter.

(2) In determining the custody of the child after a finding that the adoption will not be granted, the fact of the surrender of the child for adoption by a parent shall not be taken as any evidence of that parent's abandonment or desertion of the child or of that parent's unfitness as a parent.

(3) In contested adoptions arising through petitions for determination of rights where the prospective adopting parents were not parties to that proceeding, they need not be made parties to the contested adoption until there has been a ruling that the objecting parent is not entitled to enter a valid objection to the adoption. At that point the prospective adopting parents shall be made parties by joinder which shall show their suitability to be adopting parents as would a petition for adoption. The identity and suitability of the prospective adopting parents shall be made known to the court and the

guardian ad litem, but shall not be made known to other parties to the proceeding unless the court determines that the interests of justice or the best interests of the child require it.

(4) No birth parent or alleged parent shall be permitted to contradict statements given in a proceeding for the adoption of their child in any other proceeding concerning that child or his ancestry.

(5) Appointment of a guardian ad litem is not required in any proceeding under this chapter except as provided in subsection (1)(b) above and except for the guardian ad litem needed for an abandoned child. It shall not be necessary for a guardian ad litem to be appointed where the chancery judge presiding in the adoption proceeding deems it unnecessary and no adoption agency is involved in the proceeding. No final decree of adoption heretofore granted shall be set aside or modified because a guardian ad litem was not appointed unless as the result of a direct appeal not now barred.

(6) The provisions of Chapter 15 of this Title 93, Mississippi Code of 1972, are not applicable to proceedings under this chapter except as specifically provided by reference herein.

(7) The court may order a child's birth father, identified as such in the proceedings, to reimburse the Department of Human Services, the foster parents, the adopting parents, the home, any other agency or person who has assumed liability for such child, all or part of the costs of the medical expenses incurred for the mother and the child in connection with the birth of the child, as well as reasonable support for the child after his birth.

HISTORY:

Laws, 1998, ch. 516, § 16, eff from and after July 1, 1998.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the introductory paragraph in subsection (1). The statutory reference to "Section 92-17-6" has been changed to "Section 93-17-6". The Joint Committee ratified the correction at its May 20, 1998 meeting.

JUDICIAL DECISIONS

ANALYSIS

1. Guardian ad litem.
2. Standard of review.
3. Parental interest.

1. Guardian ad litem.

Trial court did not err in failing to adopt a guardian ad litem's recommendations as the trial judge was able to view the parties, and significant portions of the guardian ad litem's report were unsubstantiated. Neshoba County Dep't of Human Servs. v. Hodge, 919 So. 2d 1157, 2006 Miss. App. LEXIS 2 (Miss. Ct. App. 2006).

A chancellor is not required to appoint a guardian ad litem to protect the interest of the child in an uncontested adoption proceeding which necessarily involves the termination of parental rights. J. C. v. In re R.Y., 797 So. 2d 209, 2001 Miss. LEXIS 47 (Miss. 2001).

2. Standard of review.

Chancellor's denial of a petition to adopt a child and to terminate the natural father's parental rights on the grounds of abandonment and unfitness was affirmed because the chancellor's findings of fact and determination were supported by credible evidence as the natural father was led by the mother to believe that he was not the father of the child. K.D.F. v. J.L.H., 933 So. 2d 971, 2006 Miss. LEXIS 286 (Miss. 2006).

3. Parental interest.

In a contested adoption suit, the biological parents had no interest in the adoption of their minor children, since they unequivocally surrendered their parental rights and chose not to participate in the proceedings. In the Interest of N.B. v. Berryman, 135 So. 3d 220, 2014 Miss. App. LEXIS 144 (Miss. Ct. App. 2014).

§ 93-17-9. Repealed.

Repealed by Laws of 2016, ch. 431, § 22, eff from and after passage (approved April 18, 2016).

§ 93-17-9. [Codes, 1942, § 1269-04; Laws, 1955, Ex. ch. 34, § 4; Laws, 1998, ch. 516, § 17, eff from and after July 1, 1998.]

Editor's Notes —

Former § 93-17-9 related to the surrender of a child to a home for care and adoption. For present similar provisions, see §§ 93-15-109 and 93-15-111.

§ 93-17-11. Investigation; interlocutory decree; appeal.

At any time after the filing of the petition for adoption and completion of process thereon, and before the entering of a final decree, the court may, in its discretion, of its own motion or on motion of any party to the proceeding, require an investigation and report to the court to be made by any person, officer or home as the court may designate and direct concerning the child, and shall require in adoptions, other than those in which the petitioner or petitioners are a relative or stepparent of the child, that a home study be performed of the petitioner or petitioners by a licensed adoption agency or by the Department of Human Services, at the petitioner's or petitioners' sole expense and at no cost to the state or county. The investigation and report shall give the material facts upon which the court may determine whether the child is a proper subject for adoption, whether the petitioner or petitioners are suitable parents for the child, whether the adoption is to its best interest, and any other facts or circumstances that may be material to the proposed adoption. The home study shall be considered by the court in determining whether the petitioner or petitioners are suitable parents for the child. The court, when an investigation and report are required by the court or by this section, shall stay the proceedings in the cause for such reasonable time as may be necessary or required in the opinion of the court for the completion of the investigation and report by the person, officer or home designated and authorized to make the same.

Upon the filing of that consent or the completion of the process and the filing of the investigation and report, if required by the court or by this section, and the presentation of such other evidence as may be desired by the court, if the court determines that it is to the best interests of the child that an interlocutory decree of adoption be entered, the court may thereupon enter an interlocutory decree upon such terms and conditions as may be determined by the court, in its discretion, but including therein that the complete care, custody and control of the child shall be vested in the petitioner or petitioners until further orders of the court and that during such time the child shall be and remain a ward of the court. If the court determines by decree at any time during the pendency of the proceeding that it is not to the best interests of the child that the adoption proceed, the petitioners shall be entitled to at least five

(5) days' notice upon their attorneys of record and a hearing with the right of appeal as provided by law from a dismissal of the petition; however, the bond perfecting the appeal shall be filed within ten (10) days from the entry of the decree of dismissal and the bond shall be in such amount as the chancellor may determine and supersedeas may be granted by the chancellor or as otherwise provided by law for appeal from final decrees.

After the entry of the interlocutory decree and before entry of the final decree, the court may require such further and additional investigation and reports as it may deem proper. The rights of the parties filing the consent or served with process shall be subject to the decree but shall not be divested until entry of the final decree.

HISTORY:

Codes, 1942, § 1269-05; Laws, 1955, Ex. ch. 34, § 5; Laws, 2004, ch. 527, § 2; Laws, 2007, ch. 496, § 3; Laws, 2009, ch. 375, § 1, eff from and after July 1, 2009.

JUDICIAL DECISIONS

1. In general.

Although chancery courts may order an investigation as to whether certain prospective adopting parents are suitable for a particular child, such reports are not conclusive on the courts if deemed not to be in the child's best interests. J. C. v. Natural Parents, 417 So. 2d 529, 1982 Miss. LEXIS 1878 (Miss. 1982).

The granting of authority to the court in adoption proceedings to make investigations limited to matters concerning whether the child is a proper subject for adoption, the petitioners are suitable parents for the child, the adoption is in the best interest of the child, and any other facts or circumstances which might be material to the proposed adoption, is not unreasonable, and such procedures do not constitute a denial of due process of law. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852, 1958 Miss. LEXIS 381 (Miss. 1958).

So long as a procedure for adoption affects all persons alike who are similarly situated and is suitable to accomplish the paramount purpose for which adoption laws are enacted, which is the promotion of the welfare of the children, and is not unjust, unreasonable or arbitrary, it will be adjudged due process. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852, 1958 Miss. LEXIS 381 (Miss. 1958).

Where, in an adoption proceeding, the rights of the prospective adoptive child's natural parents were not involved, the admission in evidence of the welfare department report, which contained hearsay material consisting of a statement by a welfare worker of conversation and correspondence with others, did not deny the prospective adoptive parents of due process of the law. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852, 1958 Miss. LEXIS 381 (Miss. 1958).

RESEARCH REFERENCES

ALR.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 104 et seq.

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Forms 171 et seq. (investigation); Forms 271 et seq. (hearing); Form 313 (interlocutory order granting petition for adoption).

1 Am. Jur. Proof of Facts, Adoption, Proof No. 6 (compliance with adoption requirements (adoption hearing) – adoption of minor); Proof No. 7 (compliance with adoption requirements (adoption hearing) – step parent adoption); Proof No. 8 (compliance with adoption requirements (adoption hearing) – adoption of adult).

CJS.

2 C.J.S., Adoption of Persons §§ 75 et seq.

§ 93-17-12. Authority of court to impose fee for court-ordered home study relating to child custody matters and in all adoptions.

In any child custody matter hereafter filed in any chancery or county court in which temporary or permanent custody has already been placed with a parent or guardian and in all adoptions, the court shall impose a fee for any court-ordered home study performed by the Department of Human Services or any other entity. The fee shall be assessed upon either party or upon both parties in the court's discretion. The minimum fee imposed shall be not less than Three Hundred Fifty Dollars ($350.00) for each household on which a home study is performed. The fee shall be paid directly to the Mississippi Department of Human Services prior to the home study being conducted by the department or to the entity if the study is performed by another entity. The judge may order the fee be paid by one or both of the parents or guardian. If the court determines that both parents or the guardian are unable to pay the fee, the judge shall waive the fee and the cost of the home study shall be defrayed by the Department of Human Services.

HISTORY:
Laws, 1993, ch. 524, § 1; Laws, 2000, ch. 462, § 1; Laws, 2003, ch. 345, § 1; Laws, 2007, ch. 496, § 5, eff from and after July 1, 2007.

RESEARCH REFERENCES

Am. Jur.
24A Am. Jur. 2d Divorce &amp; Separation §§ 862-915.

§ 93-17-13. Final decree and effect thereof; completion of home study before final decree entered.

(1) A final decree of adoption shall not be entered before the expiration of six (6) months from the entry of the interlocutory decree except (a) when a child is a stepchild of a petitioner or is related by blood to the petitioner within the third degree according to the rules of the civil law or in any case in which the chancellor in the exercise of his discretion shall determine from all the proceedings and evidence in said cause that the six-month waiting period is not necessary or required for the benefit of the court, the petitioners or the child to be adopted, and shall so adjudicate in the decree entered in said cause, in either of which cases the final decree may be entered immediately without any delay and without an interlocutory decree, (b) when the child has resided in the home of any petitioner prior to the granting of the interlocutory decree, in which case the court may, in its discretion, shorten the waiting period by the length of time the child has thus resided, or (c) when an adoption in a foreign country is registered under Article 9 of this chapter, the Mississippi Registration of Foreign Adoptions Act.

(2) The final decree shall adjudicate, in addition to such other provisions as may be found by the court to be proper for the protection of the interests of the child; and its effect, unless otherwise specifically provided, shall be that (a)

the child shall inherit from and through the adopting parents and shall likewise inherit from the other children of the adopting parents to the same extent and under the same conditions as provided for the inheritance between brothers and sisters of the full blood by the laws of descent and distribution of the State of Mississippi, and that the adopting parents and their other children shall inherit from the child, just as if such child had been born to the adopting parents in lawful wedlock; (b) the child and the adopting parents and adoptive kindred are vested with all of the rights, powers, duties and obligations, respectively, as if such child had been born to the adopting parents in lawful wedlock, including all rights existing by virtue of Section 11-7-13, Mississippi Code of 1972; provided, however, that inheritance by or from the adopted child shall be governed by paragraph (a) above; (c) that the name of the child shall be changed if desired; and (d) that the natural parents and natural kindred of the child shall not inherit by or through the child except as to a natural parent who is the spouse of the adopting parent, and all parental rights of the natural parent, or parents, shall be terminated, except as to a natural parent who is the spouse of the adopting parent. Nothing in this chapter shall restrict the right of any person to dispose of property under a last will and testament.

(3) A final decree of adoption shall not be entered until a court-ordered home study is satisfactorily completed, if required in Section 93-17-11.

HISTORY:

Codes, 1942, § 1269-06; Laws, 1955, Ex. ch. 34, § 6; Laws, 1958, chs. 267, 285, § 2; Laws, 1971, ch. 399, § 1; Laws, 1998, ch. 516, § 18; Laws, 2007, ch. 496, § 6; Laws, 2014, ch. 385, § 2, eff from and after July 1, 2014.

Cross References —

Rights of adopting parents under the wrongful death law, see § 11-7-13.

Other sections derived from same 1942 code section, see §§ 93-17-15, 93-17-21.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2. Application in particular circumstances.
3.-10. [Reserved for future use].

II. UNDER FORMER LAW.

11. Generally.
12. Rights of inheritance.
13. —By adopted child.
14. —Through adopted child.
15. Right to bring wrongful death action.
16. Rights under war risk insurance.

I. UNDER CURRENT LAW.

1. In general.

The "unless otherwise specifically provided"; in language of the statute must be interpreted in light of the context of the adoption statutes as a whole, and these statutes are clearly written to foster legal stability in the relationship between adoptive parents and their children; such language was intended by the legislature to provide natural and adoptive parents with the option of entering into limited arrangements such as post-adoption visitation agreements as long as the best interests of the child would be served by such an arrangement. Humphrey v. Pannell, 710 So. 2d 392, 1998 Miss. LEXIS 145 (Miss. 1998).

The statute was not intended by the legislature to grant a natural parent the right to weaken the legal bonds of the adoptive parent-child relationship by reserving the right to, in effect, sit and wait for the circumstances of the adoptive family to materially change and then divest the adoptive family of the custody of the child. Humphrey v. Pannell, 710 So. 2d 392, 1998 Miss. LEXIS 145 (Miss. 1998).

Under wrongful death statute, adopted child was wrongful death beneficiary of his natural father; right to bring wrongful death action fornatural father's death was not terminated at time of adoption. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Inheritance laws of Mississippi, where decedent's estate was located, rather than law of Louisiana, pursuant to which decedent's natural child was adopted, applied in determining whether child was wrongful death beneficiary. Estate of Jones v. Howell, 687 So. 2d 1171, 1996 Miss. LEXIS 421 (Miss. 1996).

Rights, duties, and obligations do not shift to the adoptive parents from the natural parents until the time of the adoption; thus, adoptive parents were not liable for medical expenses incurred during the adopted baby's 7-week hospital stay prior to the adoption where the adoptive parents did not enter into a contract with the hospital or the birth mother to provide for prenatal or newborn expenses. Wise v. Gulf States Collection Servs., 633 So. 2d 1025, 1994 Miss. LEXIS 124 (Miss. 1994).

2. Application in particular circumstances.

Miss Code Ann. § 97-13-3(4)'s requirement to include an individual's spouse in the adoption proceeding was to be followed in the instant case where the statute was unambiguous, and no reason was offered for not following the requirement. In re Adoption of the Child Described in the Petition: In re Adoption of the Child Described in the Petition: D.D.H., — So. 3d —, 2018 Miss. LEXIS 9 (Miss. Jan. 11, 2018).

Chancellor erred in denying the individual's petition to adopt pursuant to Miss. Code Ann. § 93-17-13(2) where the individual had been in the child's life since her birth, had acted as a natural parent, and provided support and care for her, he continued to fill that role after learning that he was not the natural father, he sought to allow the natural mother to retain her rights, and no third parties to the adoption were seeking to keep parental rights. In re Adoption of the Child Described in the Petition: In re Adoption of the Child Described in the Petition: D.D.H., — So. 3d —, 2018 Miss. LEXIS 9 (Miss. Jan. 11, 2018).

Chancery court did not err in granting an adoption because clear and convincing evidence supported a finding that the father was unfit to rear and train his children since he was sentenced to life imprisonment and continued to exhibit threatening and violent behavior; the father's past and present conduct would pose a risk of substantial harm to the physical, mental or emotional health of his children, and the passage of time evinced a substantial erosion of the parent-child relationship. Blakeney v. McRee, 188 So. 3d 1154, 2016 Miss. LEXIS 87 (Miss. 2016).

Mother was not entitled to the natural parent presumption because she had previously consented to the adoption of her child by her parents and relinquished her legal relationship with the child as his parent. An adoption, once entered, acted as an irrevocable surrender of all rights, obligations, and privileges of the natural parent with and to the child. D.M. v. D.R., 62 So. 3d 920, 2011 Miss. LEXIS 172 (Miss. 2011).

Chancery court did not err in ruling that appellee was entitled to two shares of a decedent's estate; while Miss. Code Ann. § 91-1-3 preserved appellee's right to inherit his mother's portion of the decedent's estate as his mother's sole descendant, Miss. Code Ann. § 93-17-13 provided that appellee would be treated as the decedent's adopted brother for inheritance purposes. Jenkins v. Jenkins, 990 So. 2d 807, 2008 Miss. App. LEXIS 557 (Miss. Ct. App. 2008).

3.-10. [Reserved for future use].

II. UNDER FORMER LAW.

11. Generally.

It was the intention of the legislature in the passage of this section [Code 1942, § 1269.06] to sever all rights, duties, and obligations of the natural parent toward the child adopted, and to bestow those rights, duties, and obligations upon the adopting parent just the same as if the child had been born in wedlock to the adoptive parent. W. R. Fairchild Constr. Co. v. Owens, 224 So. 2d 571, 1969 Miss. LEXIS 1295 (Miss. 1969).

The 1955 adoption law has no effect upon any adoption proceeding consummated prior to July 1, 1955, and applies to pending adoption proceedings on the effective date of the statute only if amendments were made so as to bring the proceedings under the provisions of the statute, and the statute was not intended to affect the rights of adoptive parents and adopted children where the final decree of adoption had been rendered prior to the effective date of the statute. Gray v. Morgan, 236 Miss. 245, 110 So. 2d 346, 1959 Miss. LEXIS 314 (Miss. 1959).

The proceeding of the adoption of a child is purely statutory, and the method provided by this section [Code 1942, § 1269], which was in force at the time of an alleged oral contract of adoption, was the exclusive method whereby a child could be adopted with the right of inheritance from the adoptive parents. Brassiell v. Brassiell, 228 Miss. 243, 87 So. 2d 699, 1956 Miss. LEXIS 509 (Miss. 1956).

12. Rights of inheritance.

The chancellor correctly determined that decedent's son was entitled to inherit decedent's estate, pursuant to § 93-17-13, notwithstanding the facts that he had been adopted by his paternal grandparents in Tennessee, since decedent had died in Mississippi and the subject property was located in Mississippi, so that Mississippi's law of descent and distribution controlled. Warren v. Foster, 450 So. 2d 786, 1984 Miss. LEXIS 1759 (Miss. 1984).

Laws 1955, Ex. ch. 34, does not enlarge the right of inheritance of one adopted prior to its effective date, or by adoption proceedings then pending unless so amended as to come under the provisions of the new law. Gray v. Morgan, 236 Miss. 245, 110 So. 2d 346, 1959 Miss. LEXIS 314 (Miss. 1959).

A claim of inheritance based upon an alleged oral contract of adoption made many years prior to the death of the intestate, will not be recognized. Brassiell v. Brassiell, 228 Miss. 243, 87 So. 2d 699, 1956 Miss. LEXIS 509 (Miss. 1956).

Child adopted in Kentucky, having inherited property from adoptive father, and having died without issue, property descends to remaining heir of adoptive daughter, viz., his wife (child's adoptive mother); and adopted child's brothers and sisters by natural blood had no right to such property and their bill would be dismissed. Brewer v. Browning, 115 Miss. 358, 76 So. 267, 1917 Miss. LEXIS 213 (Miss. 1917).

13. —By adopted child.

The meaning of the phrase "heirs of the body" clearly and literally excludes adopted children. Posey v. Webb, 528 So. 2d 833, 1988 Miss. LEXIS 337 (Miss. 1988).

This section did not prohibit an adopted child from sharing in a testamentary trust established by his grandmother for the benefit of the children or descendants of her adopted son; it was the legislative intent to elevate an adopted child to the same status in law as a natural child, for purposes of inheritance from the adopting parents and their children. As a descendant of his father by adoption, the child was entitled to share in the trust unless there was language in the will directing otherwise. Dodds v. Deposit Guaranty Nat'l Bank, 371 So. 2d 878, 1979 Miss. LEXIS 2092 (Miss. 1979).

Although the effect of a final decree of adoption is that natural parents will not inherit through the child, and all rights of the natural parents are terminated, the section [Code 1942, § 1269.06] does not state that the right of the child to inherit from natural parents is to be terminated, indicating that the legislature intended that a child might continue to inherit from his or her natural parents. Alack v. Phelps, 230 So. 2d 789, 1970 Miss. LEXIS 1562 (Miss. 1970).

Code 1942, § 1269, conferred upon an adopted child no right of inheritance from kindred of the adoptive parent. Gray v. Morgan, 236 Miss. 245, 110 So. 2d 346, 1959 Miss. LEXIS 314 (Miss. 1959).

Under the law prior to 1955, an adopted child was not entitled to inherit from its adoptive mother's sister. Gray v. Morgan, 236 Miss. 245, 110 So. 2d 346, 1959 Miss. LEXIS 314 (Miss. 1959).

A person adopted in 1922, who was not re-adopted under the 1955 adoption law, could not inherit property from the sister of the adoptive mother. Gray v. Morgan, 236 Miss. 245, 110 So. 2d 346, 1959 Miss. LEXIS 314 (Miss. 1959).

This section [Code 1942, § 1269] does not confer any property or inheritability rights upon the adopted child, it simply empowers the chancery court to grant the adoption. Reeves v. Lowe, 213 Miss. 152, 56 So. 2d 475, 1952 Miss. LEXIS 344 (Miss. 1952).

Adopted children have no interest in estate of adopting parents unless decree of adoption makes them lawful heirs of adopting parents and they are not necessary parties to suit to adjudicate heirship. Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22, 1949 Miss. LEXIS 305 (Miss. 1949).

Adopted child cannot take property by descent from its adopting parents except under this section [Code 1942, § 1269]. Fisher v. Browning, 107 Miss. 729, 66 So. 132, 1914 Miss. LEXIS 136 (Miss. 1914), overruled in part, Brewer v. Browning, 115 Miss. 358, 76 So. 267, 1917 Miss. LEXIS 213 (Miss. 1917).

Adopted child acquires no rights of heirship where the decree of adoption did not vest it with such rights. Leonard v. H. Weston Lumber Co., 107 Miss. 345, 65 So. 459, 1914 Miss. LEXIS 90 (Miss. 1914); Reeves v. Lowe, 213 Miss. 152, 56 So. 2d 475, 1952 Miss. LEXIS 344 (Miss. 1952).

Property inherited by adopted child goes to it in fee. Fisher v. Browning, 107 Miss. 729, 66 So. 132, 1914 Miss. LEXIS 136 (Miss. 1914), overruled in part, Brewer v. Browning, 115 Miss. 358, 76 So. 267, 1917 Miss. LEXIS 213 (Miss. 1917).

Decree of adoption which clothed the adopting father with the rights and obligations of a parent, and the infant with the rights of a daughter in reference to the adopting parent's estate makes the infant the heir of the adopting parent. Adams v. Adams, 102 Miss. 259, 59 So. 84, 1912 Miss. LEXIS 50 (Miss. 1912).

The adopted child of another does not become the heir of the petitioner unless heirship be one of the gifts, grants, or benefits proposed to be conferred. Beaver v. Crump, 76 Miss. 34, 23 So. 432, 1898 Miss. LEXIS 56 (Miss. 1898).

Where the proceedings provide among other things that the child shall receive at petitioner's death all property not devised to others, it cannot enforce a claim to such undevised property because of uncertainty as to the property. Beaver v. Crump, 76 Miss. 34, 23 So. 432, 1898 Miss. LEXIS 56 (Miss. 1898).

14. —Through adopted child.

A child, adopted under a pre-1955 statute and granted full rights of inheritance from his adoptive parents, became vested by gift with an undivided one-half interest in real property purchased by his adoptive mother with her own funds. When he died intestate his interest in the property reverted to his adoptive mother and was not subject to inheritance by his blood relatives; for it would be neither equitable nor fair that strangers to the blood of the adopting parents should benefit from a status to which they were not parties. Jones v. Lovell, 251 Miss. 503, 170 So. 2d 431, 1965 Miss. LEXIS 876 (Miss. 1965).

Child adopted in Kentucky, having inherited property from adoptive father, and having died without issue, property descends to remaining heir of adoptive daughter, viz., his wife (child's adoptive mother); and adopted child's brothers and sisters by natural blood had no right to such property and their bill would be dismissed. Brewer v. Browning, 115 Miss. 358, 76 So. 267, 1917 Miss. LEXIS 213 (Miss. 1917).

15. Right to bring wrongful death action.

Two minor children who, after the death of their mother, had been adopted by their paternal grandparents at the behest of the father who continued to contribute to their support, were persons entitled to bring an action for the wrongful death of the father. Alack v. Phelps, 230 So. 2d 789, 1970 Miss. LEXIS 1562 (Miss. 1970).

An adopting parent has a right to bring an action for the wrongful death of his adopted infant child. Bush Constr. Co. v. Walters, 250 Miss. 384, 164 So. 2d 900, 1964 Miss. LEXIS 469 (Miss. 1964).

Under the wrongful death statute, the word parent means the natural father or mother of the child and the adoptive parents have no right to sue for the wrongful death of an adopted child. Boroughs v. Oliver, 217 Miss. 280, 64 So. 2d 338, 1953 Miss. LEXIS 430 (Miss. 1953).

16. Rights under war risk insurance.

The conclusive presumption is that the natural child of a deceased employee was his dependent was terminated as of the date of the child's adoption, and from that date she was and is conclusively presumed to be a dependent of her adopted father for workmen's compensation purposes. W. R. Fairchild Constr. Co. v. Owens, 224 So. 2d 571, 1969 Miss. LEXIS 1295 (Miss. 1969).

A child who from the time of her adoption never resided with her natural father but remained in the care, custody, and control, and under the supervision of the mother and adoptive father, cannot be considered as a dependent of the natural father for purposes of the workmen's compensation law. W. R. Fairchild Constr. Co. v. Owens, 224 So. 2d 571, 1969 Miss. LEXIS 1295 (Miss. 1969).

Unadopted illegitimate child of deceased veteran who, while in army, declared in writing that child was his in order to obtain allotment for her, held not entitled to inherit share payable under veteran's war risk policy as "heir." Moyse v. Laughlin, 177 Miss. 751, 171 So. 784, 1937 Miss. LEXIS 153 (Miss. 1937).

RESEARCH REFERENCES

ALR.

What law, in point of time, governs as to inheritance from or through adoptive parent. 18 A.L.R.2d 960.

Adoption as affecting right of inheritance through or from natural parent or other natural kin. 37 A.L.R.2d 333.

Right of adopted child to inherit from kindred of adoptive parent. 43 A.L.R.2d 1183.

Right of children of adopted child to inherit from adopting parent. 94 A.L.R.2d 1200.

Adopted child as subject to protection of statute regarding rights of children pretermitted by will, or statute preventing disinheritance of child. 43 A.L.R.4th 947.

Attorneys' fee awards in parent-nonparent child custody case. 45 A.L.R.4th 212.

Adoption as precluding testamentary gift under natural relative's will. 71 A.L.R.4th 374.

Postadoption visitation by natural parent. 78 A.L.R.4th 218.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 134 et seq., 155 et seq.

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Forms 311 et seq. (judgments, orders, and decrees); Form 322.1 (decree – granting petition of adoption – in proceeding contested by natural parents).

CJS.

2 C.J.S., Adoption of Persons §§ 101 et seq.

Law Reviews.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

Rights of Unwed Fathers in Mississippi Adoptions, 21 Miss. C. L. Rev. 25, Fall, 2001.

§ 93-17-14. Home study in international adoptions valid for 24 months.

In the case of international adoptions, a home study of the prospective adopting parents shall be valid for a period of twenty-four (24) months from the date of completion.

HISTORY:
Laws, 2007, ch. 496, § 7; Laws, 2008, ch. 314, § 1; brought forward without change, Laws, 2014, ch. 385, § 3, eff from and after July 1, 2014.

Editor's note—
This section was brought forward without change by Chapter 384, § 3, Laws of 2014, effective July 1, 2014. Since the language of the section as it appears in the main volume is unaffected by the bringing forward of the section, it is not reprinted in this supplement.

Cross References —
Investigation of prospective parents generally, see § 93-17-11.

§ 93-17-15. Limitation on action to set aside final decree.

No action shall be brought to set aside any final decree of adoption, whether granted upon consent or personal process or on process by publication, except within six (6) months of the entry thereof.

HISTORY:
Codes, 1942, § 1269-06; Laws, 1955, Ex. ch. 34, § 6; Laws, 1958, chs. 267, 285, § 2; Laws, 1971, ch. 399, § 1, eff from and after passage (approved March 23, 1971).

Cross References —
Other sections derived from same 1942 code section, see §§ 93-17-13, 93-17-21.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Fraud and misrepresentation.

1. In general.

Chancery court did not err in dismissing an action by former parents to set aside the adoption of their child because the former parents filed the case well past the six-month statute of limitations in Miss. Code Ann. § 93-17-15; even if the procedural bar was inapplicable, no evidence existed to support setting aside the adoption or terminating the adoptive parent's parental rights under Miss. Code Ann. § 93-15-103. In re A Child: C.K. & K.K. v. N.F., 53 So. 3d 870, 2011 Miss. App. LEXIS 68 (Miss. Ct. App. 2011).

Any petition to set aside an adoption alleging fraud had to be brought within six months after the entry of the adoption. The railroad company's complaint was filed approximately one year after the entry of adoption, and thus, the strict, six-month statute of limitations imposed by Miss. Code Ann. §§ 93-17-15 and 93-17-17 was fatal to the claim. D.C.S. v. J.F., 44 So. 3d 1006, 2009 Miss. App. LEXIS 714 (Miss. Ct. App. 2009), cert. dismissed, 2010 Miss. LEXIS 515 (Miss. Sept. 30, 2010).

The statute of limitations for challenging an adoption decree in Mississippi is six months after entry of the adoption decree except for jurisdictional defects and failure to file and prosecute the same under the adoption chapter of the Mississippi Code. A.M.T.O. v. H.S.L. (In re M.D.T.), 722 So. 2d 702, 1998 Miss. LEXIS 562 (Miss. 1998).

Final decree of adoption, coupled with lapse of more than 2 years time with no action taken, is sufficient to insulate decree from attack on grounds that requirements of § 93-17-3 had not been met, where problem areas asserted by person seeking to overturn adoption decree were not jurisdictional in the sense of § 93-17-17, because of provision in § 93-17-5 precluding such action after 6 months had passed following entry of decree. In re Adoption of R.M.P.C., 512 So. 2d 702, 1987 Miss. LEXIS 2761 (Miss. 1987).

An adoption decree that had been entered in favor of the child's maternal grandparents was properly set aside, despite the contention that the natural mother was barred from bringing the action by this section's six-month statute of limitations, where the trial court was not manifestly wrong in finding that service of process by publication during a two week period when the mother was out-of-state was inadequate since there was too much communication between the parties to support non-resident publication, and that appellants' could easily have located the mother while she was out of state. Naveda v. Ahumada, 381 So. 2d 147, 1980 Miss. LEXIS 1855 (Miss.), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64, 1980 U.S. LEXIS 2997 (U.S. 1980).

2. Fraud and misrepresentation.

Claims of fraud and misrepresentation made nine years after entry of an adoption decree fell prey to the six month statute of limitations for challenges to such decrees. A.M.T.O. v. H.S.L. (In re M.D.T.), 722 So. 2d 702, 1998 Miss. LEXIS 562 (Miss. 1998).

RESEARCH REFERENCES

ALR.

Validity and construction of statutes imposing time limitations upon actions to vacate or set aside adoption decree or judgment. 83 A.L.R.2d 945.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 142 et seq.

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Forms 391 et seq. (vacation or annulment of adoption).

15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Form 463.2 (Notice of motion – To vacate judgment – Insufficiency of evidence and error of law).

§ 93-17-17. Grounds for setting aside proceedings limited.

For all purposes of this chapter, the chancery court shall be a court of general jurisdiction and it is declared to be the public policy of the state that no adoption proceedings shall be permitted to be set aside except for jurisdictional defects and for failure to file and prosecute the same under the provisions of this chapter.

HISTORY:

Codes, 1942, § 1269-07; Laws, 1955, Ex. ch. 34, § 7, eff from and after July 1, 1955.

Cross References —

Other sections derived from same 1942 code section, see §§ 93-17-23, 93-17-25.

JUDICIAL DECISIONS

1. In general.

Any petition to set aside an adoption alleging fraud had to be brought within six months after the entry of the adoption. The railroad company's complaint was filed approximately one year after the entry of adoption, and thus, the strict, six-month statute of limitations imposed by Miss. Code Ann. §§ 93-17-15 and 93-17-17 was fatal to the claim. D.C.S. v. J.F., 44 So. 3d 1006, 2009 Miss. App. LEXIS 714 (Miss. Ct. App. 2009), cert. dismissed, 2010 Miss. LEXIS 515 (Miss. Sept. 30, 2010).

The statute of limitations for challenging an adoption decree in Mississippi is six months after entry of the adoption decree except for jurisdictional defects and failure to file and prosecute the same under the adoption chapter of the Mississippi Code. A.M.T.O. v. H.S.L. (In re M.D.T.), 722 So. 2d 702, 1998 Miss. LEXIS 562 (Miss. 1998).

Final decree of adoption, coupled with lapse of more than 2 years time with no action taken, is sufficient to insulate decree from attack on grounds that requirements of § 93-17-3 had not been met, where problem areas asserted by person seeking to overturn adoption decree were not jurisdictional in the sense of § 93-17-17, because of provision in § 93-17-5 precluding such action after 6 months had passed following entry of decree. In re Adoption of R.M.P.C., 512 So. 2d 702, 1987 Miss. LEXIS 2761 (Miss. 1987).

An adoption decree that had been entered in favor of the child's maternal grandparents was properly set aside, despite the contention that the natural mother was barred from bringing the action by this section's six-month statute of limitations, where the trial court was not manifestly wrong in finding that service of process by publication during a two week period when the mother was out-of-state was inadequate since there was too much communication between the parties to support non-resident publication, and that appellants' could easily have located the mother while she was out of state. Naveda v. Ahumada, 381 So. 2d 147, 1980 Miss.

LEXIS 1855 (Miss.), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64, 1980 U.S. LEXIS 2997 (U.S. 1980).

Natural parents of adopted child are not in position to make collateral attack on adoption decree by habeas corpus proceedings on ground of fraud when they were parties to petition of adoption and were fully advised of all facts relied upon by adopting parents to obtain decree. Welch v. Welch, 208 Miss. 726, 45 So. 2d 353, 1950 Miss. LEXIS 291 (Miss. 1950).

In collateral attack on decree of adoption it will be presumed, where the court had general jurisdiction, that the petition presented by the infant's mother and adopting father was presented in the proper county. Adams v. Adams, 102 Miss. 259, 59 So. 84, 1912 Miss. LEXIS 50 (Miss. 1912).

Such decree is good against collateral attack though the petition did not show name of father or guardian, or whether they were living or their consent had been obtained. Adams v. Adams, 102 Miss. 259, 59 So. 84, 1912 Miss. LEXIS 50 (Miss. 1912).

RESEARCH REFERENCES

ALR.

Comment Note. – Right of natural parent to withdraw valid consent to adoption of child. 74 A.L.R.3d 421.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency. 74 A.L.R.3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency. 74 A.L.R.3d 527.

Race as factor in adoption proceedings. 34 A.L.R.4th 167.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 119 et seq., 137 et seq., 142 et seq.

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Forms 391 et seq. (vacation or annulment of adoption).

Law Reviews.

Rights of Unwed Fathers in Mississippi Adoptions, 21 Miss. C. L. Rev. 25, Fall, 2001.

§ 93-17-19. Costs.

All costs of the proceeding shall be taxed in the manner that the court may direct, including a reasonable fee as determined, approved, and allowed by the court to be paid for each investigation that may be authorized or required by the chancellor, other than for an investigation and report by a public authority or agency, in which event no such fee shall be allowed.

HISTORY:

Codes, 1942, § 1269-08; Laws, 1955, Ex. ch. 34, § 8, eff from and after July 1, 1955.

JUDICIAL DECISIONS

1. In general.

An unsuccessful adoption petitioner may be assessed reasonable attorney fees to be paid to one who successfully resists the adoption. Award of such fees lies within the sound discretion of the Chancery Court. Adoption of Karenina v. Presley, 526 So. 2d 518, 1988 Miss. LEXIS 244 (Miss. 1988).

RESEARCH REFERENCES

ALR.

Validity of agreement to pay expenses attendant on birth of child on condition that natural parents consent to adoption of child. 43 A.L.R.4th 935.

Attorneys' fee awards in parent-nonparent child custody case. 45 A.L.R.4th 212.

Validity and construction of surrogate parenting agreement. 77 A.L.R.4th 70.

§ 93-17-21. Revised birth certificate.

(1) A certified copy of the final decree shall be furnished to the Bureau of Vital Statistics, together with a certificate signed by the clerk giving the true or original name and the place and date of birth of the child. The said bureau shall prepare a revised birth certificate which shall contain the original date of birth, with the place of birth being shown as the residence of the adoptive parents at the time the child was born, but with the names of the adopting parents and the new name of the child. In all other particulars, the certificate shall show the true facts of birth. The fact that a revised birth certificate is issued shall be indicated only by code numbers or some letter inconspicuously placed on the face of the certificate. The word "revised" shall not appear thereon. However, in the event an unmarried adult shall be the adopting parent, then such birth certificate may show thereon, upon order of the chancellor as set forth in the decree of adoption, that same is a revised birth certificate, giving the court where said decree was issued and the date of such decree. The original birth certificate shall be removed and placed, with reference made to the decree of adoption, in a safely locked drawer or vault, and the same shall not be public records and shall not be divulged except upon the order of the court rendering the said final decree or pursuant to Sections 93-17-201 through 93-17-223, and for all purposes the revised certificate shall be and become the birth certificate of the child. However, the Bureau of Vital Statistics of the State of Mississippi shall be required to prepare and register revised certificates only for births which occurred in the State of Mississippi as shown either by the court decree or by the original birth record on file in the bureau; but if the birth occurred in some other state, then the Director of the Bureau of Vital Statistics of the State of Mississippi shall be required to furnish to the attorney or other person representing the adopted child the name and address of the proper official in the state where the child was born, to whom the adoption decree and other information may be referred for appropriate action, and shall furnish to such attorney the certified copy of the decree and the certificate furnished by the clerk.

(2) Provided, however, notwithstanding anything herein to the contrary, either an original or a revised birth certificate may be issued, as hereinafter provided, by the Bureau of Vital Statistics to any child who was born outside the United States or its possessions and adopted, either heretofore or hereafter, by an order of a court in this state. Upon presentation of a certified copy of the final decree of adoption containing the required information, the Director of the Bureau of Vital Statistics shall be authorized and directed to receive said certified copy of the decree of adoption and prepare therefrom, and record, a birth certificate which shall disclose the following information: The name of the child (being the adopted name), race, sex, date of birth, place of birth (being the actual town, district and county of said child's birth, except where the child is born in a penal or mental institution where the name of the county shall be sufficient), names, race, ages, places of birth and occupation of parents (being the adoptive parents) including the maiden name of the adoptive mother. Such

certificate shall comport in appearance and indicia with the foregoing requirements for a "revised" certificate issued to a child born in this state. The Director of the Bureau of Vital Statistics shall be authorized and directed to issue certified copies thereof, the same as if the birth certificate were that of a child who had never been adopted.

HISTORY:

Codes, 1942, § 1269-06; Laws, 1955, Ex. ch. 34, § 6; Laws, 1958, chs. 267, 285, § 2; Laws, 1971, ch. 399, § 1; Laws, 1983, ch. 522, § 49; Laws, 1989, ch. 511, § 7; Laws, 1992, ch. 306, § 14, eff from and after July 1, 1992.

Editor's Notes —

Sections 93-17-201 through 93-17-225 comprise the Mississippi Adoption Confidentiality Act.

Cross References —

Other sections derived from same 1942 code section, see §§ 93-17-13, 93-17-15.

RESEARCH REFERENCES

ALR.

Validity and application of statute authorizing change in record of birthplace of adopted child. 14 A.L.R.4th 739.

§ 93-17-23. Re-adoption.

Any child heretofore adopted under the laws of the State of Mississippi and any child who may have been adopted under the provisions of this chapter, may be re-adopted under the provisions hereof. If any such prior adoption is valid, and the re-adoption proceedings be instituted by the persons who previously adopted the child, there shall be no waiting period and no investigation and no interlocutory decree, and a final decree of adoption may be granted by the court ex parte if it be to the best interest of the child that it be re-adopted. If the re-adoption be by any person who was not a petitioner in the prior adoption or adoptions, then in such re-adoption proceedings, the persons who previously adopted the child shall be substituted in the place and stead of the natural parent and the same procedure shall be followed as if such child sought to be re-adopted was being for the first time adopted under the provisions of this chapter.

HISTORY:

Codes, 1942, § 1269-07; Laws, 1955, Ex. ch. 34, § 7, eff from and after July 1, 1955.

Cross References —

Other sections derived from same 1942 code section, see §§ 93-17-17, 93-17-25.

JUDICIAL DECISIONS

1. In general.

The 1955 adoption law has no effect upon any adoption proceeding consummated prior to July 1, 1955, and applies to pending adoption proceedings on the effective date of the statute only if amendments were made so as to bring the proceedings under the provisions of the statute, and the statute was not intended to affect the rights of adoptive parents and adopted children where the final decree of adoption had been rendered prior to the effective date of the statute. Gray v. Morgan, 236 Miss. 245, 110 So. 2d 346, 1959 Miss. LEXIS 314 (Miss. 1959).

A person adopted in 1922, who was not re-adopted under the 1955 adoption law, could not inherit property from the sister of the adoptive mother. Gray v. Morgan, 236 Miss. 245, 110 So. 2d 346, 1959 Miss. LEXIS 314 (Miss. 1959).

RESEARCH REFERENCES

ALR.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

§ 93-17-25. Proceedings and records confidential; use in court or administrative proceedings.

All proceedings under this chapter shall be confidential and shall be held in closed court without admittance of any person other than the interested parties, except upon order of the court. All pleadings, reports, files and records pertaining to adopting proceedings shall be confidential and shall not be public records and shall be withheld from inspection or examination by any person, except upon order of the court in which the proceeding was had on good cause shown.

Upon motion of any interested person, the files of adoption proceedings, heretofore had may be placed in the confidential files upon order of the court or chancellor and shall be subject to the provisions of this chapter.

Provided, however, that notwithstanding the confidential nature of said proceedings, said record shall be available for use in any court or administrative proceedings under a subpoena duces tecum addressed to the custodian of said records and portions of such record may be released pursuant to Sections 93-17-201 through 93-17-223.

HISTORY:

Codes, 1942, § 1269-07; Laws, 1955, Ex. ch. 34, § 7; Laws, 1992, ch. 306, § 15, eff from and after July 1, 1992.

Editor's Notes —

Sections 93-17-201 through 93-17-225 comprise the Mississippi Adoption Confidentiality Act.

Cross References —

Other sections derived from same 1942 code section, see §§ 93-17-17, 93-17-23.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Restricting access to judicial records of pending adoption proceedings. 83 A.L.R.3d 824.

Restricting access to judicial records of concluded adoption proceedings. 103 A.L.R.5th 255.

Am. Jur.

1A Am. Jur. Pl & Pr Forms (Rev), Adoption, Form 412 (petition or application seeking information concerning adoption of party); Form 420 (order granting permission to obtain information concerning adoption of party).

Law Reviews.

Note, When love is not enough: toward a unified wrongful adoption tort. 105 Harv L. Rev. 1761, May, 1992.

§ 93-17-27. References to marital status of natural parents prohibited.

No reference shall be required to be made to the marital status of the natural parents of the child nor shall any allegation or recital be made therein that the child was born out of wedlock in any petition filed or decree entered upon consent.

HISTORY:
Codes, 1942, § 1269-07; Laws, 1955, Ex. ch. 34, § 7, eff from and after July 1, 1955.

Cross References —
Other sections derived from same 1942 code section, see §§ 93-17-29, 93-17-31.

§ 93-17-29. References to parents and child in docket entries and decrees.

The docket entries and decrees spread upon the minutes of the court shall not refer to names of the natural parent or parents nor to the original name of the child. In the decree reference to the child shall be by the name to be conferred upon it by the court rather than by its original name if the name of the child is to be changed. The style of the cause and the docket entry thereof shall recite only the names of the petitioners and that the case is for the adoption of a child described in the petition.

HISTORY:
Codes, 1942, § 1269-07; Laws, 1955, Ex. ch. 34, § 7, eff from and after July 1, 1955.

Cross References —
Other sections derived from same 1942 code section, see §§ 93-17-27, 93-17-31.

RESEARCH REFERENCES

ALR.
Race as factor in adoption proceedings. 34 A.L.R.4th 167.

§ 93-17-31. Clerks to keep separate index, docket and minute books.

The several chancery clerks shall obtain and keep a separate, confidential index showing the true name of the child adopted, the true name of its natural parent, or parents, if known, and the true name of the persons adopting the child and the date of the decree of adoption, and the name under which the child was adopted, or the name given the child by the adoption proceedings and a cross index shall be kept showing the said true name and the name given the child in the adoption decree, and which index shall be subject to the provisions of Section 93-17-25 as to same being kept in confidence and such index shall not be examined by any person, except officers of the court including attorneys, except upon order of the court, on good cause shown, in which the proceeding was had. The reports shall be filed only if so ordered by the chancellor. The several chancery clerks shall obtain and keep a separate docket and minute book of convenient size which shall be subject to provisions of Sections 93-17-25 through 93-17-31 and in which, from July 1, 1955, all entries concerning adoption shall be made.

HISTORY:
Codes, 1942, § 1269-07; Laws, 1955, Ex. ch. 34, § 7, eff from and after July 1, 1955.

Cross References —
Other sections derived from same 1942 code section, see §§ 93-17-27, 93-17-29.

ARTICLE 3.

ADOPTION SUPPLEMENTAL BENEFITS LAW.

Sec.
93-17-51. Short title.
93-17-53. Purpose.
93-17-55. Definitions.
93-17-57. Supplemental benefits program; funding.
93-17-59. Eligibility.
93-17-61. Agreement with Department of Human Services; commencement of benefits; duration; certification of need.
93-17-63. Confidentiality.
93-17-65. Promulgation of rules and regulations.
93-17-67. Continuation of benefits.
93-17-69. Representation by Department of Public Welfare of persons proposing to adopt child who is dependent of state child-placing agency.

§ 93-17-51. Short title.

Sections 93-17-51 through 93-17-67 shall be known and may be cited as the "Mississippi Adoption Supplemental Benefits Law of 1979."

HISTORY:

Laws, 1979, ch. 510, § 1, eff from and after July 1, 1979.

Editor's Notes —

Laws of 2014, ch. 385, § 8 provides:

"SECTION 8. It is the intention of the Legislature and the codifier is so directed that Title 93, Chapter 17, be divided into Articles as follows: Article 1 beginning with Section 93-17-1; Article 3 beginning with Section 93-17-51; Article 5 beginning with Section 93-17-101; Article 7 beginning with Section 93-17-201; and Article 9 beginning with Section 93-17-301."

RESEARCH REFERENCES

Law Reviews.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

Practice References.

Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-17-53. Purpose.

The purpose of Sections 93-17-51 through 93-17-67 is to supplement the Mississippi adoption law by making possible through public supplemental benefits the most appropriate adoption of each child certified by the state department of public welfare as requiring a supplemental benefit to assure adoption.

HISTORY:

Laws, 1979, ch. 510, § 2, eff from and after July 1, 1979.

Editor's Notes —

Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

RESEARCH REFERENCES

ALR.
Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

Law Reviews.
1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

§ 93-17-55. Definitions.

As used in Sections 93-17-51 through 93-17-67, the word "child" shall mean a minor as defined by Mississippi law who is:

(a) A dependent of a public or voluntary licensed child-placing agency, eligible for Supplemental Security Income prior to the finalization of the adoption, one (1) for whom supplemental benefits were paid pursuant to the aforementioned sections in a previous adoption that was dissolved or wherein the adoptive parents died, or is the child of a minor parent in foster care for whom the board payment was increased on account of the birth;

(b) Legally free for adoption; and

(c) In special circumstances whether:

(i) Because he has established significant emotional ties with prospective adoptive parents while in their care as a foster child and it is deemed in the best interest of the child by the agency to be adopted by the foster parents, or

(ii) Because he is not likely to be adopted because of one or more of the following handicaps: 1. severe physical or mental disability, 2. severe emotional disturbance, 3. recognized high risk of physical or mental disease, or 4. any combination of these handicaps.

HISTORY:
Laws, 1979, ch. 510, § 3; Laws, 2007, ch. 337, § 1, eff from and after July 1, 2007.

Cross References —
Representation of persons proposing to adopt a child who is in special circumstances under this section, see § 93-17-69.

RESEARCH REFERENCES

Law Reviews.
1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

§ 93-17-57. Supplemental benefits program; funding.

The state department of public welfare shall establish and administer an on-going program of supplemental benefits for adoption. Supplemental benefits and services for children under this program shall be provided out of such funds as may be appropriated to the Mississippi Medicaid Commission for the medical services for children in foster care, or made available to the department from other sources.

HISTORY:

Laws, 1979, ch. 510, § 4, eff from and after July 1, 1979.

Editor's Notes —

Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

Cross References —

Mississippi Medicaid Commission [now the Medical Care Advisory Committee], generally, see §§ 43-13-107 et seq.

RESEARCH REFERENCES

Law Reviews.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

§ 93-17-59. Eligibility.

Any child meeting criteria specified in Section 93-17-55 for whom the state department of public welfare feels supplemental benefits are necessary to improve opportunities for adoption will be eligible for the program. The adoption agency shall document that reasonable efforts have been made to place the child in adoption without supplemental benefits through the use of adoption resource exchanges, recruitment and referral to appropriate specialized adoption agencies.

HISTORY:

Laws, 1979, ch. 510, § 5, eff from and after July 1, 1979.

Editor's Notes —

Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

RESEARCH REFERENCES

Law Reviews.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

§ 93-17-61. Agreement with Department of Human Services; commencement of benefits; duration; certification of need.

(1) When parents are found and approved for adoption of a child certified as eligible for supplemental benefits, and before the final decree of adoption is issued, there shall be executed a written agreement between the family entering into the adoption and the Department of Human Services. In individual cases, supplemental benefits may commence with the adoptive placement or at the appropriate time after the adoption decree and will vary with the needs of the child as well as the availability of other resources to meet the child's needs. The supplemental benefits may be for special services only or for money payments as allowed under Section 43-13-115, Mississippi Code of 1972, and either for a limited period, for a long-term not exceeding the child's eighteenth birthday, or for any combination of the foregoing. The amount of the time-limited, long-term supplemental benefits may in no case exceed that which would be currently allowable for such child under the Mississippi Medicaid Law.

(2) When supplemental benefits last for more than one (1) year, the

adoptive parents shall present an annual written certification that the child remains under the parents' care and that the child's need for supplemental benefits continues. Based on investigation by the agency and available funds, the agency may approve continued supplemental benefits. These benefits shall be extended so long as the parents remain legally responsible for and are providing support for the child. The agency shall continue paying benefits until a child reaches twenty-one (21) years of age if the child meets the criteria stated in Section 93-17-67(1) for continuation of Medicaid coverage.

(3) A child who is a resident of Mississippi when eligibility for supplemental benefits is certified shall remain eligible and receive supplemental benefits, if necessary for adoption, regardless of the domicile or residence of the adopting parents at the time of application for adoption, placement, legal decree of adoption or thereafter.

HISTORY:
Laws, 1979, ch. 510, § 6; Laws, 2007, ch. 337, § 2; Laws, 2008, ch. 541, § 1, eff from and after July 1, 2008.

RESEARCH REFERENCES

Law Reviews.
1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

§ 93-17-63. Confidentiality.

All records regarding such adoption shall be confidential. Anyone violating or releasing information of a confidential nature, as contemplated by Sections 93-17-51 through 93-17-67 without the approval of the court with jurisdiction or the State Department of Public Welfare unless such release is made pursuant to Sections 93-17-201 through 93-17-223 shall be guilty of a misdemeanor and subject to a fine not exceeding One Thousand Dollars ($1,000.00) or imprisonment of six (6) months, or both.

HISTORY:
Laws, 1979, ch. 510, § 7; Laws, 1992, ch. 306, § 16, eff from and after July 1, 1992.

Editor's Notes —
Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

Sections 93-17-201 through 93-17-223 comprise the Mississippi Adoption Confidentiality Act.

Cross References —
Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Law Reviews.
1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

§ 93-17-65. Promulgation of rules and regulations.

The state department of public welfare shall promulgate rules and regulations necessary to implement the provisions of Sections 93-17-51 through 93-17-67.

HISTORY:
Laws, 1979, ch. 510, § 8, eff from and after July 1, 1979.

Editor's Notes —
Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

Cross References —
State department of public welfare, generally, see § 43-1-1 et seq.

RESEARCH REFERENCES

Law Reviews.
1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

§ 93-17-67. Continuation of benefits.

(1) If the adoptive parents of a child eligible for adoption supplemental benefits sign an adoption assistance agreement with the Department of Human Services, then, whether or not they accept such benefits, Medicaid coverage shall be provided for the child under the agency's medical payment program from and after the commencement date established pursuant to Section 93-17-61 until the child's eighteenth birthday, provided that federal matching funds are available for such payment.

(2) Any child who is adopted in this state through a state-supported adoption agency and who immediately prior to such adoption was receiving Medicaid benefits because of a severe physical or mental handicap shall continue to receive such coverage benefits after adoption age eighteen (18), and such benefits shall be payable as provided under the agency's medical payment program for so long as the State Department of Human Services determines that the treatment or rehabilitation for which payment is being made is in the best interest of the child concerned, but not past the age of twenty-one (21) years, provided that federal matching funds are available for such payment and that any state funds used for such payment shall have been appropriated specifically for such purpose.

(3) If permitted by federal law without any loss to the state of federal matching funds, the financial resources of the adopting parents shall not be a factor in such determination except that payments on behalf of a child of any age may be adjusted when insurance benefits available to the adopting parents would pay all or part of such payments being made by the state, or if medical or rehabilitation services are otherwise available without cost to the adopting parents. The amount of financial assistance given shall not exceed the amount that the Medicaid Commission would be required to pay for the same medical treatment or rehabilitation.

(4) The receipt of Medicaid benefits by an adopted child under Sections 93-17-51 through 93-17-67 shall not qualify the adopting parents for Medicaid eligibility, unless either parent is otherwise eligible under Section 43-13-115, Mississippi Code of 1972.

HISTORY:
Laws, 1979, ch. 510, § 9; Laws, 2008, ch. 541, § 2, eff from and after July 1, 2008.

RESEARCH REFERENCES

Law Reviews.
1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December, 1979.

§ 93-17-69. Representation by Department of Public Welfare of persons proposing to adopt child who is dependent of state child-placing agency.

Any person proposing to adopt a child who is a dependent of a state child-placing agency and who is in special circumstances as defined in paragraph (c) of Section 93-17-55 shall be represented by the State Department of Public Welfare when requested by the adopting parent in all phases of the adoption proceeding. State child-placing agencies shall advise prospective adopting parents of their right under this section to be represented in adoption proceedings. The fees for filing the petition for adoption and preparing a revised birth certificate, any court costs taxed against the petitioner and any other actual payments made by the Department of Public Welfare to third parties as required to complete the adoption proceeding, shall be paid by the adopting parent.

HISTORY:
Laws, 1987, ch. 363, eff from and after July 1, 1987.

Editor's Notes —
Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

ARTICLE 5.

INTERSTATE AGREEMENTS FOR PROTECTION OF CHILDREN BEING PROVIDED ADOPTION ASSISTANCE.

Sec.
93-17-101. Legislative findings; purpose.
93-17-103. Development of interstate compacts; authority of Department of Public Welfare; definitions.
93-17-105. Interstate compacts; requirements.
93-17-107. Medicaid eligibility; medical assistance identification; penalties for false statement or claim; applicability.
93-17-109. Inclusion of federal aid in certain state plans.

§ 93-17-101. Legislative findings; purpose.

(1) The Legislature finds that:

(a) Locating adoptive families for children for whom state assistance is desirable, pursuant to the Mississippi adoption assistance law, and assuring the protection of the interests of the children affected during the entire assistance period, require special measures when the adoptive parents move to other states or are residents of another state; and

(b) Providing medical and other necessary services for children, with state assistance, encounters special difficulties when the providing of services takes place in other states.

(2) The purposes of Sections 93-17-101 through 93-17-109 are to:

(a) Authorize the Mississippi Department of Public Welfare to enter into interstate agreements with agencies of other states for the protection of children on behalf of whom adoption assistance is being provided by the Mississippi Department of Public Welfare; and

(b) Provide procedures for interstate children's adoption assistance payments, including medical payments.

HISTORY:

Laws, 1989, ch. 401, § 1, eff from and after July 1, 1989.

Editor's Notes —

Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

Laws of 2014, ch. 385, § 8 provides:

"SECTION 8. It is the intention of the Legislature and the codifier is so directed that Title 93, Chapter 17, be divided into Articles as follows: Article 1 beginning with Section 93-17-1; Article 3 beginning with Section 93-17-51; Article 5 beginning with Section 93-17-101; Article 7 beginning with Section 93-17-201; and Article 9 beginning with Section 93-17-301."

RESEARCH REFERENCES

ALR.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq). 93 A.L.R. Fed. 314.

§ 93-17-103. Development of interstate compacts; authority of Department of Public Welfare; definitions.

(1) The Mississippi Department of Public Welfare is authorized to develop, participate in the development of, negotiate and enter into one or more interstate compacts on behalf of this state with other states to implement one or more of the purposes set forth in Sections 93-17-101 through 93-17-109. When so entered into, and for so long as it shall remain in force, such a compact shall have the force and effect of law.

(2) For the purposes of Sections 93-17-101 through 93-17-109, the term "state" shall mean a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands or a territory or possession of or administered by the United States.

(3) For the purposes of Sections 93-17-101 through 93-17-109, the term "adoption assistance state" means the state that is signatory to an adoption assistance agreement in a particular case.

(4) For the purposes of Sections 93-17-101 through 93-17-109, the term "residence state" means the state of which the child is a resident by virtue of the residence of the adoptive parents.

HISTORY:
Laws, 1989, ch. 401, § 2, eff from and after July 1, 1989.

Editor's Notes —
Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

§ 93-17-105. Interstate compacts; requirements.

A compact entered into pursuant to the authority conferred by Sections 93-17-101 through 93-17-109 shall contain the following:

(a) A provision making the compact available for joinder by all states;

(b) A provision or provisions for withdrawal from the compact upon written notice to the parties, but with a period of one (1) year between the date of the notice and the effective date of the withdrawal;

(c) A requirement that the protections afforded by or pursuant to the compact continue in force for the duration of the adoption assistance and be applicable to all children and their adoptive parents who on the effective date of the withdrawal are receiving adoption assistance from a party state other than the one in which they are resident and have their principal place of abode;

(d) A requirement that each instance of adoption assistance to which the compact applies be covered by an adoption assistance agreement in writing between the adoptive parents and the state child welfare agency of the state which undertakes to provide the adoption assistance, and further, that any such agreement be expressly for the benefit of the adopted child and enforceable by the adoptive parents and the state agency providing the adoption assistance; and

(e) Such other provisions as may be appropriate to implement the proper administration of the compact.

HISTORY:
Laws, 1989, ch. 401, § 3, eff from and after July 1, 1989.

Joint Legislative Committee Note —
Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in paragraph (c). The word "whey" was changed to "they". The Joint Committee ratified the correction at its December 3, 1996 meeting, and the section has been reprinted in the supplement to reflect the corrected language.

§ 93-17-107. Medicaid eligibility; medical assistance identification; penalties for false statement or claim; applicability.

(1) A child with special needs resident in this state who is the subject of an adoption assistance agreement with another state and who has been determined eligible for medicaid in that state shall be entitled to receive a medical assistance identification from this state upon filing with the Mississippi Department of Public Welfare a certified copy of the adoption assistance agreement obtained from the adoption assistance state which certifies to the eligibility of the child for medicaid. In accordance with regulations of the Mississippi Department of Public Welfare, the adoptive parents shall be

required, at least annually, to show that the agreement is still in force or has been renewed.

(2) The Division of Medicaid, Office of the Governor, shall consider the holder of a medical assistance identification pursuant to this section as any other holder of a medical assistance identification under the laws of this state and shall process and make payment on claims on account of such holder in the same manner and pursuant to the same conditions and procedures as for other recipients of medical assistance.

(3) The submission of any claim for payment or reimbursement for services or benefits pursuant to this section or the making of any statement in connection therewith, which claim or statement the maker knows or should know to be false, misleading or fraudulent shall be punishable as perjury and shall also be subject to a fine not to exceed Ten Thousand Dollars ($10,000.00), or imprisonment for not to exceed two (2) years, or both.

(4) The provisions of this section shall apply only to medical assistance for children under adoption assistance agreements from states that have entered into a compact with this state under which the other state provides medical assistance to children with special needs under adoption assistance agreements made by this state. All other children entitled to medical assistance pursuant to adoption assistance agreements entered into by this state shall be eligible to receive it in accordance with the laws and procedures applicable thereto.

HISTORY:

Laws, 1989, ch. 401, § 4, eff from and after July 1, 1989.

Editor's Notes —

Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

§ 93-17-109. Inclusion of federal aid in certain state plans.

Consistent with federal law, the Mississippi Department of Public Welfare and the Division of Medicaid, Office of the Governor of the State of Mississippi, in connection with the administration of Sections 93-17-101 through 93-17-109 and any compact entered into pursuant hereto, shall include in any state plan made pursuant to the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272), Titles IV(e) and XIX of the Social Security Act, and any other applicable federal laws, the provision of adoption assistance and medical assistance for which the federal government pays some or all of the cost provided such authority is granted under the provisions of some law of this state other than the provisions of Sections 93-17-101 through 93-17-109. Such departments shall apply for and administer all relevant federal aid in accordance with law.

HISTORY:

Laws, 1989, ch. 401, § 5, eff from and after July 1, 1989.

Editor's Notes —

Section 43-1-1 provides that the term "State Department of Public Welfare" or "State Board of Public Welfare" shall mean the Department of Human Services.

Federal Aspects—

Social Security Act, Title IV, Part E, see 42 USCS §§ 670 et seq.

Social Security Act, Title XIX, see 42 USCS §§ 1396 et seq.

Adoption Assistance and Child Welfare Act of 1980, see 42 USCS §§ 670 et seq.

ARTICLE 7.

MISSISSIPPI ADOPTION CONFIDENTIALITY ACT.

Sec.

93-17-201. Short title.
93-17-203. Definitions.
93-17-205. Centralized adoption records file established; contents; filing of supplemental information; authorization to release birth parent's identity; notification of genetic illness.
93-17-207. Release of nonidentifying information; persons eligible to receive; fee.
93-17-209. Search for birth parents by agency to obtain medical, social, or genetic information; fee.
93-17-211. Civil and criminal immunity for persons acting under Adoption Confidentiality Act.
93-17-213. Promulgation of rules and regulations; fees.
93-17-215. Request by adoptee for identifying information.
93-17-217. Identification and counseling of requesting adoptee; release of information by bureau.
93-17-219. Search for birth parent; when permitted; fee; agency contact with birth parent; release of information to adoptee.
93-17-221. Petition in chancery court for disclosure of identifying information.
93-17-223. One birth parent prohibited from divulging identity of other parent.

§ 93-17-201. Short title.

Sections 93-17-201 through 93-17-223 may be cited as the "Mississippi Adoption Confidentiality Act."

HISTORY:

Laws, 1992, ch. 306, § 1, eff from and after July 1, 1992.

Editor's Notes —

Laws of 2014, ch. 385, § 8 provides:

"SECTION 8. It is the intention of the Legislature and the codifier is so directed that Title 93, Chapter 17, be divided into Articles as follows: Article 1 beginning with Section 93-17-1; Article 3 beginning with Section 93-17-51; Article 5 beginning with Section 93-17-101; Article 7 beginning with Section 93-17-201; and Article 9 beginning with Section 93-17-301."

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Restricting access to judicial records of concluded adoption proceedings. 103 A.L.R.5th 255.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-203. Definitions.

The following words and phrases shall have the meanings ascribed herein unless the context clearly indicates otherwise:

(a) "Agency" means a county welfare department, a licensed or nonlicensed adoption agency or any other individual or entity assisting in the finalization of an adoption.

(b) "Adoptee" means a person who is or has been adopted in this state at any time.

(c) "Birth parent" means either:

(i) The mother designated on the adoptee's original birth certificate; or

(ii) The person named by the mother designated on the adoptee's original birth certificate as the father of the adoptee.

(d) "Board" means the Mississippi State Board of Health.

(e) "Bureau" means the Bureau of Vital Records of the Mississippi State Board of Health.

(f) "Licensed adoption agency" means any agency or organization performing adoption services and duly licensed by the Mississippi Department of Human Services, Division of Family and Children's Services.

HISTORY:

Laws, 1992, ch. 306, § 2, eff from and after July 1, 1992.

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-205. Centralized adoption records file established; contents; filing of supplemental information; authorization to release birth parent's identity; notification of genetic illness.

(1) The bureau shall maintain a centralized adoption records file for all adoptions performed in this state after July 1, 2005, which shall include the following information:

(a) The medical and social history of the birth parents, including information regarding genetically inheritable diseases or illnesses and any similar information furnished by the birth parents about the adoptee's grandparents, aunts, uncles, brothers and sisters if known;

(b) A report of any medical examination which either birth parent had within one (1) year before the date of the petition for adoption, if available and known;

(c) A report describing the adoptee's prenatal care and medical condition at birth, if available and known;

(d) The medical and social history of the adoptee, including information regarding genetically inheritable diseases or illnesses, and any other relevant medical, social and genetic information if available; and

(e) Forms 100A, 100B (if applicable) and evidence of Interstate Compact for Placement of Children approval (if applicable).

The Administrative Office of Courts shall assist the bureau in the maintenance of its centralized adoption record by compiling the number of finalized adoptions in each chancery court district on a monthly basis, and submitting this information to the bureau. The bureau shall include these statistics in its centralized adoption record. The information in this report shall include the number of adoptions in this state where the adopting parent is a blood relative of the adoptee and the number of adoptions in this state where the adopting parent is not a blood relative of the adoptee. The report shall not include any individual identifying information. This information shall be updated annually and made available to the public upon request for a reasonable fee.

(2) Any birth parent may file with the bureau at any time any relevant supplemental nonidentifying information about the adoptee or the adoptee's birth parents, and the bureau shall maintain this information in the centralized adoption records file.

(3) The bureau shall also maintain as part of the centralized adoption records file the following:

(a) The name, date of birth, social security number (both original and revised, where applicable) and birth certificate (both original and revised) of the adoptee;

(b) The names, current addresses and social security numbers of the adoptee's birth parents, guardian and legal custodian;

(c) Any other available information about the birth parent's identity and location.

(4) Any birth parent may file with the bureau at any time an affidavit authorizing the bureau to provide the adoptee with his or her original birth certificate and with any other available information about the birth parent's identity and location, or an affidavit expressly prohibiting the bureau from providing the adoptee with any information about such birth parent's identity and location, and prohibiting any licensed adoption agency from conducting a search for such birth parent under the terms of Sections 93-17-201 through 93-17-223. An affidavit filed under this section may be revoked at any time by written notification to the bureau from the birth parent.

(5) Counsel for the adoptive parents in the adoption finalization proceeding shall provide the bureau with the information required in subsections (1) and (3) of this section, and he shall also make such information a part of the adoption records of the court in which the final decree of adoption is rendered. This information shall be provided on forms prepared by the bureau.

(6)(a) If an agency receives a report from a physician stating that a birth parent or another child of the birth parent has acquired or may have a genetically transferable disease or illness, the agency shall notify the bureau and the appropriate licensed adoption agency, and the latter agency shall notify the adoptee of the existence of the disease or illness, if he or she is twenty-one (21) years of age or over, or notify the adoptee's guardian, custodian or adoptive parent if the adoptee is under age twenty-one (21).

(b) If an agency receives a report from a physician that an adoptee has acquired or may have a genetically transferable disease or illness, the agency shall notify the bureau and the appropriate licensed agency, and the latter agency shall notify the adoptee's birth parent of the existence of the disease or illness.

(7) Compliance with the provisions of this section may be waived by the court, in its discretion, in any chancery court proceeding in which one or more of the petitioners for adoption is the natural mother or father of the adoptee.

HISTORY:

Laws, 1992, ch. 306, § 3; Laws, 1994, ch. 396, § 1; Laws, 2005, ch. 419, § 1; Laws, 2012, ch. 556, § 2, eff from and after July 1, 2012.

Cross References —

Interstate Compact for Placement of Children, see § 43-18-1 et seq.

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

Direction to release nonidentifying information maintained as provided in this section, see § 93-17-207.

Request by adoptee for identifying information maintained pursuant to this section, see § 93-17-215.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-207. Release of nonidentifying information; persons eligible to receive; fee.

(1) The bureau or the agency shall release the nonidentifying information maintained as provided in Section 93-17-205 for a reasonable fee, including the actual cost of reproduction, to any of the following persons upon request made with sufficient proof of identity:

(a) An adoptee eighteen (18) years of age or older;

(b) An adoptive parent;

(c) The guardian or legal custodian of an adoptee; or

(d) The offspring or blood sibling of an adoptee if the requester is eighteen (18) years of age or older.

(2) Information released pursuant to subsection (1) of this section shall not include the name and address of the birth parent, the identity of any provider of health care to the adoptee or to the birth parent and any other information which might reasonably lead to the discovery of the identity of either birth parent.

HISTORY:

Laws, 1992, ch. 306, § 4, eff from and after July 1, 1992.

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

Obtaining medical, social or genetic information by persons specified in this section, see § 93-17-209.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-209. Search for birth parents by agency to obtain medical, social, or genetic information; fee.

(1) Whenever any person specified under Section 93-17-207 wishes to obtain medical, social or genetic background information about an adoptee or nonidentifying information about the birth parents of such adoptee, and the information is not on file with the bureau and the birth parents have not filed affidavits prohibiting a search to be conducted for them under the provisions of Sections 93-17-201 through 93-17-223, the person may request a licensed adoption agency to locate the birth parents to obtain the information.

(2) Employees of any agency conducting a search under this section may not inform any person other than the birth parents of the purpose of the search.

(3) The agency may charge the requester a reasonable fee for the cost of the search. When the agency determines that the fee will exceed One Hundred Dollars ($100.00) for either birth parent, it shall notify the requester. No fee in excess of One Hundred Dollars ($100.00) per birth parent may be charged unless the requester, after receiving notification under this paragraph, has given consent to proceed with the search.

(4) The agency conducting the search shall, upon locating a birth parent, notify him or her of the request and of the need for medical, social and genetic information.

(5) The agency shall release to the requester any medical or genetic information provided by a birth parent under this section without disclosing the birth parent's identity or location.

(6) If a birth parent is located but refuses to provide the information requested, the agency shall notify the requester, without disclosing the birth parent's identity or location, and the requester may petition the chancery court to order the birth parent to disclose the nonidentifying information. The court shall grant the motion for good cause shown.

(7) The Mississippi Department of Health and Human Services shall provide the bureau each year with a list of licensed adoption agencies in this state capable of performing the types of searches described in this section.

HISTORY:

Laws, 1992, ch. 306, § 5, eff from and after July 1, 1992.

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

Requirement that adoptee provide identification and submit to counseling before agency acts on request made pursuant to this section, see § 93-17-217.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-211. Civil and criminal immunity for persons acting under Adoption Confidentiality Act.

Any person, including this state or any political subdivision of this state, and any employee, agent or representative of any agency who participates in good faith in any requirement of Sections 93-17-201 through 93-17-223 shall have immunity from any liability, civil or criminal, that results from his or her actions. In any proceeding, civil or criminal, the good faith of any person participating in the requirements of Sections 93-17-201 through 93-17-223 shall be presumed.

HISTORY:

Laws, 1992, ch. 306, §§ 6, 12, eff from and after July 1, 1992.

Editor's Notes —

The text of this section was added by two sections of Chapter 306, Laws, 1992. Since both sections were identical, by direction of the State Attorney General's office, the text was printed only once, as § 93-17-211.

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-213. Promulgation of rules and regulations; fees.

The bureau shall promulgate rules and regulations necessary to carry out the provisions of Sections 93-17-201 through 93-17-223 and the bureau may charge reasonable fees to implement Sections 93-17-201 through 93-17-223.

HISTORY:

Laws, 1992, ch. 306, § 7, eff from and after July 1, 1992.

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

RESEARCH REFERENCES

ALR.
Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.
2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-215. Request by adoptee for identifying information.

Any person twenty-one (21) years of age or over who has been adopted in this state may request the bureau through a licensed adoption agency providing post-adoption services to obtain and provide the identifying information regarding either or both of his or her birth parents maintained as provided in Section 93-17-205, unless that birth parent has executed an affidavit prohibiting the release of such information.

HISTORY:
Laws, 1992, ch. 306, § 8, eff from and after July 1, 1992.

Cross References —
Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

Requirement that adoptee provide identification and submit to counseling before agency acts on request made pursuant to this section, see § 93-17-217.

RESEARCH REFERENCES

ALR.
Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.
2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-217. Identification and counseling of requesting adoptee; release of information by bureau.

Provided the birth parent has not filed an affidavit prohibiting the release of identifying information and before acting on a request made pursuant to Section 93-17-209 or Section 93-17-215, the agency shall require the adoptee to provide adequate identification and to submit to counseling by such agency in connection with the release and use of this information. The bureau shall release the requested information to the designated agency upon request by such agency.

HISTORY:
Laws, 1992, ch. 306, § 9, eff from and after July 1, 1992.

Cross References —
Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

RESEARCH REFERENCES

ALR.
Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.
2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-219. Search for birth parent; when permitted; fee; agency contact with birth parent; release of information to adoptee.

(1) If the bureau does not have on file (a) an affidavit either authorizing release of identifying information or prohibiting such release and any further contact from each known birth parent for whom information is sought, or (b) a notice that such birth parent has been contacted once and has refused to authorize the release of confidential information, then the adoptee may request the agency to undertake a search for the birth parent who has not filed an affidavit or who has not been contacted. The licensed agency shall not inform any person other than the birth parents of the purpose of the search.

(2) The licensed agency may charge the adoptee a reasonable fee for the cost of the search. When the agency determines that the fee will exceed One Hundred Dollars ($100.00) for either birth parent, it shall notify the adoptee. No fee in excess of One Hundred Dollars ($100.00) per birth parent may be charged unless the adoptee, after receiving notification under this paragraph, has given consent to proceed with the search.

(3) Upon locating a birth parent the licensed agency conducting the search shall make at least one (1) verbal contact and notify him or her of the following:

(a) The nature of the information requested;

(b) The date of the request; and

(c) The fact that the birth parent has the right to consent to or prohibit the release of this information by filing with the bureau the affidavit to this effect.

(4) Within three (3) working days after contacting a birth parent, the licensed agency shall provide the birth parent with a written statement of the information requested and an affidavit form authorizing or prohibiting the release of the requested information. If the birth parent authorizes the release of the information, the licensed agency shall disclose the requested information about that birth parent.

(5) If a licensed agency has contacted a birth parent as provided by this section, and the birth parent does not file the affidavit, the agency shall not disclose the requested information.

(6) If, after a search under this section, a known birth parent cannot be located, the agency shall not disclose the requested identifying information about that birth parent, although it may disclose any available nonidentifying information regarding that birth parent, and it may disclose identifying information about the other birth parent if such other birth parent has signed an unrevoked affidavit authorizing such release. If a birth parent is located and refuses to authorize the release of identifying information, the agency

locating this birth parent shall notify the bureau. The bureau shall note such contact and refusal in its records.

(7) Only one (1) contact shall be made with a birth parent pursuant to a search request under this section if the birth parent refuses to authorize the release of the requested information. Further contacts with a birth parent under this section on behalf of the same adoptee shall be prohibited.

HISTORY:

Laws, 1992, ch. 306, § 10, eff from and after July 1, 1992.

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-221. Petition in chancery court for disclosure of identifying information.

The adoptee may petition the chancery court to order the agency to disclose any identifying information that may not be disclosed under Sections 93-17-201 through 93-17-223. The court shall grant the petition for good cause shown.

HISTORY:

Laws, 1992, ch. 306, § 11, eff from and after July 1, 1992.

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

§ 93-17-223. One birth parent prohibited from divulging identity of other parent.

In cases where only one (1) of the birth parents has authorized the release of identifying information, that birth parent shall be prohibited from divulging to the adoptee the identity, or any information reasonably calculated to lead to discovery of the identity, of the other birth parent, and shall execute a sworn affidavit stating that no such information shall be revealed. The refusal of any birth parent to comply with this prohibition shall constitute an act of bad faith under the terms of Sections 93-17-201 through 93-17-223, and such birth parent shall be subject to civil liability for the release of such information.

HISTORY:

Laws, 1992, ch. 306, § 13, eff from and after July 1, 1992.

Cross References —

Revised birth certificates for adopted children, see § 93-17-21.

Confidentiality of adoption proceedings and records of proceedings, see § 93-17-25.

Additional confidentiality provisions applicable to adoption records, see § 93-17-63.

RESEARCH REFERENCES

ALR.

Restricting access to judicial records of concluded adoption proceedings. 83 A.L.R.3d 800.

Am. Jur.

2 Am. Jur. 2d, Adoption §§ 183 et seq.

ARTICLE 9.

MISSISSIPPI REGISTRATION OF FOREIGN ADOPTIONS ACT.

Sec.

93-17-301. Short title.
93-17-303. Registration of foreign adoptions.
93-17-305. Procedure for registration of foreign adoption decree; jurisdiction; restrictions; exceptions; forms.
93-17-307. Forms.

§ 93-17-301. Short title.

This article shall be known and may be cited as the Mississippi Registration of Foreign Adoptions Act.

HISTORY:

Laws, 2014, ch. 385, § 4, eff from and after July 1, 2014.

Editor's Notes —

Laws of 2014, ch. 385, § 8 provides:

"SECTION 8. It is the intention of the Legislature and the codifier is so directed that Title 93, Chapter 17, be divided into Articles as follows: Article 1 beginning with Section 93-17-1; Article 3 beginning with Section 93-17-51; Article 5 beginning with Section 93-17-101; Article 7 beginning with Section 93-17-201; and Article 9 beginning with Section 93-17-301."

§ 93-17-303. Registration of foreign adoptions.

(1) A child who has automatically acquired United States citizenship following a foreign adoption and who possesses a Certificate of Citizenship in accordance with the Child Citizenship Act, Public Law 106-395, may be issued a Mississippi birth certificate upon compliance with this article and the requirements for adoptions under this chapter to the extent not superseded by this article.

(2) A parent shall not proceed under this article if the foreign adoption has been registered or otherwise finalized by a court of this or any other state.

(3) A parent who is eligible to obtain a decree of registration of a foreign adoption under this article may proceed pro se.

HISTORY:

Laws, 2014, ch. 385, § 5; Laws, 2017, ch. 427, § 7, eff from and after July 1, 2017.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in this section's subsection designations by adding the subsection (1) designation at the beginning of the first paragraph. The Joint Committee ratified the correction at its August 17, 2015, meeting.

Amendment Notes —

The 2017 amendment added (3).

§ 93-17-305. Procedure for registration of foreign adoption decree; jurisdiction; restrictions; exceptions; forms.

(1) An adopting parent or parents may petition the chancery court in the county having jurisdiction to register a foreign adoption decree so that it will be given full and final effect in this state. The petition and order shall be in substantially the form set forth in Section 93-17-307 unless the Supreme Court promulgates by rule a different set of forms, in which case the petition and order shall be in substantially the form set forth by court rule. As part of the Petition to Register a Foreign Adoption, a child's name may be changed from that appearing on the foreign adoption decree if all other requirements of law as to name change are met.

(2) A foreign adoption decree previously registered or otherwise finalized by a court of this or any other state may not be registered subsequently in any court of this state.

(3) If the chancellor, in termtime or vacation, determines that the foreign adoption can be registered, the chancellor shall sign the order and shall direct the chancery clerk to enter the date of the foreign adoption decree and identify the foreign court on the docket. A certified copy of the order, along with a copy of U.S. Government Form N-560, Certificate of Citizenship, or a copy of the child's United States passport, or both, if either or both documents are a part of the court file, shall be provided to the petitioner by the chancery clerk.

(4) If the chancery court determines that the foreign adoption cannot be registered, the petitioner may proceed as applicable under the provisions of this chapter for adoptions generally. Reasons for which a foreign adoption cannot be registered include, without limitation, if the court determines that the foreign adoption is not a full and final adoption because the foreign-born child has been issued an IH-4 or IR-4 visa.

(5) Adopting parent(s) who are eligible to register a foreign adoption under this article may, for any reason, proceed under this chapter as for adoptions generally.

(6) The petition and accompanying documents, including the final decree, are confidential and are subject to rules of confidentiality as otherwise provided in this chapter for adoption records.

HISTORY:

Laws, 2014, ch. 385, § 6, eff from and after July 1, 2014.

§ 93-17-307. Forms.

The petition shall be accompanied by the documentation indicated on the forms. The petition and order shall be in substantially the following form unless the Supreme Court adopts a rule setting forth a different form:

(a) **Form for petition; verification by parents.**

IN THE CHANCERY COURT OF ________ COUNTY, MISSISSIPPI IN RE: FOREIGN ADOPTION OF ____________ FILE NO. ____________

PETITION TO REGISTER FOREIGN ADOPTION

1. Petitioner(s), the Adopting Parent(s) of the above-named adopted child, is/are ____.

2. Petitioner(s) reside(s) in ________________ County, Mississippi, at

____

(Street Address)

____

(City, State, Zip)

3. Has any other court in this or any other state reviewed, registered, finalized or otherwise assumed jurisdiction over the foreign adoption decree being registered here:

(circle one) Yes No

If yes, please provide the name of the court, the state and county, what was previously presented to the court and the resulting decision from the court: (Attach all court decrees)

____

____

____

____

____

____

4. The full name of the adopted child at birth as listed on the foreign birth certificate, if available, was

____

5. The full name of the adopted child as written on the foreign adoption decree is ____.

6. The full name of the adopted child as he or she is to be known from this time forward is

____

7. The date of birth of the adopted child is ____________________________.

8. The date of the foreign adoption decree is ___________________________.

9. The type of United States visa issued to the adopted child is:

(circle one) IR-2, IR-3, IH-3, IR-4, IH-4

10. The following documents are attached to this Petition:

a. Copy of child's birth certificate or other birth identification issued by country of birth; or if none, an affidavit of parent(s) stating why none is available.

b. The original documents related to the foreign adoption certified by the United States Embassy abroad and English translation certified by the translator to be correct.

c. Copy of adopted child's United States visa.

d. Copy of home study.

e. A copy of U.S. Government Form N-560, Certificate of Citizenship, or a copy of the child's United States passport, or both, if either or both documents are available.

f. A valid government-issued picture identification of parent or parents, such as a passport or driver's license.

g. Proof of residency of the parent or parents in the State of Mississippi.

h. The social security card of the child.

WHEREFORE, Petitioner(s) request(s) that this Court enter its Order authorizing the registration and docketing of the attached Foreign Adoption Decree with the clerk of the court and decreeing
that ____
(Name of child as written on Foreign Adoption Decree)
shall henceforth be known as ____(Child's name from this time forward)____
and shall have all the rights of a child and heir of the Petitioner(s).

____
Signature of Adopting Parent [FN1]

____
Signature of Adopting Parent

____
Daytime telephone no. for Adopting Parent(s)

[FN1] When there are two (2) adopting parents, both must sign.

VERIFICATION TO PETITION TO REGISTER FOREIGN ADOPTION

I/We, ____________________, verify that I/we am/are the Petitioner(s) named in the foregoing Petition, that I/we have read and understand the information set forth in the Instructions to the Petition to Register Foreign Adoption Decree, and that the facts set forth in the foregoing Petition are true and correct to the best of my/our knowledge, information and belief. I/We further verify that all documents attached to this Petition are true and correct copies of the originals. I/We understand that false statements made herein are subject to the penalties for perjury.

Date: ______________________________

____
Signature of Adopting Parent

____
Signature of Adopting Parent

(b) **Form of Order.**

(i) Order of adoption.

IN THE CHANCERY COURT OF ________________ COUNTY, MISSISSIPPI

IN RE: FOREIGN ADOPTION OF ________________ ADOPTION NO. ______________

ORDER

It is hereby ORDERED and DECREED that the Petition to Register Foreign Adoption of:

____
(Adopting Parent(s))
is GRANTED and that this Court authorizes the registration and docketing of the Foreign Adoption Decree entered on
________________ (Date of Foreign Adoption Decree)
by __________________________ (Name of Foreign Court)
in __________________________ (Foreign Country).

It is FURTHER ORDERED and DECREED that the above Foreign Adoption Decree shall be enforceable as if this Court had entered the Decree and that henceforth this child

____
(Name of child as written on Foreign Adoption Decree)
shall be known as

____
(Child's name from this time forward)
and shall have all the rights of a child and heir of

____
(Adopting Parent(s))

Ordered this the ______ day of __________, 20______.

____
Chancellor

(ii) Order denying adoption.

IN THE CHANCERY COURT OF ________________ COUNTY, MISSISSIPPI

IN RE: FOREIGN ADOPTION OF ________________ ADOPTION NO. ______________

ORDER

It is hereby ORDERED and DECREED that the Petition to Register Foreign Adoption of:

____

(Adopting Parent(s))

_______________________ to Register Foreign Adoption Decree is DENIED but that Petitioners may proceed with an adoption pursuant to Mississippi law without paying any additional filing fee.

Ordered this the ______ day of ______________, 20______.

____

Chancellor

(c) **Instructions.**

INSTRUCTIONS FOR FILING
PETITION TO REGISTER FOREIGN ADOPTION DECREE

When a child is adopted in conformity with the laws of a foreign country, the adopting parent(s) may register the foreign adoption and obtain a Mississippi adoption decree so that a Mississippi birth certificate can be obtained.

Adopting parent(s) seeking to register the foreign adoption must:

1. Complete, sign and date the Petition to Register Foreign Adoption including Verification. If a foreign adoption decree shows that there are two (2) adopting parents, both parents must execute the Petition to Register Foreign Adoption and verification thereof.

2. Attach the following documents to the Petition:

* A copy of the Foreign Adoption Decree;

* A copy of the child's foreign birth certificate. If no birth certificate was issued, a copy of any other birth identification issued by the country of birth should be attached. If no birth certificate or birth identification can be obtained, an Affidavit stating the reason should be submitted;

* A copy of the child's United States visa;

* An English translation of all documents not in English, with a verification by the translator that all translations are true and correct;

* A copy of the home studies.

* If available, a copy of the child's Certificate of Citizenship (U.S. Government Form N-560) or a copy of the child's U.S. passport, or both.

3. The Petition to Register with the attachments should be filed with the chancery court in the county in which the adopting parent(s) reside(s). A filing fee for the adoption will be charged in accordance with the fee schedule of the chancery court.

After the Petition to Register is filed, it will be submitted to the Court for review. If the Petition to Register and accompanying documents establish that the foreign adoption of the child is full and final, the Court will enter its order directing the registration of the Foreign Adoption Decree. The chancery clerk will then issue an order of adoption to which will be attached a copy of U.S. Government Form N-560 and/or a copy of the child's United States passport if those items are in the court file for the Petitioner to submit to the Department of Health, Bureau of Vital Records, in order to obtain a birth certificate.

If the Court cannot determine that the foreign adoption is full and final, it will enter its order denying the Petition. In that case, it will be necessary to proceed under Title 93, Chapter 17, applying to adoptions generally without payment of an additional filing fee.

A foreign adoption may not be a full and final adoption eligible for registration if the child has an IH-4 or IR-4 United States visa, in which case it will be necessary to proceed under Mississippi general adoption law because the adoption of the foreign-born child was not finalized in the country of the child's birth.

Only one (1) state court, whether in this or another state, should exercise jurisdiction over the registration of the foreign adoption or the completion of the adoption initiated in the native country of the foreign-born child. Thus, if the adoption has been finalized or the foreign adoption decree has been registered in another state court or in another court within this state, the adopting parent(s) need not and should not proceed under this article. In similar fashion, if the adoption of the foreign-born child has been finalized in this state, and thereafter, another petitioner seeks to adopt this child, the subsequent proceeding will be a standard proceeding under the applicable provisions of this chapter. Such a situation could occur when the child is to be adopted by a stepparent after divorce or death of the original adopting parent(s), or when, after termination of parental rights, the child is to be adopted by different adopting parent(s).

HISTORY:

Laws, 2014, ch. 385, § 7, eff from and after July 1, 2014.

CHAPTER 19.

REMOVAL OF DISABILITY OF MINORITY

Sec.	
93-19-1.	Removal of disability as to real estate.
93-19-3.	Application; defendants.
93-19-5.	Application; when defendants are not necessary.
93-19-7.	Trial and decree.
93-19-9.	Terms of decree.
93-19-11.	Married minor not under disability for purpose of action involving marital rights.
93-19-13.	Persons eighteen years of age or older competent to contract in matters affecting personal property.
93-19-15.	Age requirements for participation in physiological training.

§ 93-19-1. Removal of disability as to real estate.

The chancery court of the county in which a minor resides, or the chancery court of a county in which a resident minor owns real estate in matters pertaining to such real estate, may remove the disability of minority of such minor. In cases of married minors, the residence of the husband shall be the residence of the parties. The chancery court of a county in which a nonresident minor of the State of Mississippi owns real estate or any interest in real estate may remove the disability of minority of such minor as to such real estate, so as to enable said minor to do and perform all acts with reference to such real estate, to sell and convey, to mortgage, to lease, and to make deeds of trust and contracts, including promissory notes, concerning said real estate, or any interest therein which may be owned by such minor, as fully and effectively as if said minor were twenty-one (21) years of age. The jurisdiction thus exercised shall be that of a court of general equity jurisdiction, and all presumptions in favor of that adjudged shall be accorded at all times.

HISTORY:

Codes, 1880, § 1838; 1892, § 493; 1906, § 543; Hemingway's 1917, § 300; 1930, § 353; 1942, § 1264; Laws, 1924, ch. 158; Laws, 1952, ch. 253; Laws, 1954, ch. 216; Laws, 1956, ch. 223; Laws, 1958, ch. 272, § 1; Laws, 1962, chs. 282, 283.

Cross References —

Definition of term "minor", see § 1-3-27.

Land and conveyances thereof generally, see §§ 89-1-1 et seq.

Another section derived from same 1942 code section, see § 93-19-11.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. Removal of disability of minor in general.
2. Effect of removal of disability.

1. Removal of disability of minor in general.

A petition for the removal of disabilities was properly filed in the county in which the minor resided rather than the county where a guardianship over the minor had been established. Barrett v. The Mississippi Bar, 648 So. 2d 1154, 1995 Miss. LEXIS 27 (Miss. 1995).

In a proceeding to remove the disability of minority, the attorney representing the minor violated § 73-3-35 by failing to make a full disclosure to the chancellor regarding the existence of a guardianship over the minor in another county; the attorney's oath of office required the attorney to deal honestly with the court and disclose all material facts. Barrett v. The Mississippi Bar, 648 So. 2d 1154, 1995 Miss. LEXIS 27 (Miss. 1995).

Decree removing disabilities of minority held invalid, where evidence disclosed that minor did not reside in county in judicial district of court which entered order, and hence minor's signing of mortgage was ineffectual, notwithstanding petition recited that minor lived in such county. Howard v. McMurchy, 175 Miss. 328, 166 So. 917, 1936 Miss. LEXIS 43 (Miss. 1936).

Where no petition could be found praying removal of disabilities of minors, presumption was that chancery court, a court not of record in such proceeding when rendering decree removing disabilities, did not have jurisdiction. Hayes v. Federal Land Bank, 162 Miss. 877, 140 So. 340 (Miss. 1932).

Chancery court has no jurisdiction to remove disability of minority where petition does not show minor resides in county. Dulion v. Folkes, 153 Miss. 91, 120 So. 437, 1928 Miss. LEXIS 194 (Miss. 1928).

No presumption is raised in favor of chancery court's jurisdiction in removing disability of minority. Dulion v. Folkes, 153 Miss. 91, 120 So. 437, 1928 Miss. LEXIS 194 (Miss. 1928).

Minor not residing in county cannot, by appearance by petition to remove disability of minority, confer jurisdiction on court. Dulion v. Folkes, 153 Miss. 91, 120 So. 437, 1928 Miss. LEXIS 194 (Miss. 1928).

Chancery court may remove disabilities of person under 14 years of age. McLeiter v. Rackley, 148 Miss. 75, 114 So. 128, 1927 Miss. LEXIS 13 (Miss. 1927).

Chancery court had jurisdiction to remove disabilities of minority of illegitimate minor, though petition alleged minor's father was dead. Wilkerson v. Swayze, 147 Miss. 141, 113 So. 327, 1927 Miss. LEXIS 347 (Miss. 1927).

The chancery court, when removing the disabilities of minority, is one of limited jurisdiction, and therefore no presumption as to its jurisdiction arises, and it is incumbent upon one relying upon the decree to show that the court had acquired jurisdiction under the law. Marks v. McElroy, 67 Miss. 545, 7 So. 408, 1890 Miss. LEXIS 94 (Miss. 1890); Howard v. McMurchy, 175 Miss. 328, 166 So. 917, 1936 Miss. LEXIS 43 (Miss. 1936).

2. Effect of removal of disability.

Decrees removing disabilities of minority whereby minors were authorized to sue and be sued, to buy and sell real and personal property in their own names, and perform all acts necessary for proper management of their estates, held insufficient to authorize minors to mortgage their property. Howard v. McMurchy, 175 Miss. 328, 166 So. 917, 1936 Miss. LEXIS 43 (Miss. 1936).

Where words of decree removing disabilities of minority are unambiguous, power thereby conferred cannot be extended beyond plain meaning of language used. Howard v. McMurchy, 175 Miss. 328, 166 So. 917, 1936 Miss. LEXIS 43 (Miss. 1936).

Decree authorizing infant to sell land and receive trust deed for the price did not empower her to cancel the trust deed. Watson v. Peebles, 102 Miss. 725, 59 So. 881, 1912 Miss. LEXIS 112 (Miss. 1912).

Emancipation of minor does not empower him to demand a conveyance of a trustee who holds land by deed directing a conveyance to him when he becomes of age. Ray v. Kelly, 82 Miss. 597, 35 So. 165, 1903 Miss. LEXIS 184 (Miss. 1903).

OPINIONS OF THE ATTORNEY GENERAL

A lease is enforceable against persons twenty-one years of age or older and married persons eighteen years of age or older for property to be occupied by them as a residence. A lease is also enforceable against a minor tenant who has had his or her disability removed for that purpose by an order entered by the appropriate chancery court. 1995 Miss. Op. Att'y Gen. 763.

RESEARCH REFERENCES

ALR.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction. 29 A.L.R.3d 1270.

Am. Jur.

42 Am. Jur. 2d, Infants §§ 4 et seq.

14 Am. Jur. Pl & Pr Forms (Rev), Infants, Form 21 (petition or application of infant between 18 and 21 years of age for removal of disabilities and release of funds for medical and educational purposes).

CJS.

43 C.J.S., Infants §§ 235–245.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-19-3. Application; defendants.

The application therefor shall be made in writing by the minor by his next friend, and it shall state the age of such minor and join as defendants his parent or parents then living, or, if neither be living, two of his adult kin within the third degree, computed according to the civil law, and the reasons on which the removal of disability is sought; and, when such petition shall be filed, the clerk shall issue process as in other suits to make such person or persons parties defendants, which shall be executed and returned as in other cases, and shall make publication for nonresident defendants as required by law, and any person so made a party, or any other relative or friend of the minor, may appear and resist the application.

In cases where a minor has been adopted by decree of court, the adoptive parent or parents, or the next of kin of the adoptive parent, or parents, as the case may be, shall be joined as defendants in lieu of the natural parents or the next of kin of the natural parents, as herein provided. Where the custody and control of a minor has been by decree of court awarded to one of the natural parents to the exclusion of the other, it shall be sufficient herein to join as defendant only the parent to whom the custody and control has been awarded.

HISTORY:

Codes, 1880, § 1839; 1892, § 494; 1906, § 544; Hemingway's 1917, § 301; 1930, § 354; 1942, § 1265; Laws, 1924, ch. 158; Laws, 1940, ch. 236; Laws, 1946, ch. 196, § 1.

Cross References —

Appointment of guardian ad litem, see § 9-5-89.

Liability for costs where infant is suing by next friend, see § 11-53-45.

JUDICIAL DECISIONS

ANALYSIS

1. Proceedings in general.
2. Petition for removal of disability.
3. Service of process.
4. Parties.

1. Proceedings in general.

Power of chancery court to remove disability of minority is statutory and one relying on a decree removing disability must show that the court acquired jurisdiction. Lake v. Perry, 95 Miss. 550, 49 So. 569, 1909 Miss. LEXIS 280 (Miss. 1909); Marks v. McElroy, 67 Miss. 545, 7 So. 408, 1890 Miss. LEXIS 94 (Miss. 1890); Howard v. McMurchy, 175 Miss. 328, 166 So. 917, 1936 Miss. LEXIS 43 (Miss. 1936).

Illegitimate minor held not debarred from right to present cause for removal of disabilities of minority. Wilkerson v. Swayze, 147 Miss. 141, 113 So. 327, 1927 Miss. LEXIS 347 (Miss. 1927).

Chancellor had jurisdiction to render decree removing disabilities of minority in vacation, where only living parent appeared and answered petition. Wilkerson v. Swayze, 147 Miss. 141, 113 So. 327, 1927 Miss. LEXIS 347 (Miss. 1927).

Petition to remove disabilities of minority is not case in equity. Wilkerson v. Swayze, 147 Miss. 141, 113 So. 327, 1927 Miss. LEXIS 347 (Miss. 1927).

2. Petition for removal of disability.

Where petition to remove disability of minority did not show minor resided in county, court had no jurisdiction and decree was void. Dulion v. Folkes, 153 Miss. 91, 120 So. 437, 1928 Miss. LEXIS 194 (Miss. 1928).

Petition to remove disability of minority showing property inherited was in county did not show minor resided in county, in view of other statements. Dulion v. Folkes, 153 Miss. 91, 120 So. 437, 1928 Miss. LEXIS 194 (Miss. 1928).

Where not shown by petition the court could not take judicial notice that petitioner was resident because guardianship proceedings were pending. Dulion v. Folkes, 153 Miss. 91, 120 So. 437, 1928 Miss. LEXIS 194 (Miss. 1928).

Fraud will not be presumed because illegitimate states in petition to remove disabilities of minority that father is dead. Wilkerson v. Swayze, 147 Miss. 141, 113 So. 327, 1927 Miss. LEXIS 347 (Miss. 1927).

Petition sufficiently signed, by minor, by aunt as next friend, by mother, and by minor brother and sister by mother as next friend. Eastman-Gardner Co. v. Leverett, 141 Miss. 96, 106 So. 106, 1925 Miss. LEXIS 214 (Miss. 1925).

3. Service of process.

The summoning of a parent as defendant in a proceeding under this section [Code 1942, § 1265] is not excused by the parent's mental incompetency. Floyd v. Floyd, 239 Miss. 69, 121 So. 2d 133, 1960 Miss. LEXIS 268 (Miss. 1960).

Next of kin may waive issuance of summons. McLeiter v. Rackley, 148 Miss. 75, 114 So. 128, 1927 Miss. LEXIS 13 (Miss. 1927).

4. Parties.

This statute does not require the minor's nearest of kin to be made parties to an ex parte application for the removal of the minor's disability of minority in which any two of the minor's next of kin within the third degree, computed according to the civil law, unite with the minor. Johnson v. Mississippi Power Co., 68 F.2d 545, 1934 U.S. App. LEXIS 4904 (5th Cir. Miss. 1934).

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Infants §§ 8, 9.

CJS.

43 C.J.S., Infants §§ 239–245.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-19-5. Application; when defendants are not necessary.

If the parent or parents then living, or, if they both be not living, if any two of his adult kin within the third degree shall unite with the minor and his next friend in his application, or if the minor has no parent then living and no kindred within the prescribed degree whose place of residence is known to him or his next friend, it shall not be necessary to make any person defendant thereto. But the court shall proceed to investigate the merits of such application, and decree thereon as in other cases.

In cases where a minor has been adopted by decree of court, the adoptive parent or parents, or the next of kin of the adoptive parent or parents, as the case may be, may unite with the minor and his next friend in his application in lieu of the natural parents or the next of kin of the natural parents, as herein provided. Where the custody and control of a minor has been by decree of court awarded to one of the natural parents or adopted parents, as the case may be, to the exclusion of the other, it shall be sufficient herein for only the parent to whom the custody and control has been awarded to unite with the minor and his next friend in his application, as herein provided.

HISTORY:

Codes, 1880, § 1840; 1892, § 495; 1906, § 545; Hemingway's 1917, § 302; 1930, § 355; 1942, § 1266; Laws, 1918, ch. 123; Laws, 1940, ch. 236; Laws, 1946, ch. 196, § 2.

JUDICIAL DECISIONS

1. In general.

Petition sufficiently signed, by minor, by aunt as next friend, by mother, and by minor brother and sister by mother as next friend. Eastman-

Gardner Co. v. Leverett, 141 Miss. 96, 106 So. 106, 1925 Miss. LEXIS 214 (Miss. 1925).

Ex parte petition for removal of disabilities, signed by minor through father and mother as next friends, held sufficient, under Laws, 1918, ch. 123 [Code 1942, § 1266]. Bazor v. J. J. Newman Lumber Co., 133 Miss. 538, 97 So. 761, 1923 Miss. LEXIS 152 (Miss. 1923).

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Infants §§ 8, 9.

CJS.

43 C.J.S., Infants §§ 239–245.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-19-7. Trial and decree.

When the proper persons have been made parties to the application, the court shall examine it, and the objections to it, if any, and may hear testimony in open court, in reference thereto, and shall make such decree thereon as may be for the best interest of the minor.

HISTORY:

Codes, 1880, § 1841; 1892, § 496; 1906, § 546; Hemingway's 1917, § 303; 1930, § 356; 1942, § 1267.

JUDICIAL DECISIONS

1. In general.

The recitals of a decree removing the disability of minority import verity and cannot be drawn in question collaterally. Johnson v. Mississippi Power Co., 68 F.2d 545, 1934 U.S. App. LEXIS 4904 (5th Cir. Miss. 1934).

Decree of chancery court, in proceeding to remove disabilities of minority, is valid though failing to recite jurisdictional facts when allegations of petition show basis of jurisdiction of court to act, as petition is part of record of the proceeding. Dyer v. Russell, 204 Miss. 719, 38 So. 2d 104, 1948 Miss. LEXIS 400 (Miss. 1948).

Decree removing disabilities of minority held void, where no petition could be found praying removal of disability. Hayes v. Federal Land Bank, 162 Miss. 877, 140 So. 340 (Miss. 1932).

Void decree, removing disability of minority, was nullity, and constituted no defense in minor's action to disaffirm action in signing deed. Dulion v. Folkes, 153 Miss. 91, 120 So. 437, 1928 Miss. LEXIS 194 (Miss. 1928).

Decree removing disabilities of minority need not recite that chancellor heard evidence in support thereof. McLeiter v. Rackley, 148 Miss. 75, 114 So. 128, 1927 Miss. LEXIS 13 (Miss. 1927).

Chancellor had jurisdiction to render decree removing disabilities of minority in vacation, where only living parent appeared and answered petition. Wilkerson v. Swayze, 147 Miss. 141, 113 So. 327, 1927 Miss. LEXIS 347 (Miss. 1927).

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Infants §§ 8, 9.

14 Am. Jur. Pl & Pr Forms (Rev), Infants, Forms 22-24 (order removing infant's disabilities).

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-19-9. Terms of decree.

The decree may be for the partial removal of the disability of the minor so as to enable him to do some particular act proposed to be done and specified in the decree; or it may be general, and empower him to do all acts in reference to his property, and making contracts, and suing and being sued, and engaging in any profession or avocation, which he could do if he were twenty-one years of age; and the decree made shall distinctly specify to what extent the disability of the minor is removed, and what character of acts he is empowered to perform notwithstanding his minority, and may impose such restrictions and qualifications as the court may adjudge proper.

HISTORY:

Codes, 1880, § 1842; 1892, § 497; 1906, § 547; Hemingway's 1917, § 304; 1930, § 357; 1942, § 1268.

JUDICIAL DECISIONS

1. In general.

Plaintiff's tort action based on events that occurred when he was 19 years old was timely as it was filed less than three years after his 21st birthday; removal of the disability of minority did not arise automatically upon the occurrence of specified events except for reaching the age of 21, and thus, plaintiff's emancipation did not trigger the automatic removal of disability of minority. Baker v. RR Brink Locking Sys., 721 F.3d 716, 2013 U.S. App. LEXIS 13884 (5th Cir. Miss. 2013).

A chancery court order, removing the disabilities of a 19-year-old woman and empowering her to engage "in any profession or avocation which she could do if she were 21 years of age", as decreed pursuant to Code 1972 § 93-19-9, would take precedence over an Alcoholic Beverage Control Division regulation prohibiting the employment of persons under age 21 from the handling of alcoholic beverages, since the regulatory authority vested in the Division by Code 1972 § 67-1-37(h) requires that such regulations not be inconsistent with other laws of the state. Mississippi State Tax Com. v. Reynolds, 351 So. 2d 326, 1977 Miss. LEXIS 1927 (Miss. 1977).

Decrees removing disabilities of minors and empowering them to buy or sell real and personal property and to do all things necessary for the proper management of their property, to make contracts, and to sue and be sued, but distinctly specifying what acts they were empowered to perform, did not authorize such minors to mortgage their property. Howard v. McMurchy, 175 Miss. 328, 166 So. 917, 1936 Miss. LEXIS 43 (Miss. 1936).

Where words of decree removing disabilities of minority are unambiguous, power thereby conferred cannot be extended beyond plain meaning of language used. Howard v. McMurchy, 175 Miss. 328, 166 So. 917, 1936 Miss. LEXIS 43 (Miss. 1936).

Void decree removing disability of minority may be attacked anywhere. Lake v. Perry, 95 Miss. 550, 49 So. 569, 1909 Miss. LEXIS 280 (Miss. 1909).

RESEARCH REFERENCES

Am. Jur.

42 Am. Jur. 2d, Infants §§ 8, 9.

CJS.

43 C.J.S., Infants §§ 239–245.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-19-11. Married minor not under disability for purpose of action involving marital rights.

A married minor shall not be under the disability of minority for the purpose of bringing or defending a suit for divorce, separate maintenance and support, temporary maintenance or support, custody of children or any other action involving marital rights as between the parties, and any married minor may file or defend such a suit in his own name without the necessity of being represented by a next friend or guardian ad litem, and be considered adult for the purposes of such a suit.

HISTORY:
Codes, 1880, § 1838; 1892, § 493; 1906, § 543; Hemingway's 1917, § 300; 1930, § 353; 1942, § 1264; Laws, 1924, ch. 158; Laws, 1952, ch. 253; Laws, 1954, ch. 216; Laws, 1956, ch. 223; Laws, 1958, ch. 272, § 1; Laws, 1962, chs. 282, 283.

Cross References —
Another section providing removal of disability of minority in marital actions, see § 93-5-9.

Another section derived from same 1942 code section, see § 93-19-1.

RESEARCH REFERENCES

Law Reviews.
Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue-Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

§ 93-19-13. Persons eighteen years of age or older competent to contract in matters affecting personal property.

All persons eighteen (18) years of age or older, if not otherwise disqualified, or prohibited by law, shall have the capacity to enter into binding contractual relationships affecting personal property. Nothing in this section shall be construed to affect any contracts entered into prior to July 1, 1976.

In any legal action founded on a contract entered into by a person eighteen (18) years of age or older, the said person may sue in his own name as an adult and be sued in his own name as an adult and be served with process as an adult.

HISTORY:
Laws, 1976, ch. 406, § 3, eff from and after July 1, 1976.

Cross References —
Actions on contracts made during infancy, see § 15-3-11.

JUDICIAL DECISIONS

1. In general.
Minor's waiver of liability did not entitle a church to summary judgment in a wrongful death action filed against the church by the minor's mother, based on the minor's death, because the minor was not legally able to sign a contract waiving liability. Colyer v. First United Methodist Church of New Albany, 214 So. 3d 1084, 2016 Miss. App. LEXIS 160 (Miss. Ct. App. 2016), cert. dismissed, in part, 214 So. 3d 1061, 2017 Miss. LEXIS 158 (Miss. 2017).

The maker of a promissory note who was 19 years of age at the time he signed the note was not under the disability of minority, as defined by § 93-19-13, and thus the note was enforceable against him. Peoples Bank of Mendenhall v. Wyatt, 441 So. 2d 117, 1983 Miss. LEXIS 3018 (Miss. 1983).

This statute effectively removes the disability of minority of all persons 18 years of age or older for the purpose of entering into contracts affecting personal property including the right to settle a claim for personal injuries, to execute a contract settling the claim, and to accept money in settlement of the claim. Garrett v. Gay, 394 So. 2d 321, 1981 Miss. LEXIS 1941 (Miss. 1981).

OPINIONS OF THE ATTORNEY GENERAL

All persons 18 years of age or older, if not otherwise disqualified, or prohibited by law, shall have the capacity to enter into binding contractual relationships affecting personal property. A person must be 21 years of age or older to enter into a binding contract concerning real property, except a married minor 18 years of age or older may purchase or sell homestead property. 2005 Miss. Op. Att'y Gen. 141.

RESEARCH REFERENCES

ALR.

Statutory change of age of majority as affecting pre-existing status or rights. 75 A.L.R.3d 228.

Am. Jur.

45 Am. Jur. Proof of Facts 2d 631, Age of Person.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

1981 Mississippi Supreme Court Review; Contract, Corporate, and Commercial Law. 52 Miss. L. J. 411, June, 1982.

§ 93-19-15. Age requirements for participation in physiological training.

(1) Notwithstanding any other provision of state law, persons eighteen (18) years of age or older shall be entitled to participate in physiological training.

(2) For the purpose of this section, physiological training means the training of flying personnel, passengers, and crew members, military and civilian, which shall include instruction in one (1) or more of the following areas: altitude chamber flights; rapid decompression chamber flights; physiological effects of altitude; human factors in rapid decompression; oxygen equipment; cabin pressurization and decompression; pressure breathing; principles and problems of vision, spatial disorientation and other sensory phenomena; noise and vibration; speed; acceleration; escape from aircraft; emergency procedures; ejection seat and parachute training; and prechamber flight indoctrination.

HISTORY:

Laws, 1991, ch. 375, § 1, eff from and after passage (approved March 15, 1991).

CHAPTER 21.

PROTECTION FROM DOMESTIC ABUSE

Article 1.	Protection from Domestic Abuse Law.	93-21-1
Article 3.	Domestic Violence Shelters.	93-21-101
Article 5.	Children's Trust Fund Act.	93-21-301

ARTICLE 1.

PROTECTION FROM DOMESTIC ABUSE LAW.

Sec.	
93-21-1.	Short title.
93-21-3.	Definitions.
93-21-5.	Jurisdiction and venue.
93-21-7.	Petition to seek domestic abuse protection order; proper forum for petition alleging domestic abuse; waiver of filing fees in domestic abuse cases.
93-21-9.	Contents of petition.
93-21-11.	Notice and hearing.
93-21-13.	Emergency domestic abuse protection order; duration of order; extension; entry of protection order into Mississippi Protection Order Registry; de novo hearing for parties aggrieved by issuance or denial of issuance of order.
93-21-15.	Temporary domestic abuse protection orders; relief; duration; final domestic abuse protection order or consent agreements; provisions addressing custody, visitation or support of minor children; order to set forth findings of fact and provide details of acts restrained; order to be entered into Mississippi Protection Order Registry; modification, amendment or dissolution of order.
93-21-16.	Full faith and credit for certain protective orders issued in other jurisdictions.
93-21-17.	Grant of relief not to affect property titles or availability of other remedies; court approval required to amend orders.
93-21-19.	Testimony by spouses not to be restricted.
93-21-21.	Knowing violation of protection orders, court-approved consent agreements or bond conditions issued by Mississippi or foreign courts is misdemeanor or contempt; penalties.
93-21-23.	Participants in reports or proceedings presumed acting in good faith; immunity from liability.
93-21-25.	Mississippi Protection Order Registry; certain orders to be maintained in registry; duties of clerk of issuing court; process for entry and removal of orders.
93-21-27.	Immunity of law enforcement officers for arrests arising from incidents of domestic violence.
93-21-28.	Emergency law enforcement response in domestic abuse cases.
93-21-29.	Proceedings to be in addition to other civil or criminal remedies.
93-21-31.	Domestic Violence Training Fund; funding of expenses of Domestic Violence Division of the Office of Attorney General; deposit of user charges and fees authorized under this section into State General Fund.
93-21-33.	Domestic Violence Task Force created; membership, duties and responsibilities.

§ 93-21-1. Short title.

This chapter shall be known and may be cited as the "Protection from Domestic Abuse Law."

HISTORY:

Laws, 1981, ch 429, § 1, eff from and after July 1, 1981.

Cross References —

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

Establishment and support of domestic violence shelters, see §§ 93-21-101 et seq.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

Authority of a law enforcement officer to arrest a person without a warrant if the person has violated an order or agreement entered pursuant to the Protection From Domestic Abuse Law (§§ 93-21-1 through 93-21-29), see § 99-3-7.

Applicability of Mississippi Rules of Civil Procedure to proceedings subject to provisions of Title 93, see Miss. R. Civ. P. 81.

Federal Aspects—

Victims of Child Abuse Act of 1990, P. L. 101-647 §§ 201 et seq., is codified at 42 USCS §§ 13001 et seq.

JUDICIAL DECISIONS

1. Protection order.

There is no precedent for converting a Miss. R. Civ. P. 65 domestic violence protection order into an injunction under the rule; neither the Domestic Abuse Protection Act nor the rule contemplates this action. Pratt v. Nelson, 170 So. 3d 620, 2015 Miss. App. LEXIS 381 (Miss. Ct. App. 2015).

Chancellor's decision to enter a restraining order and injunction under Miss. R. Civ. P. 65(b) was clearly erroneous because he applied the wrong legal standard; a sister did not request relief under the rule but only requested a domestic violence order of protection under the Domestic Abuse Protection Act, and since relief was not originally requested under the rule, the requirements of Rule 65(d)(2) had not been met regarding the petition for a domestic violence protection order. Pratt v. Nelson, 170 So. 3d 620, 2015 Miss. App. LEXIS 381 (Miss. Ct. App. 2015).

OPINIONS OF THE ATTORNEY GENERAL

Sections 93-21-1 through 93-21-29 apply to actions that may be taken in order to assure the safety of individuals who may be the victims of domestic abuse. They are not meant for criminal charges of domestic assault. 1996 Miss. Op. Att'y Gen. 862.

There is no requirement that a victim have a lawyer present before filing a petition seeking protection from abuse. 2004 Miss. Op. Att'y Gen. 527.

Form petitions, subpoenas, and orders have been developed specifically to meet the need of domestic violence victims in seeking protective orders. These forms are available from the office of the Attorney General or from the Mississippi Coalition Against Domestic Violence. 2004 Miss. Op. Att'y Gen. 527.

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

"Cohabitation" for purposes of domestic violence statutes. 71 A.L.R.5th 285.

Physical examination of child's body for evidence of abuse as violative of Fourth Amendment or as raising Fourth Amendment issue. 93 A.L.R. Fed. 530.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

CJS.

67A C.J.S., Parent §§ 170 et seq.

Practice References.

Family Law Litigation Guide with Forms:

Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-21-3. Definitions.

As used in this chapter, unless the context otherwise requires:

(a) "Abuse" means the occurrence of one or more of the following acts between spouses, former spouses, persons living as spouses or who formerly lived as spouses, persons having a child or children in common, other individuals related by consanguinity or affinity who reside together or who formerly resided together or between individuals who have a current or former dating relationship:

(i) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon;

(ii) Placing, by physical menace or threat, another in fear of imminent serious bodily injury;

(iii) Criminal sexual conduct committed against a minor within the meaning of Section 97-5-23;

(iv) Stalking within the meaning of Section 97-3-107;

(v) Cyberstalking within the meaning of Section 97-45-15; or

(vi) Sexual offenses within the meaning of Section 97-3-65 or 97-3-95.

"Abuse" does not include any act of self-defense.

(b) "Adult" means any person eighteen (18) years of age or older, or any person under eighteen (18) years of age who has been emancipated by marriage.

(c) "Court" means the chancery court, justice court, municipal court or county court.

(d) "Dating relationship" means a social relationship of a romantic or intimate nature between two (2) individuals; it does not include a casual relationship or ordinary fraternization between two (2) individuals in a business or social context. Whether a relationship is a "dating relationship" shall be determined by examining the following factors:

(i) The length of the relationship;

(ii) The type of relationship; and

(iii) The frequency of interaction between the two (2) individuals involved in the relationship.

(e) "Mutual protection order" means a protection order that includes provisions in favor of both the individual seeking relief and the respondent.

HISTORY:

Laws, 1981, ch 429, § 2; Laws, 1998, ch. 471, § 1; Laws, 2001, ch. 467, § 1; Laws, 2007, ch. 589, § 1; Laws, 2008, ch. 391, § 1; Laws, 2009, ch. 545, § 1, eff from and after July 1, 2009.

Cross References —

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see § 43-47-5.

Protective order from another jurisdiction issued to protect applicant from abuse as defined in this section to be accorded full faith and credit, see § 93-21-16.

Marriage as defense to charge of sexual battery, see § 97-3-99.

JUDICIAL DECISIONS

1. Abuse.

Chancery court erred in entering a domestic-violence protective order under Miss. Code Ann. § 93-21-7(1) against a husband because none of the events testified to by the wife satisfied the definition of "abuse" in Miss. Code Ann. § 93-21-3(a); the wife testified the husband had touched her stomach when she did not want him to, made her feel "pinned" near her car, and threatened to keep custody of their older child. Wolfe v. Wolfe, 49 So. 3d 650, 2010 Miss. App. LEXIS 634 (Miss. Ct. App. 2010).

OPINIONS OF THE ATTORNEY GENERAL

"Family or household member", as that term is used in Sections 97-3-7 and 99-3-7, includes individuals who are married, were married, or who live together in a relationship, although not married; further, it is not limited to a blood relationship and can relate to an in-law relationship or other relatives of one spouse living in the household; however, "boyfriend-girlfriend" (or any other variation of this) relationships are not included in the definition of "family or household member", unless the persons reside or resided together as spouses; finally, although not falling into the definition of "family or household member", if the individuals have a biological or legally adopted child between them, the relationship is also protected. 2000 Miss. Op. Att'y Gen. 588.

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

2 Am. Jur. Proof of Facts 2d, Child Abuse – The Battered Child Syndrome, §§ 35 et seq. (proof of physical abuse in juvenile or family court proceeding).

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition).

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-5. Jurisdiction and venue.

(1) The municipal justice, county or chancery court shall have jurisdiction over proceedings under this chapter as provided in this chapter. The petitioner's right to relief under this chapter shall not be affected by his leaving the residence or household to avoid further abuse.

(2) Venue shall be proper in any county or municipality where the respondent resides or in any county or municipality where the alleged abusive act or acts occurred.

(3) If a petition for an order for protection from domestic abuse is filed in a court lacking proper venue, the court, upon objection of the respondent, shall transfer the action to the appropriate venue pursuant to other applicable law.

(4) A record shall be made of any proceeding in justice or municipal court that involves domestic abuse.

HISTORY:

Laws, 1981, ch. 429, § 3; Laws, 2009, ch. 545, § 2; Laws, 2012, ch. 514, § 1, eff from and after July 1, 2012.

Cross References —

For purposes of judicial enforcement of certain protective orders from other jurisdictions, the orders are presumed valid if they meet the requirements of subsection (4) of this section, see § 93-21-16.

JUDICIAL DECISIONS

1. In general.

In interstate custody conflicts, the Uniform Child Custody Jurisdiction Act (UCCJA) provides the exclusive state law source for determining state court subject matter jurisdiction. The chancery courts have no power under the Protection From Domestic Abuse Law that are inconsistent with the jurisdictional injunctions of the UCCJA. Curtis v. Curtis, 574 So. 2d 24, 1990 Miss. LEXIS 850 (Miss. 1990).

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-7. Petition to seek domestic abuse protection order; proper forum for petition alleging domestic abuse; waiver of filing fees in domestic abuse cases.

(1) Any person may seek a domestic abuse protection order for himself by filing a petition alleging abuse by the respondent. Any parent, adult household member, or next friend of the abused person may seek a domestic abuse protection order on behalf of any minor children or any person alleged to be incompetent by filing a petition with the court alleging abuse by the respondent. Cases seeking relief under this chapter shall be priority cases on the court's docket and the judge shall be immediately notified when a case is filed in order to provide for expedited proceedings.

(2) A petition seeking a domestic abuse protection order may be filed in any of the following courts: municipal, justice, county or chancery. A chancery court shall not prohibit the filing of a petition which does not seek emergency relief on the basis that the petitioner did not first seek or obtain temporary relief in another court. A petition requesting emergency relief pending a hearing shall not be filed in chancery court unless specifically permitted by the chancellor under the circumstances or as a separate pleading in an ongoing chancery action between the parties. Nothing in this section shall:

(a) Be construed to require consideration of emergency relief by a chancery court; or

(b) Preclude a chancery court from entering an order of emergency relief.

(3) The petitioner in any action brought pursuant to this chapter shall not bear the costs associated with its filing or the costs associated with the issuance or service of any notice of a hearing to the respondent, issuance or service of an order of protection on the respondent, or issuance or service of a warrant or witness subpoena. If the court finds that the petitioner is entitled to an order protecting the petitioner from abuse, the court shall be authorized to assess all costs including attorney's fees of the proceedings to the respondent. The court may assess costs including attorney's fees to the petitioner only if the allegations of abuse are determined to be without merit and the court finds that the petitioner is not a victim of abuse as defined by Section 93-21-3.

HISTORY:

Laws, 1981, ch. 429, § 4; Laws, 2001, ch. 382, § 1; Laws, 2007, ch. 589, § 2; Laws, 2009, ch. 433, § 1; Laws, 2009, ch. 545, § 3; Laws, 2012, ch. 514, § 2, eff from and after July 1, 2012.

Joint Legislative Committee Note —

Section 1 of ch. 433, Laws of 2009, effective July 1, 2009 (approved March 23, 2009). Section 3 of ch. 545, Laws of 2009, effective from and after July 1, 2009 (approved April 15, 2009), also amended this section. As set out above, this section reflects the language of Section 3 of ch. 545, Laws of 2009, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References —

Victims of stalking and sexual assault exempt from payment of fees related to filing for injunctive relief, see § 99-1-31.

JUDICIAL DECISIONS

1. Insufficient evidence.

Chancery court erred in entering a domestic-violence protective order under Miss. Code Ann. § 93-21-7(1) against a husband because none of the events testified to by the wife satisfied the definition of "abuse" in Miss. Code Ann. § 93-21-3(a); the wife testified the husband had touched her stomach when she did not want him to, made her feel "pinned" near her car, and threatened to keep custody of their older child. Wolfe v. Wolfe, 49 So. 3d 650, 2010 Miss. App. LEXIS 634 (Miss. Ct. App. 2010).

OPINIONS OF THE ATTORNEY GENERAL

A petition filed with the justice court seeking a protective order should be filed and docketed as a civil case; in addition, the abused shall not bear the costs associated with the petition or service of warrants, unless the court finds that the allegations of abuse are false. 2003 Miss. Op. Att'y Gen. 199.

Any protective order issued by a justice court is temporary and shall not exceed ten days during which time the petitioner may seek a protective order from chancery court. 2003 Miss. Op. Att'y Gen. 199.

An indigent domestic violence victim may file a temporary ex parte restraining order without paying the $25.00 civil process fee to have the defendant served. 2003 Miss. Op. Att'y Gen. 368.

A person seeking a protective order from domestic violence is not required to pay any fees at the time of filing of the petition and there is no requirement that a pauper's oath or other statement of financial ability be filed. 2004 Miss. Op. Att'y Gen. 527.

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-9. Contents of petition.

(1) A petition filed under the provisions of this chapter shall state:

(a) Except as otherwise provided in this section, the name, address and county of residence of each petitioner and of each individual alleged to have committed abuse;

(b) The facts and circumstances concerning the alleged abuse;

(c) The relationships between the petitioners and the individuals alleged to have committed abuse; and

(d) A request for one or more domestic abuse protection orders.

(2) If a petition requests a domestic abuse protection order for a spouse and alleges that the other spouse has committed abuse, the petition shall state whether or not a suit for divorce of the spouses is pending and, if so, in what jurisdiction.

(3) Any temporary or permanent decree issued in a divorce proceeding subsequent to an order issued pursuant to this chapter may, in the discretion of the chancellor hearing the divorce proceeding, supersede in whole or in part the order issued pursuant to this chapter.

(4) If a petitioner is a former spouse of an individual alleged to have committed abuse:

(a) A copy of the decree of divorce shall be attached to the petition; or

(b) The petition shall state the decree is currently unavailable to the petitioner and that a copy of the decree will be filed with the court before the time for the hearing on the petition.

(5) If a petition requests a domestic abuse protection order for a child who is subject to the continuing jurisdiction of a youth court, family court or a chancery court, or alleges that a child who is subject to the continuing jurisdiction of a youth court, family court or chancery court has committed abuse:

(a) A copy of the court orders affecting the custody or guardianship, possession and support of or access to the child shall be filed with the petition; or

(b) The petition shall state that the orders affecting the child are currently unavailable to the petitioner and that a copy of the orders will be filed with the court before the hearing on the petition.

(6) If the petition includes a request for emergency relief pending a hearing, the petition shall contain a general description of the facts and circumstances concerning the abuse and the need for immediate protection.

(7) If the petition states that the disclosure of the petitioner's address would risk abuse of the petitioner or any member of the petitioner's family or household, or would reveal the confidential address of a shelter for domestic violence victims, the petitioner's address may be omitted from the petition. If a petitioner's address has been omitted from the petition pursuant to this subsection and the address of the petitioner is necessary to determine jurisdiction or venue, the disclosure of such address shall be made orally and in camera. A nonpublic record containing the address and contact information of a petitioner shall be maintained by the court to be utilized for court purposes only.

(8) Every petition shall be signed by the petitioner under oath that the facts and circumstances contained in the petition are true to the best knowledge and belief of the petitioner.

(9) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop a standardized form petition to be used when requesting a domestic abuse protection order.

HISTORY:

Laws, 1981, ch. 429, § 5; Laws, 1989, ch. 353, § 1; Laws, 2009, ch. 545, § 4, eff from and after July 1, 2009.

Editor's Notes —

Laws, 1999, ch. 432, § 1, provides that: "SECTION 1. From and after the date Laws, 1999, ch. 432, is effectuated under Section 5 of the Voting Rights Act of 1965, all family courts are abolished. All matters pending in any family court abolished shall be transferred to the county court of the county wherein the family court was located without the necessity for any motion or order of court for such transfer."

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Attorneys' fee awards in parent-nonparent child custody case. 45 A.L.R.4th 212.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-11. Notice and hearing.

(1) Within ten (10) days of the filing of a petition under the provisions of this chapter, the court shall hold a hearing, at which time the petitioner must prove the allegation of abuse by a preponderance of the evidence.

(2) The respondent shall be given notice of the filing of any petition and of the date, time and place set for the hearing by personal service of process. A court may conduct a hearing in the absence of the respondent after first

ascertaining that the respondent was properly noticed of the hearing date, time and place.

HISTORY:

Laws, 1981, ch. 429, § 6; Laws, 2007, ch. 589, § 3; Laws, 2009, ch. 545, § 5, eff from and after July 1, 2009.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error changing the word "act" to "chapter" in the first sentence of (1). The Joint Committee ratified the correction at its June 26, 2007 meeting.

Cross References —

All orders issued pursuant to this chapter to be maintained in Mississippi Protective Order Registry, see § 93-21-25.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Judicial misconduct.

1. In general.

County agency had no duty, under due process clause of Federal Constitution's Fourteenth Amendment, to protect child against abuse by his father while child was in father's custody. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249, 1989 U.S. LEXIS 1039 (U.S. 1989).

2. Judicial misconduct.

Supreme court accepted and affirmed the recommendation of the Mississippi Commission on Judicial Performance for a public reprimand of the judge because she was involved in her relatives' cases; she failed to adjudicate the domestic abuse cases properly by dismissing the matters without a hearing or order; she erred in ordering the refund of an expungement fee; she sought the removal of the complainant from her job; she violated the statute dealing with justice court fees; and her conduct was prejudicial to the administration of justice. Miss. Comm'n on Judicial Performance v. Curry, — So. 3d —, 2018 Miss. LEXIS 315 (Miss. July 26, 2018).

OPINIONS OF THE ATTORNEY GENERAL

The Court hearing a domestic violence charge could prohibit the defendant from possessing a handgun if, pursuant to Miss. Code Ann. § 93-21-11, the Court deems it necessary to protect the victim(s). Where a handgun was stolen from the defendant, recovered by a Police Department, and its return was requested by the defendant, the Department may ask the Court for such an order and if granted, may refuse to return the handgun to the defendant. Dawson, Jr., 2007 Miss. Op. Att'y Gen. 101, 2007 Miss. AG LEXIS 89.

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

2 Am. Jur. Proof of Facts 2d, Child Abuse – The Battered Child Syndrome, §§ 35 et seq. (proof of physical abuse in juvenile or family court proceeding).

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition).

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-13. Emergency domestic abuse protection order; duration of order; extension; entry of protection order into Mississippi Protection Order Registry; de novo hearing for parties aggrieved by issuance or denial of issuance of order.

(1)(a) The court in which a petition seeking emergency relief pending a hearing is filed must consider all such requests in an expedited manner. The court may issue an emergency domestic abuse protection order without prior notice to the respondent upon good cause shown by the petitioner. Immediate and present danger of abuse to the petitioner, any minor children or any person alleged to be incompetent shall constitute good cause for issuance of an emergency domestic abuse protection order. The respondent shall be provided with notice of the entry of any emergency domestic abuse protection order issued by the court by personal service of process.

(b) A court granting an emergency domestic abuse protection order may grant relief as provided in Section 93-21-15(1)(a).

(c) An emergency domestic abuse protection order shall be effective for ten (10) days, or until a hearing may be held, whichever occurs first. If a hearing under this subsection (1) is continued, the court may grant or extend the emergency order as it deems necessary for the protection of the abused person. A continuance under this subsection (1)(c) shall be valid for no longer than twenty (20) days.

(2) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop standardized forms for emergency domestic abuse protection orders. Use of the standardized forms in protection order proceedings pursuant to this chapter shall be fully implemented by all courts no later than July 1, 2015. However, in any criminal prosecution or contempt proceeding for a violation of a domestic abuse protection order, it shall not be a defense that the order was not issued on the standardized form.

(3) Upon issuance of any protection order by the court, the order shall be entered into the Mississippi Protection Order Registry by the clerk of the court pursuant to Section 93-21-25, and a copy provided to the sheriff's department in the county of the court of issuance.

(4) Any person aggrieved by the decision of a municipal or justice court judge to issue an emergency domestic abuse protection order or to deny issuance of an emergency domestic protection order shall be entitled to request a de novo review by the chancery or county court. All parties shall be advised of the procedure for seeking a de novo hearing.

HISTORY:

Laws, 1981, ch. 429, § 7; Laws, 1989, ch. 353, § 2; Laws, 1995, ch. 320, § 1; Laws, 1995, ch. 569, § 2; Laws, 1998, ch. 471, § 2; Laws, 2002, ch. 337, § 1; Laws, 2004, ch. 566, § 10; Laws, 2007, ch. 589, § 4; Laws, 2009, ch. 545, § 6; Laws, 2012, ch. 514, § 3, eff from and after July 1, 2012.

Cross References —

All orders issued pursuant to this chapter to be maintained in Mississippi Protective Order Registry, see § 93-21-25.

Mississippi Protection Order Registry, see § 93-21-25.

OPINIONS OF THE ATTORNEY GENERAL

Any protective order issued by a justice court is temporary and shall not exceed ten days during which time the petitioner may seek a protective order from chancery court. 2003 Miss. Op. Att'y Gen. 199.

A petition filed with the justice court seeking a protective order should be filed and docketed as a civil case; in addition, the abused shall not bear the costs associated with the petition or service of warrants, unless the court finds that the allegations of abuse are false. 2003 Miss. Op. Att'y Gen. 199.

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-15. Temporary domestic abuse protection orders; relief; duration; final domestic abuse protection order or consent agreements; provisions addressing custody, visitation or support of minor children; order to set forth findings of fact and provide details of acts restrained; order to be entered into Mississippi Protection Order Registry; modification, amendment or dissolution of order.

(1)(a) After a hearing is held as provided in Section 93-21-11 for which notice and opportunity to be heard has been granted to the respondent, and upon a finding that the petitioner has proved the existence of abuse by a preponderance of the evidence, the municipal and justice courts shall be empowered to grant a temporary domestic abuse protection order to bring about a cessation of abuse of the petitioner, any minor children, or any person alleged to be incompetent. The relief the court may provide includes, but is not limited to, the following:

(i) Directing the respondent to refrain from abusing the petitioner, any minor children, or any person alleged to be incompetent;

(ii) Prohibiting or limiting respondent's physical proximity to the abused or other household members as designated by the court, including residence and place of work;

(iii) Prohibiting or limiting contact by the respondent with the abused or other household members designated by the court, whether in person, by telephone or by other electronic communication;

(iv) Granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both; or

(v) Prohibiting the transferring, encumbering or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business.

(b) The duration of any temporary domestic abuse protection order issued by a municipal or justice court shall not exceed thirty (30) days. However, if the party to be protected and the respondent do not have minor children in common, the duration of the temporary domestic abuse protection order may exceed thirty (30) days but shall not exceed one (1) year.

(c) Any person aggrieved by the decision of a municipal or justice court judge to issue a temporary domestic abuse protection order or to deny such an order shall be entitled to request a de novo review by the chancery or county court. All parties shall be advised of the procedure for seeking a de novo hearing.

(2)(a) After a hearing is held as provided in Section 93-21-11 for which notice and opportunity to be heard has been granted to the respondent, and upon a finding that the petitioner has proved the existence of abuse by a preponderance of the evidence, the chancery or county court shall be empowered to grant a final domestic abuse protection order or approve any consent agreement to bring about a cessation of abuse of the petitioner, any minor children, or any person alleged to be incompetent. In granting a final domestic abuse protection order, the chancery or county court may provide for relief that includes, but is not limited to, the following:

(i) Directing the respondent to refrain from abusing the petitioner, any minor children, or any person alleged to be incompetent;

(ii) Granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both;

(iii) When the respondent has a duty to support the petitioner, any minor children, or any person alleged to be incompetent living in the residence or household and the respondent is the sole owner or lessee, granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both, or by consent agreement allowing the respondent to provide suitable, alternate housing;

(iv) Awarding temporary custody of or establishing temporary visitation rights with regard to any minor children or any person alleged to be incompetent, or both;

(v) If the respondent is legally obligated to support the petitioner, any minor children, or any person alleged to be incompetent, ordering the respondent to pay temporary support for the petitioner, any minor children, or any person alleged to be incompetent;

(vi) Ordering the respondent to pay to the abused person monetary compensation for losses suffered as a direct result of the abuse, including, but not limited to, medical expenses resulting from such abuse, loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses, a reasonable attorney's fee, or any combination of the above;

(vii) Prohibiting the transferring, encumbering, or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business;

(viii) Prohibiting or limiting respondent's physical proximity to the abused or other household members designated by the court, including residence, school and place of work;

(ix) Prohibiting or limiting contact by the respondent with the abused or other household members designated by the court whether in person, by telephone or by electronic communication; and

(x) Ordering counseling or professional medical treatment for the respondent, including counseling or treatment designed to bring about the cessation of domestic abuse.

(b) Except as provided below, a final domestic abuse protection order issued by a chancery or county court under the provisions of this chapter shall be effective for such time period as the court deems appropriate. The expiration date of the order shall be clearly stated in the order.

(c) Temporary provisions addressing temporary custody, visitation or support of minor children contained in a final domestic abuse protection order issued by a chancery or county court shall be effective for one hundred eighty (180) days. A party seeking relief beyond that period must initiate appropriate proceedings in the chancery court of appropriate jurisdiction. If at the end of the one-hundred-eighty-day period, neither party has initiated such proceedings, the custody, visitation or support of minor children will revert to the chancery court order addressing such terms that was in effect at the time the domestic abuse protection order was granted. The chancery court in which custody, visitation or support proceedings have been initiated may provide for any temporary provisions addressing custody, visitation or support as the court deems appropriate.

(3) Every domestic abuse protection order issued pursuant to this section shall set forth the reasons for its issuance, shall contain specific findings of fact regarding the existence of abuse, shall be specific in its terms and shall describe in reasonable detail the act or acts to be prohibited. No mutual protection order shall be issued unless that order is supported by an independent petition by each party requesting relief pursuant to this chapter, and the order contains specific findings of fact regarding the existence of abuse by each party as principal aggressor, and a finding that neither party acted in self-defense.

(4) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop standardized forms for temporary and final domestic abuse protection orders. The use of standardized forms in protection order proceedings pursuant to this chapter shall be fully implemented by all courts no later than July 1, 2015. However, in any criminal prosecution or contempt proceeding for a violation of a domestic abuse protection order, it shall not be a defense that the order was not issued on the standardized form.

(5) Upon issuance of any protection order by the court, the order shall be entered in the Mississippi Protection Order Registry by the clerk of the court pursuant to Section 93-21-25, and a copy shall be provided to the sheriff's department in the county of the court of issuance.

(6) Upon subsequent petition by either party and following a hearing of which both parties have received notice and an opportunity to be heard, the court may modify, amend, or dissolve a domestic abuse protection order previously issued by that court.

HISTORY:

Laws, 1981, ch. 429, § 8; Laws, 2002, ch. 337, § 2; Laws, 2007, ch. 589, § 5; Laws, 2009, ch. 545, § 7; Laws, 2012, ch. 514, § 4; Laws, 2014, ch. 463, § 2, eff from and after July 1, 2014.

Cross References —

All orders issued pursuant to this chapter to be maintained in Mississippi Protective Order Registry, see § 93-21-25.

Mississippi Protection Order Registry, see § 93-21-25.

Authority of a law enforcement officer to arrest a person without a warrant if the person has violated an order or agreement entered pursuant to the Protection From Domestic Abuse Law (§§ 93-21-1 through 93-21-29), see § 99-3-7.

JUDICIAL DECISIONS

1. In general.

County agency had no duty, under due process clause of Federal Constitution's Fourteenth Amendment, to protect child against abuse by his father while child was in father's custody. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249, 1989 U.S. LEXIS 1039 (U.S. 1989).

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-16. Full faith and credit for certain protective orders issued in other jurisdictions.

(1) A protective order from another jurisdiction issued to protect the applicant from abuse as defined in Section 93-21-3, or a protection order as defined in Section 93-22-3, issued by a tribunal of another state shall be accorded full faith and credit by the courts of this state and enforced in this state as provided for in the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

(2) For purposes of enforcement by Mississippi law enforcement officers, a protective order from another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, is presumed to be valid if it meets the requirements of Section 93-22-7.

(3) For purposes of judicial enforcement of a protective order issued in another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, an order is presumed valid if it meets the requirements of Section 93-22-5(4). It is an affirmative defense in any action seeking enforcement of a protective order issued in another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, that any criteria for the validity of the order is absent.

HISTORY:

Laws, 1999, ch. 434, § 1; Laws, 1999, ch. 552, § 1; Laws, 2004, ch. 566, § 11; Laws, 2007, ch. 589, § 6, eff from and after July 1, 2007.

Joint Legislative Committee Note —

Section 1 of ch. 434, Laws, 1999, effective from and after passage (approved March 19, 1999), enacted this section. Section 1 of ch. 552, Laws, 1999, effective from and after July 1, 1999, also enacted this section. As set out above, this section reflects the language of Section 1 of ch. 552, Laws, 1999, pursuant to Section 1-3-79, which provides that whenever the same section of law is enacted by different bills during the same legislative session, the enactment with the latest effective date shall supersede all other enactments of the same section taking effect earlier.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (1), (2) and (3). Deleted the words "of this act" after "Section 93-22-3". In (2), changed "Section 93-22-5(d)" to "Section 93-22-5(4)". The Joint Committee ratified the correction at its June 29, 2005 meeting.

Comparable Laws from other States —

Alabama Code, § 30-5-1 et seq., § 30-5A-1 et seq.

Arkansas Code Annotated, §§ 9-15-301 through 9-15-303.

Georgia Code Annotated, §§ 19-13-1 through 19-13-23.

Louisiana Revised Statutes Annotated, § 46:2136.

Tennessee Code Annotated, § 36-3-622.

Texas Family Code, §§ 86.005, 88.001 et seq.

§ 93-21-17. Grant of relief not to affect property titles or availability of other remedies; court approval required to amend orders.

(1) The granting of any relief authorized under this chapter shall not preclude any other relief provided by law.

(2) The court may amend its order or agreement at any time upon subsequent petition filed by either party. Protective orders issued under the provisions of this chapter may only be amended by approval of the court.

(3) No order or agreement under this chapter shall in any manner affect title to any real property.

HISTORY:

Laws, 1981, ch. 429, § 9; Laws, 2001, ch. 383, § 1; Laws, 2007, ch. 589, § 7, eff from and after July 1, 2007.

Cross References —

All orders issued pursuant to this chapter to be maintained in Mississippi Protective Order Registry, see § 93-21-25.

§ 93-21-19. Testimony by spouses not to be restricted.

There shall be no restrictions concerning a spouse testifying against his spouse in any hearing under the provisions of this chapter.

HISTORY:

Laws, 1981, ch. 429, § 10, eff from and after July 1, 1981.

Cross References —

Competency of spouses as witnesses, generally, see § 13-1-5.

Unavailability of husband-wife privilege in certain non-support and paternity actions, see § 43-19-43.

Suits between spouses, see § 93-3-3.

RESEARCH REFERENCES

ALR.

Competency of one spouse to testify against other in prosecution for offense against child of both or either. 93 A.L.R.3d 1018.

Propriety and prejudicial effect of third party accompanying or rendering support to witness during testimony. 82 A.L.R.4th 1038.

Am. Jur.

81 Am. Jur. 2d, Witnesses §§ 230 et seq.

§ 93-21-21. Knowing violation of protection orders, court-approved consent agreements or bond conditions issued by Mississippi or foreign courts is misdemeanor or contempt; penalties.

(1) Upon a knowing violation of (a) a protection order or court-approved consent agreement issued pursuant to this chapter, (b) a similar order issued by a foreign court of competent jurisdiction for the purpose of protecting a person from domestic abuse, or (c) a bond condition imposed pursuant to Section 99-5-37, the person violating the order or condition commits a misdemeanor punishable by imprisonment in the county jail for not more than six (6) months or a fine of not more than One Thousand Dollars ($1,000.00), or both.

(2) Alternatively, upon a knowing violation of a protection order or court-approved consent agreement issued pursuant to this chapter or a bond condition issued pursuant to Section 99-5-37, the issuing court may hold the person violating the order or bond condition in contempt, the contempt to be punishable as otherwise provided by applicable law. A person shall not be both convicted of a misdemeanor and held in contempt for the same violation of an order or bond condition.

(3) When investigating allegations of a violation under subsection (1) of this section, law enforcement officers shall utilize the uniform offense report prescribed for this purpose by the Office of the Attorney General in consultation with the sheriff's and police chief's associations. However, failure of law enforcement to utilize the uniform offense report shall not be a defense to a crime charged under subsection (1) of this section.

(4) In any conviction for a violation of a domestic abuse protection order as described in subsection (1) of this section, the court shall enter the disposition of the matter into the corresponding uniform offense report.

(5) Nothing in this section shall be construed to interfere with the court's authority, if any, to address bond condition violations in a more restrictive manner.

HISTORY:

Laws, 1981, ch. 429, § 11; Laws, 2003, ch. 430, § 1; Laws, 2012, ch. 514, § 5, eff from and after July 1, 2012.

Cross References —

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

Authority of a law enforcement officer to arrest a person without a warrant if the person has violated an order or agreement entered pursuant to the Protection From Domestic Abuse Law (§§ 93-21-1 through 93-21-29), see § 99-3-7.

Mississippi Protection Order Registry, see § 93-21-2

OPINIONS OF THE ATTORNEY GENERAL

Any individual violating a restraining order or injunction issued under the Protection from Domestic Abuse Law or a similar order from a foreign court may be arrested without a warrant and charged with a violation of § 93-21-21. 2002 Miss. Op. Att'y Gen. 212.

RESEARCH REFERENCES

Am. Jur.
6 Am. Jur. 2d, Assault and Battery §§ 27, 28.
41 Am. Jur. 2d, Husband and Wife § 251 et seq.
42 Am. Jur. 2d, Infants §§ 12-23.
59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

CJS.
67A C.J.S., Parent §§ 170 et seq.

§ 93-21-23. Participants in reports or proceedings presumed acting in good faith; immunity from liability.

Any licensed doctor of medicine, licensed doctor of dentistry, intern, resident or registered nurse, psychologist, social worker, family protection worker, family protection specialist, preacher, teacher, attorney, law enforcement officer, or any other person or institution participating in the making of a report pursuant to this chapter or participating in judicial proceedings resulting therefrom shall be presumed to be acting in good faith, and if found to have acted in good faith shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed. The reporting of an abused person shall not constitute a breach of confidentiality.

HISTORY:
Laws, 1981, ch 429, § 12; Laws, 2004, ch. 489, § 8; Laws, 2006, ch. 600, § 10, eff from and after July 1, 2006.

RESEARCH REFERENCES

ALR.
Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect. 44 A.L.R.4th 649.
Validity, construction, and application of state statute requiring doctor or other person to report child abuse. 73 A.L.R.4th 782.

Am. Jur.
6 Am. Jur. Proof of Facts 2d, Failure to Report Suspected Case of Child Abuse, §§ 10 et seq. (proof of physicians' negligent failure to diagnose and report suspected case of child abuse).
24 Am. Jur. Proof of Facts 3d 1, Action by Crime Victim Against School Arising out of Assault or Criminal Act.

§ 93-21-25. Mississippi Protection Order Registry; certain orders to be maintained in registry; duties of clerk of issuing court; process for entry and removal of orders.

(1) In order to provide a statewide registry for protection orders and to aid law enforcement, prosecutors and courts in handling such matters, the Attorney General is authorized to create and administer a Mississippi Protection Order Registry. The Attorney General's office shall implement policies and procedures governing access to the registry by authorized users, which shall include provisions addressing the confidentiality of any information which may tend to reveal the location or identity of a victim of domestic abuse.

(2) All orders issued pursuant to Sections 93-21-1 through 93-21-29, 97-3-7(11), 97-3-65(6) or 97-3-101(5) will be maintained in the Mississippi Protection Order Registry. It shall be the duty of the clerk of the issuing court to enter all civil and criminal domestic abuse protection orders and all criminal

sexual assault protection orders, including any modifications, amendments or dismissals of such orders, into the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays. A separate copy of any order shall be provided to the sheriff's department TAC officers of the county of the issuing court. The copy may be provided in electronic format. Each qualifying protection order submitted to the Mississippi Protection Order Registry shall be automatically transmitted to the National Criminal Information Center Protection Order File. Failure of the clerk to enter the order into the registry or to provide a copy of the order to law enforcement shall have no effect on the validity or enforcement of an otherwise valid protection order.

Any information regarding the registration or issuance of a civil or criminal domestic abuse protection order or a criminal sexual assault protection order, or the filing of a petition for a civil domestic abuse protection order which is maintained in the Mississippi Protection Order Registry and would tend to reveal the identity or location of the protected person(s) shall not constitute a public record and shall be exempt from disclosure pursuant to the Mississippi Public Records Act of 1983. This information may be disclosed to appropriate law enforcement, prosecutors or courts for protection order enforcement purposes.

HISTORY:

Laws, 1981, ch. 429, § 13; Laws, 2007, ch. 589, § 8; Laws, 2009, ch. 433, § 5; Laws, 2012, ch. 514, § 6; Laws, 2015, ch. 332, § 2; Laws, 2017, ch. 414, § 4, eff from and after passage (approved Apr. 6, 2017).

Amendment Notes —

The 2017 amendment, effective April 6, 2017, in the first paragraph of (2), inserted "97-3-65(6) or 97-3-101(5)" and made a related change in the first sentence, and inserted "and all criminal sexual assault protection orders" in the second sentence; and in the second paragraph of (2), rewrote the first sentence, which read: "Any information regarding the registration of a domestic violence protection order, the filing of a petition for a domestic violence protection order, or the issuance of a domestic violence protection order which is maintained in the Mississippi Protection Order Registry which would tend to reveal the identity or location of the protected person(s) shall not constitute a public record and shall be exempt from disclosure pursuant to the Mississippi Public Records Act of 1983."

Cross References —

Mississippi Public Records Act of 1983, see § 25-61-1 et seq.

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

RESEARCH REFERENCES

ALR.

Liability of health maintenance organizations (HMOs) for negligence of member physicians. 51 A.L.R.5th 271.

Physical examination of child's body for evidence of abuse as violative of Fourth Amendment or as raising Fourth Amendment issue. 93 A.L.R. Fed. 530.

Am. Jur.

6 Am. Jur. Proof of Facts 2d, Failure to Report Suspected Case of Child Abuse, §§ 10 et seq. (proof of physicians' negligent failure to diagnose and report suspected case of child abuse).

§ 93-21-27. Immunity of law enforcement officers for arrests arising from incidents of domestic violence.

A law enforcement officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from an alleged domestic violence incident brought by any authorized party, or an arrest made in good faith pursuant to Section 99-3-7(3), or failure, in good faith, to make an arrest pursuant to Section 99-3-7(3).

HISTORY:

Laws, 1981, ch. 429, § 14; Laws, 1988, ch. 571, § 2, eff from and after passage (approved May 21, 1988).

Cross References —

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

Authority of a law enforcement officer to arrest a person without a warrant if the person has violated an order or agreement entered pursuant to the Protection From Domestic Abuse Law (§§ 93-21-1 through 93-21-29), see § 99-3-7.

JUDICIAL DECISIONS

ANALYSIS

1. Police immunity.
2. Use of excessive force.

1. Police immunity.

Even if the town police officers owed a duty to the murder victim under Miss. Code Ann. § 99-3-7(3)(a), Miss. Code Ann. § 93-21-27 specifically provided immunity to the officers. Fair v. Town of Friars Point, 930 So. 2d 467, 2006 Miss. App. LEXIS 419 (Miss. Ct. App. 2006).

Circuit court properly determined that the immunity provisions of Miss. Code Ann. §§ 93-21-28 and 93-21-27 pertaining to a police officer's response to a domestic abuse call did not apply in a citizen's excessive force action because the qualifier for immunity under Miss. Code Ann. §§ 93-21-28 and 93-21-27 was that the police officer must take steps that were reasonably necessary and the arrest or act must be in good faith. The record showed that the police officer's actions in responding to a domestic disturbance call at the citizen's parents' home was not reasonable or in good faith because the officer handcuffed the citizen and then ground his face into the concrete garage floor, which caused his teeth to break. City of Jackson v. Calcote, 910 So. 2d 1103, 2005 Miss. App. LEXIS 49 (Miss. Ct. App. 2005).

2. Use of excessive force.

Finding that a city was not liable for a citizen's injuries under Miss. Code Ann. § 11-46-5(2) was reversed because the police acted with malice when they responded to a domestic disturbance call; a citizen was arrested for resisting arrest and disorderly conduct, was handcuffed and in submission, and one officer ground the citizen's face into the concrete garage floor, causing his teeth to break. The court held that the circuit court properly found that the immunity provisions of Miss. Code Ann. §§ 93-21-27 and 93-21-28 pertaining to domestic abuse incidents did not apply. City of Jackson v. Calcote, 910 So. 2d 1103, 2005 Miss. App. LEXIS 49 (Miss. Ct. App. 2005).

§ 93-21-28. Emergency law enforcement response in domestic abuse cases.

(1) A person who alleges that he or she or a minor child has been the victim of domestic violence may request the assistance of a local law enforcement agency. The local law enforcement agency shall respond to the request for assistance. The local law enforcement officer responding to the request for assistance shall take whatever steps are reasonably necessary to protect the complainant from harm and shall advise the complainant of sources of shelter,

medical care, counseling and other services. Upon request by the complainant and where feasible, the law enforcement officer shall transport the complainant to appropriate facilities such as hospitals or public or private facilities for shelter and accompany the complainant to his or her residence, within the jurisdiction in which the request for assistance was made, so that the complainant may remove food, clothing, medication and such other personal property as is reasonably necessary to enable the complainant and any minor children who are presently in the care of the complainant to remain elsewhere pending further proceedings.

(2) In providing the assistance authorized by subsection (1), no officer may be held criminally or civilly liable on account of reasonable measures taken under authority of subsection (1).

HISTORY:

Laws, 1995, ch. 569, § 1, eff from and after July 1, 1995.

JUDICIAL DECISIONS

ANALYSIS

1. Police immunity.
2. Use of excessive force.

1. Police immunity.

Circuit court properly determined that the immunity provisions of Miss. Code Ann. §§ 93-21-28 and 93-21-27 pertaining to a police officer's response to a domestic abuse call did not apply in a citizen's excessive force action because the qualifier for immunity under Miss. Code Ann. §§ 93-21-28 and 93-21-27 was that the police officer must take steps that were reasonably necessary and the arrest or act must be in good faith. The record showed that the police officer's actions in responding to a domestic disturbance call at the citizen's parents' home was not reasonable or in good faith because the officer handcuffed the citizen and then ground his face into the concrete garage floor, which caused his teeth to break. City of Jackson v. Calcote, 910 So. 2d 1103, 2005 Miss. App. LEXIS 49 (Miss. Ct. App. 2005).

2. Use of excessive force.

Finding that a city was not liable for a citizen's injuries under Miss. Code Ann. § 11-46-5(2) was reversed because the police acted with malice when they responded to a domestic disturbance call; a citizen was arrested for resisting arrest and disorderly conduct, was handcuffed and in submission, and one officer ground the citizen's face into the concrete garage floor, causing his teeth to break. The court held that the circuit court properly found that the immunity provisions of Miss. Code Ann. §§ 93-21-27 and 93-21-28 pertaining to domestic abuse incidents did not apply. City of Jackson v. Calcote, 910 So. 2d 1103, 2005 Miss. App. LEXIS 49 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

Am. Jur.

28 Am. Jur. Proof of Facts 3d 1, Proof of Equal Protection Violation by Municipal Police Department in Failing to Protect Victims of Domestic Violence.

CJS.

28 C.J.S., Domestic Abuse and Violence §§ 27 et seq.

§ 93-21-29. Proceedings to be in addition to other civil or criminal remedies.

Any proceeding under this chapter shall be in addition to other available civil or criminal remedies.

HISTORY:

Laws, 1981, ch. 429, § 15, eff from and after July 1, 1981.

Cross References —

Crimes against the person, generally, see §§ 97-3-1 et seq.

Offenses affecting children, generally, see §§ 97-5-1 et seq.

Penalties for contributing to neglect or delinquency of a child and felonious abuse or battery of a child, see § 97-5-39.

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-31. Domestic Violence Training Fund; funding of expenses of Domestic Violence Division of the Office of Attorney General; deposit of user charges and fees authorized under this section into State General Fund.

(1) There is hereby created in the State Treasury a special fund designated as the Domestic Violence Training Fund. The fund shall be administered by the Attorney General. Money remaining in the fund at the end of a fiscal year shall not lapse into the State General Fund and any interest earned from the investment of monies in the fund shall be deposited to the credit of the fund. Monies appropriated to the fund shall be used by the Attorney General for the general administration and expenses of the Domestic Violence Division which provides training to law enforcement, prosecutors, judges, court clerks and other professionals in the field of domestic violence awareness, prevention and enforcement.

(2) The clerks of the various courts shall remit the proceeds generated by Chapter 434, Laws of 2009, to the Department of Finance and Administration as is done generally for other fees collected by the clerks.

(3) From and after July 1, 2016, the expenses of the Domestic Violence Division of the Office of Attorney General shall be defrayed by appropriation from the State General Fund and all user charges and fees authorized under this section shall be deposited into the State General Fund as authorized by law and as determined by the State Fiscal Officer.

(4) From and after July 1, 2016, no state agency shall charge another state agency a fee, assessment, rent or other charge for services or resources received by authority of this section.

HISTORY:

Laws, 2009, ch. 433, § 7; Laws, 1st Ex Sess, 2017, ch. 7, § 40, eff from and after passage (approved June 23, 2017).

Amendment Notes —

The 2017 amendment, effective June 23, 2017, added (3) and (4).

§ 93-21-33. Domestic Violence Task Force created; membership, duties and responsibilities.

(1) There is established the Domestic Violence Task Force, which will be made up of not more than twenty-six (26) members as follows:

(a) The Governor shall appoint the following appointees who shall possess a practicing knowledge of domestic violence as follows:

(i) Four (4) executive directors of domestic violence shelters representing the geographical divisions of the Delta, South, Central and North Mississippi;

(ii) Two (2) batterer's intervention program managers;

(b) The Attorney General, or his designee;

(c) The State Auditor, or his designee;

(d) The Executive Director of the Mississippi Association of Police Chiefs, or his designee;

(e) The Executive Director of the Mississippi Prosecutor's Association, or his designee;

(f) The Executive Director of the Mississippi Sheriff's Association, or his designee;

(g) The Executive Director of the Mississippi Judicial College, or his or her designee;

(h) A practicing member of the Mississippi State Medical Association appointed by the Governor;

(i) A seated or retired justice court judge appointed by the Governor;

(j) A seated or retired chancery court judge appointed by the Governor;

(k) A seated or retired municipal court judge appointed by the Governor;

(*l*) A seated or retired county court judge appointed by the Governor;

(m) One (1) licensed social worker appointed by the Governor;

(n) One (1) attorney with lobbying experience appointed by the Governor;

(o) Two (2) victims of domestic violence appointed by the Governor;

(p) One (1) practicing municipal prosecutor appointed by the Governor;

(q) One (1) member of the faith-based community to be appointed by the Governor;

(r) One (1) statistical expert appointed by the Governor;

(s) One (1) information technology professional appointed by the Governor; and

(t) The Director of the Mississippi Coalition Against Domestic Violence, or her designee.

The members of the task force shall serve at the pleasure of their respective appointing authorities; ten (10) members shall constitute a quorum for the transaction of business. The members shall elect a chairman and committees whose duties shall be established by the task force.

(2) The Chairmen of the House Public Health and Welfare Committee, the House Appropriations Committee, the Senate Public Health and Welfare Committee and the Senate Appropriations Committee, or their designees, two (2) members of the State Senate appointed by the Lieutenant Governor and one (1) member of the House of Representatives appointed by the Speaker of the House, shall serve as ex officio nonvoting members of the task force.

(3) In addition to the committee members required by subsection (2), the task force shall consist of such other members as are necessary to meet the requirements of any federal regulation applicable to the task force.

(4) The chairman of the task force shall be elected by the voting members of the committee annually and shall not serve more than two (2) consecutive years as chairman. The chair shall call the meetings of the task force.

(5) The members of the task force shall serve without compensation.

(6) The task force shall meet not less than quarterly, and task force members shall be furnished written notice of the meetings at least ten (10) days before the date of the meeting. The first meeting of the task force shall be called by the Governor within sixty (60) days of March 20, 2013.

(7) The task force shall provide recommendations and advice regarding the following:

(a) Streamlining funding to domestic violence shelters resulting in uniform and objective funding and auditing standards;

(b) Providing recommendations regarding the Victims of Domestic Violence Fund under Section 93-21-117 and its disbursement to shelters;

(c) Considering the impact, definition, funding and certification of batterer intervention programs;

(d) Creating standards for confidentiality of client records;

(e) Updating training requirements for grant monitors, law enforcement and court personnel;

(f) Providing uniform reporting and automation options;

(g) Implementing the formation of a domestic violence commission with the charge of executing recommendations made by this task force;

(h) Recommending whether the administration of federal grant funds, including, but not limited to, the grant funds known as VOCA and VOWA, should be relocated to the Office Against Interpersonal Violence under the umbrella of the Department of Health.

(8) The Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER) will provide support and recommendations to the task force.

(9)(a) The task force will develop a report with legislative recommendations to the Governor and to the 2014 Regular Session of the Legislature to be submitted no later than October 1, 2013.

(b) The task force will develop an additional report with legislative recommendations to the Governor and to the 2015 Regular Session of the Legislature to be submitted no later than October 15, 2014.

(c) The task force shall stand dissolved on December 31, 2014.

HISTORY:

Laws, 2013, ch. 395, § 1; Laws, 2014, ch. 509, § 9, eff from and after passage (approved Apr. 23, 2014).

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (7)(h) by substituting "Office Against Interpersonal Violence" for "Office of Interpersonal Violence." The Joint Committee ratified the correction at its July 24, 2014, meeting.

ARTICLE 3.

DOMESTIC VIOLENCE SHELTERS.

Sec.

93-21-101. Definitions.
93-21-103. Domestic violence shelters.
93-21-105. Repealed.
93-21-107. Eligibility for funds; requirements.
93-21-109. Records withheld from public disclosure.
93-21-111. Annual report.
93-21-113. Reporting criminal acts or omissions to law enforcement personnel; filing charges against offender; plea bargaining.
93-21-115. Donations from municipalities to support local shelters.
93-21-117. Victims of Domestic Violence Fund.
93-21-119. Office Against Interpersonal Violence (OAIV) established; OAIV Advisory Board; purpose, membership.
93-21-121. Office Against Interpersonal Violence powers and duties.
93-21-123. Office Against Interpersonal Violence authorized to seek, receive and administer certain grants.

§ 93-21-101. Definitions.

As used in Sections 93-21-101 through 93-21-113, unless the context otherwise requires:

(a) "Domestic violence shelter" means a place established to provide temporary food and shelter, counseling, and related services to victims of domestic violence.

(b) "Interpersonal violence" means any behavior between family members and intimate partners, but also between acquaintances and strangers, that causes physical, psychological, or sexual harm and includes the crimes of domestic violence, stalking, sexual assault, trafficking, child sexual abuse, and related crimes.

(c) "Batterer intervention program" means a program that focuses on behavior modification for perpetrators of domestic violence in an effort to prevent domestic violence from reoccurring. This shall not include programs focusing on anger management or marriage counseling. Any batterer intervention program must document cooperation with a domestic violence shelter program.

(d) "OAIV" means the Office Against Interpersonal Violence established in Section 93-21-119.

HISTORY:

Laws, 1983, ch. 502, § 1, eff from the after passage (approved April 12, 1983); Laws, 2014, ch. 509, § 4, eff from and after July 1, 2014.

Cross References —

Exemption from sales tax of sales of tangible personal property or services to domestic violence shelters which qualify for state funding, see § 27-65-111.

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

Protection from domestic abuse, generally, see §§ 93-21-1 et seq.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome. 18 A.L.R.4th 1153.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

2 Am. Jur. Proof of Facts 2d, Child Abuse – The Battered Child Syndrome, §§ 35 et seq. (proof of physical abuse in juvenile or family court proceeding).

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition).

23 Am. Jur. Proof of Facts 2d, Pain and Suffering, §§ 1-30.

CJS.

67A C.J.S., Parent §§ 170 et seq.

Practice References.

Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice (Matthew Bender).

Family Law and Practice (Matthew Bender).

Kolodny, Koritzinsky, Stark and Gold-Bikin, Divorce Practice Handbook (Michie).

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-21-103. Domestic violence shelters.

There is hereby established a program for victims of domestic violence through domestic violence shelters. The oversight of shelters, and distribution of state funds for the purpose of serving victims of domestic violence, shall be the responsibility of the Office Against Interpersonal Violence created in Sections 93-21-119 through 93-21-123. The Office Against Interpersonal Violence shall have the authority to promulgate the administrative rules that are necessary and proper to further carry out the purposes of this section.

HISTORY:

Laws, 1983, ch. 502, § 2; Laws, 2014, ch. 509, § 5, eff from and after July 1, 2014.

Cross References —

Exemption from sales tax of sales of tangible personal property or services to domestic violence shelters which qualify for state funding, see § 27-65-111.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

Federal Aspects—

Displaced homemakers self-sufficiency assistance act, P. L. 101-554, 29 USCS 2301 et seq.

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome. 18 A.L.R.4th 1153.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 103 et seq.

2 Am. Jur. Proof of Facts 2d, Child Abuse – The Battered Child Syndrome, §§ 35 et seq. (proof of physical abuse in juvenile or family court proceeding).

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition).

23 Am. Jur. Proof of Facts 2d, Pain and Suffering, §§ 1-30.

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-105. Repealed.

Repealed by Laws, 2014, ch. 509, § 10, effective from and after July 1, 2014.

§ 93-21-105. [Laws, 1983, ch. 502, § 3, eff from and after passage (approved April 12, 1983).]

Editor's Notes —

Former § 93-21-105 provided specific statutory criteria for the allocation of state funds to domestic violence shelters.

§ 93-21-107. Eligibility for funds; requirements.

(1) To qualify for funds under the provisions of Sections 93-21-101 through 93-21-113, a domestic violence shelter shall meet all the following requirements:

(a) Be incorporated in the state or recognized by the Secretary of State as a private or public nonprofit corporation. Such corporation shall have a board of directors and/or an advisory committee who represents the racial, ethnic and social economic diversity of the area to be served, including, if possible, at least one (1) person who is or has been a victim of domestic violence.

(b) Have designed and developed a program to provide the following basic services to victims of domestic violence and their children:

(i) Shelter on a twenty-four (24) hour a day, seven (7) days a week basis.

(ii) A twenty-four (24) hour, seven (7) days a week switchboard for crisis calls.

(iii) Temporary housing and food facilities.

(iv) Group support and peer counseling.

(v) Referrals to existing services in the community and follow-up on the outcome of the referrals.

(vi) A method of referral for medical care, legal assistance and group support and counseling of victims of domestic violence.

(vii) Information regarding reeducation, marriage and family counseling, job counseling, and training programs, housing referrals, and other available social services.

(viii) A referral program of counseling for the victim and the offender.

(2) Domestic violence shelters shall establish procedures for admission of victims of domestic violence who may seek admission to these shelters on a voluntary basis.

(3) A domestic violence shelter shall not qualify for funds if it discriminates in its admissions or provision of services on the basis of race, religion, color, age, marital status, national origin or ancestry.

(4) Any state-source grant made to a shelter shall be matched with local funds in an amount not less than twenty-five percent (25%) of the state-source grant amount. The local contribution may not include in-kind contributions.

(5) A domestic violence shelter receiving state funding under the provisions of Sections 93-21-101 through 93-21-113 shall not be prohibited from accepting gifts, trusts, bequests, grants, endowments, federal funds, other special source funds or transfers of property of any kind for the support of that shelter program.

(6) The OAIV shall insure that no grant made with state funds is in an amount that would exceed One Hundred Thousand Dollars ($100,000.00) inflated by a general CPI inflator to insure that the grant offers shelters the same buying power that a grant of One Hundred Thousand Dollars ($100,000.00) provided in 1983.

(7) A domestic violence shelter shall require persons employed by or volunteering services to the shelter to maintain the confidentiality of any information that would identify individuals served by the shelter.

(8) A domestic violence shelter shall provide educational programs relating to battered spouses and domestic violence designed for both the community at large and/or specialized groups such as hospital personnel and law enforcement officials.

(9) No child shall be placed in any domestic violence shelter that receives state funding under these provisions of Sections 93-21-101 through 93-21-113, and no domestic violence shelter that receives state funding under these provisions may admit or accept any child, unless the child is accompanied by his parent or guardian and such parent or guardian will remain with the child in the shelter until the child leaves or is released from the shelter. However, this subsection shall not prevent any rape crisis center from providing care, counseling and related services to any child who is a victim of rape, attempted rape, sexual battery or attempted sexual battery and who is not accompanied by his parent or guardian.

HISTORY:

Laws, 1983, ch. 502, § 4; Laws, 1990, ch. 539, § 3; Laws, 2014, ch. 509, § 6, eff from and after July 1, 2014.

Cross References —

Exemption from sales tax of sales of tangible personal property or services to domestic violence shelters which qualify for state funding, see § 27-65-111.

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

Office Against Interpersonal Violence (OAIV), see §§ 93-21-119 through 93-21-123.

Federal Aspects—

Displaced homemakers self-sufficiency assistance act, P. L. 101-554, 29 USCS 2301 et seq.

§ 93-21-109. Records withheld from public disclosure.

(1) Records maintained by domestic violence shelters, except the official minutes of the board of directors of the shelter, and financial reports filed as required by statute with the board of supervisors or municipal authorities or any other agency of government, shall be withheld from public disclosure under the provisions of the Mississippi Public Records Act of 1983.

(2) Any employee, contractor, volunteer or agent of a domestic violence shelter, or of any other entity in possession of information which would tend to identify a victim of domestic violence, who discloses any information that is exempt from disclosure under the Mississippi Public Records Act of 1983, or makes any observation or comment about the identity or condition of any person admitted to a shelter or receiving services of a shelter, unless directed to do so by an order of a court of competent jurisdiction, shall be civilly liable to the person whose personal information was disclosed in the amount of Ten Thousand Dollars ($10,000.00), plus any compensatory damages that the individual may have suffered as the result of the disclosure.

(3)(a) No employee, contractor, volunteer or agent of a domestic violence shelter shall be compelled to testify in any civil matter, or surrender any documents, files, or other records of the shelter, regarding a victim of domestic violence or sexual assault without the consent of the victim, except as provided herein.

(b) A defendant may request from the court an in camera review of the materials in possession of any shelter employees, contractors, agents or volunteers to determine if there would be a good cause for allowing disclosure of the materials. In deciding on disclosure, the court shall consider the following factors:

(i) The materiality of the information to the defense; and

(ii) The effect disclosure may have on the victim and the victim's relationship with the employee, contractor, volunteer, or agent of the shelter.

(4) A resident or staff member of a domestic violence shelter shall not be required to disclose the street address or physical location of that shelter to any public or private agency. In all cases where the provision of a physical address is required, a post office box address for the domestic violence shelter shall be deemed sufficient.

HISTORY:

Laws, 1983, ch. 502, § 5; Laws, 2002, ch. 337, § 3; Laws, 2014, ch. 509, § 7, eff from and after July 1, 2014.

Cross References —

Mississippi Public Records Act of 1983, generally, see §§ 25-61-1 et seq.

Exemption from sales tax of sales of tangible personal property or services to domestic violence shelters which qualify for state funding, see § 27-65-111.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

Mississippi Public Records Act of 1983, see § 25-61-1 et seq.

§ 93-21-111. Annual report.

A domestic violence shelter that receives funds pursuant to the provisions of Sections 93-21-101 through 93-21-113 shall file at a minimum an annual report with the commission of budget and accounting and other data reports as requested. A copy of the annual report shall also be furnished to the chairmen of the pensions, social welfare and public health committee of the Mississippi House of Representatives and the public health and welfare committee of the Mississippi Senate. The annual report shall include statistics on the number of persons served by the shelter, the relationship of the victim of domestic violence to the offender, the number of referrals made for medical, psychological, financial, educational, vocational, child care, or legal services, and shall include the results of an independent audit. No information contained in the report shall identify any person served by the shelter, or enable any person to determine the identity of any such person.

HISTORY:

Laws, 1983, ch. 502, § 6, eff from and after passage (approved April 12, 1983).

Cross References —

Exemption from sales tax of sales of tangible personal property or services to domestic violence shelters which qualify for state funding, see § 27-65-111.

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

§ 93-21-113. Reporting criminal acts or omissions to law enforcement personnel; filing charges against offender; plea bargaining.

Domestic violence shelters through their employees and officials shall, on every occasion other than the initial request for assistance, report to the district attorney, the county attorney, or the appropriate law enforcement official or other state agencies any occurrence or instance coming to their attention which would involve the commission of a crime or the failure to perform or render a service or assistance to a victim of domestic violence when required by law to do so.

Every municipal prosecutor, county attorney, district attorney or other appropriate law enforcement official who, having had reported to him a case of domestic violence, if the facts submitted be sufficient, shall immediately file charges against the offender on the behalf of the victim. Such prosecutor may in plea bargaining with the offender enter into an agreement whereby the offender shall receive counseling in lieu of further prosecution, and if the offender shall successfully attend counseling as agreed upon for the period of time agreed upon, the municipal prosecutor, county attorney or district attorney, as the case may be, shall pass such case to the file.

No municipal prosecutor, county attorney or district attorney shall grant such right in plea bargaining to the same offender more than once.

HISTORY:

Laws, 1983, ch. 502, § 7; Laws, 2007, ch. 589, § 9, eff from and after July 1, 2007.

Cross References —

Exemption from sales tax of sales of tangible personal property or services to domestic violence shelters which qualify for state funding, see § 27-65-111.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

JUDICIAL DECISIONS

1. In general.

County agency had no duty, under due process clause of Federal Constitution's Fourteenth Amendment, to protect child against abuse by his father while child was in father's custody. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249, 1989 U.S. LEXIS 1039 (U.S. 1989).

OPINIONS OF THE ATTORNEY GENERAL

This section provides prosecutors with the authority to offer, in plea bargaining with an individual charged with a first offense of simple domestic violence, to allow such an offender to enter into an agreement whereby they receive counseling in lieu of further prosecution. It is a matter within the prosecutor's discretion whether to make such an offer to a defendant, based upon the facts of each case. If an offender agrees to receive the recommended counseling in lieu of further prosecution, and in fact successfully completes the counseling, the prosecutor shall pass the case to the file. 2004 Miss. Op. Att'y Gen. 19.

RESEARCH REFERENCES

ALR.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Modern status of interspousal tort immunity in personal injury and wrongful death actions. 92 A.L.R.3d 901.

Validity and construction of penal statute prohibiting child abuse. 1 A.L.R.4th 38.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome. 18 A.L.R.4th 1153.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 27, 28.

41 Am. Jur. 2d, Husband and Wife § 251 et seq.

42 Am. Jur. 2d, Infants §§ 12-23.

59 Am. Jur. 2d, Parent and Child §§ 97 et seq.

2 Am. Jur. Proof of Facts 2d, Child Abuse – The Battered Child Syndrome, §§ 35 et seq. (proof of physical abuse in juvenile or family court proceeding).

3 Am. Jur. Proof of Facts 2d, Child Neglect, §§ 44 et seq. (proof of emotional neglect – child's emotional well-being endangered by parent's disturbed condition).

23 Am. Jur. Proof of Facts 2d, Pain and Suffering, §§ 1-30.

CJS.

67A C.J.S., Parent §§ 170 et seq.

§ 93-21-115. Donations from municipalities to support local shelters.

The governing authorities of any municipality in the state are hereby authorized and empowered, in their discretion, to donate annually out of any money in the municipal treasury such sums as the governing authorities deem advisable to support any domestic violence shelter or rape crisis center operating within or serving its area. For the purposes of this section, "rape crisis center" means a place established to provide care, counseling and related services to victims of rape, attempted rape, sexual battery or attempted sexual battery.

HISTORY:

Laws, 1983, ch. 502, § 9; Laws, 1990, ch. 539, § 1, eff from and after October 1, 1990.

Cross References —

Donations by county board of supervisors to support local domestic violence shelters, see § 19-5-93.

Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

Establishment of "Victims of Domestic Violence Fund" and expenditure of monies from such fund, see § 93-21-117.

OPINIONS OF THE ATTORNEY GENERAL

Although a Drug Task Force may not make a donation of funds or property, the counties and cities making up the Task Force may contribute funds to a domestic violence shelter as they see fit under Sections 19-5-93(o) and 93-21-115. 1995 Miss. Op. Att'y Gen. 329.

A policy of a municipality establishing a lower fee for use of municipal facilities for charitable benefits than charged for other private uses would be impermissible. As an alternative, however, certain statutes authorize municipal donations to certain types of qualified organizations. 2006 Miss. Op. Att'y Gen. 48.

§ 93-21-117. Victims of Domestic Violence Fund.

(1) There is hereby created in the State Treasury a special fund to be known as the "Victims of Domestic Violence Fund." The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(a) Monies appropriated by the Legislature;
(b) The interest accruing to the fund;
(c) Monies received under the provisions of Section 99-19-73;
(d) Monies received from the federal government;
(e) Donations to the Victims of Domestic Violence Fund;
(f) Assessments collected pursuant to Section 83-39-31; and
(g) Monies received from such other sources as may be provided by law.

(2) The circuit clerks of the state shall deposit in the fund on a monthly basis the additional fee charged and collected for marriage licenses under the provisions of Section 25-7-13, Mississippi Code of 1972.

(3) All other monies received by the state from every source for the support of the program for victims of domestic violence, established by Sections 93-21-101 through 93-21-113, shall be deposited in the "Victims of Domestic Violence Fund." The monies in the fund shall be used by the State Department of Health solely for funding and administering domestic violence shelters under the provisions of Sections 93-21-101 through 93-21-113, in such amounts as the Legislature may appropriate to the department for the program for victims of domestic violence established by Sections 93-21-101 through 93-21-113. Not more than ten percent (10%) of the monies in the "Victims of Domestic Violence Fund" shall be appropriated to the State Department of Health for the administration of domestic violence shelters.

(4) From and after July 1, 2014, the Office Against Interpersonal Violence

is granted all powers and duties with respect to the management of funds in the Victims of Domestic Violence Fund. Any reference to the Department of Health in this article pertaining to the management of the Victims of Domestic Violence Fund means the Office Against Interpersonal Violence within the Department of Health. In addition to the ten percent (10%) set aside in subsection (3), from and after July 1, 2014, the OAIV is authorized to utilize no more than an additional five percent (5%) of the monies in the Victims of Domestic Violence Fund at its discretion for transition expenses and expense related to statewide projects of the OAIV.

(5) Nothing in this chapter shall be construed to limit the ability of a domestic violence shelter or other domestic violence program to solicit private donations or community support. Any funds raised by a shelter or program from private donations or community support are not subject to the provisions of this chapter.

HISTORY:

Laws, 1985, ch. 461, § 1; Laws, 2005, ch. 413, § 4; Laws, 2009, ch. 463, § 2; Laws, 2014, ch. 509, § 8, eff from and after July 1, 2014.

Cross References —

Mississippi Public Records Act of 1983, see § 25-61-1 et seq.

§ 93-21-119. Office Against Interpersonal Violence (OAIV) established; OAIV Advisory Board; purpose, membership.

(1) There is established the Office Against Interpersonal Violence (OAIV) within the Mississippi Department of Health under the direct supervision of the State Health Officer. The OAIV shall be responsible for administering certain state and federal pass-through victim-services funds and related monies, and for developing, promulgating and implementing certification and reporting standards for domestic violence and related victim service providers, and related activities.

(2)(a) There is established an OAIV Advisory Board. The purpose of the Advisory Board is to make recommendations to the Department of Health and to assist the Department of Health in the development, promulgation and implementation of certification and reporting standards for domestic violence and other victim service providers, and in other related activities to be undertaken by the office. The Advisory Board shall not have independent authority to take official action on behalf of the office or the Mississippi Department of Health and its actions are purely advisory in nature.

(b) The Advisory Board shall consist of seven (7) members to be appointed by the State Health Officer as follows:

(i) One (1) licensed therapist or social worker, whose initial term shall be for two (2) years;

(ii) One (1) member of the faith community, whose initial term shall be for two (2) years;

(iii) One (1) licensed attorney, whose initial term shall be for three (3) years;

(iv) One (1) certified public accountant with experience in auditing, whose initial term shall be for three (3) years;

(v) One (1) business professional, whose initial term shall be for four (4) years;

(vi) One (1) medical professional with forensic experience who may be either a medical doctor or a registered nurse, whose initial term shall be for five (5) years; and

(vii) One (1) survivor of interpersonal violence whose initial term shall be for six (6) years.

All appointees must have general knowledge or first-hand knowledge, or both, of interpersonal violence, and successfully complete training on interpersonal violence provided by Department of Health staff. The members of the Advisory Board shall be women and men of recognized achievement who are representative of the ethnic, geographic, socioeconomic and cultural diversity of the State of Mississippi. Preference in appointments shall be given to appointees who have been members of the Domestic Violence Task Force established in Section 93-21-33. The initial appointments must be made within twenty (20) days after April 23, 2014. As the initial terms expire, the State Health Officer shall appoint members for terms of six (6) years.

(3) Members of the Advisory Board shall be entitled to travel and per diem expenses as provided in Sections 25-3-41 and 25-3-69.

(4) The Advisory Board shall create a steering committee at its first meeting. The purpose of the steering committee is to provide assistance and recommendations to the Advisory Board in the performance of its statutory duties. The steering committee shall consist of four (4) program directors actively engaged in the management of programs for interpersonal violence victims, the Executive Director of the Mississippi Coalition Against Domestic Violence, the Executive Director of the Mississippi Coalition Against Sexual Assault, a representative of the Mississippi Attorney General's Office Bureau of Victim Assistance, and any other individuals whose experience or expertise are deemed necessary to the process or projects of the commission. The members of the steering committee shall be nominated and approved by the Advisory Board, and members of the steering committee shall serve at the pleasure of the Advisory Board. The Advisory Board may authorize members of the steering committee to receive reimbursement for travel and per diem expenses as provided in Sections 25-3-41 and 25-3-69.

HISTORY:

Laws, 2014, ch. 509, § 1, eff from and after passage (approved Apr. 23, 2014).

§ 93-21-121. Office Against Interpersonal Violence powers and duties.

(1) The Office Against Interpersonal Violence shall have authority to:

(a) Receive funds intended for care of victims of interpersonal violence when those funds are not directed elsewhere;

(b) Administer funds received from any source and establish procedures for the disbursement of funds to certified agencies for the delivery of shelter and other services for victims of interpersonal violence;

(c) Cooperate with the Attorney General's office for the certification of any programs receiving funding;

(d) Study the subject of interpersonal violence and related matters, and regularly report to the Legislature on the need for legislative revisions and initiatives in those areas; and

(e) Develop a strategic plan for the delivery of services for victims of interpersonal violence.

(2) The Mississippi Department of Health shall seek appropriations authority on behalf of the OAIV to expend any funds it receives from any source, and shall comply with all statutes and regulations of the state pertaining to fiscal management of public funds.

(3) The OAIV shall have the authority, with the assistance of the Advisory Board, to develop performance standards, financial audit standards, and other necessary standards to insure that all the grantees are managing their facilities and services consistent with the purposes of the grant. From and after July 1, 2016, only agencies meeting the standards developed by the OAIV shall be eligible to receive funding administered by the OAIV.

HISTORY:
Laws, 2014, ch. 509, § 2, eff from and after July 1, 2014.

§ 93-21-123. Office Against Interpersonal Violence authorized to seek, receive and administer certain grants.

(1) From and after July 1, 2016, the Office Against Interpersonal Violence shall be the single state agency for the receipt and administration of and the sole authority and responsibility to seek grants on behalf of the state which will be administered or available after July 1, 2016.

(2) The OAIV shall also be authorized to contract with any agency of the state to receive grants or subgrants for the delivery of services to victims of interpersonal violence.

(3) The OAIV shall have the authority to seek grants from any other source making funds available when the purpose of the grant is to provide services and assistance to victims of interpersonal violence, or offers training to persons who assist such victims.

HISTORY:
Laws, 2014, ch. 509, § 3, eff from and after July 1, 2014.

ARTICLE 5.

CHILDREN'S TRUST FUND ACT.

Sec.
93-21-301. Short title.
93-21-303. Declaration of policy.
93-21-305. Fund established; source of funds; interest; disbursements; purpose of fund.

Sec.
93-21-307. Administration of fund; powers and duties of Division of Family and Children's Services.
93-21-309. Purposes for which grants or loans may be made from fund.
93-21-311. Criteria for making grant or loan.

§ 93-21-301. Short title.

Sections 93-21-301 through 93-21-311 shall be known as the "Children's Trust Fund Act of 1989."

HISTORY:
Laws, 1989, ch. 509, § 1, eff from and after July 1, 1989.

Cross References —
Additional fee for each original and each copy of a birth certificate to be deposited into the Mississippi Children's Trust Fund, see § 41-57-11.

§ 93-21-303. Declaration of policy.

The Legislature of the State of Mississippi finds and declares the policy of this state as follows:

(a) The children of Mississippi are its single greatest resource and our children require the utmost protection to guard their future and the future of this state;

(b) Child abuse and neglect are a threat to the family unit and impose major expenses on society in addition to the individual and collective damage on the children of this state;

(c) There is a need to assist private and public agencies in identifying and establishing community-based educational and service programs for the prevention of child abuse and neglect;

(d) An increase in educational, service and prevention programs will assist in breaking the cycle of child abuse and neglect and will assist in reducing the breakdown of families and thus reduce the need for state assistance and intervention and state expenses; and

(e) Programs to prevent child abuse and neglect should be partnerships between citizens, local communities and the State of Mississippi.

HISTORY:
Laws, 1989, ch. 509, § 2, eff from and after July 1, 1989.

Cross References —
Additional fee for each original and each copy of a birth certificate to be deposited into the Mississippi Children's Trust Fund, see § 41-57-11.

§ 93-21-305. Fund established; source of funds; interest; disbursements; purpose of fund.

(1) There is hereby established in the State Treasury a special fund to be known as the "Mississippi Children's Trust Fund."

(2) The fund shall consist of any monies appropriated to the fund by the Legislature, any donations, gifts and grants from any source, receipts from the birth certificate fees as provided by subsection (2) of Section 41-57-11, and any

other monies which may be received from any other source or which may be hereafter provided by law.

(3) Monies in the fund shall be used only for the purposes set forth in Sections 93-21-301 through 93-21-311. Interest earned on the investment of monies in the fund shall be returned and deposited to the credit of the fund.

(4) Disbursements of money from the fund shall be on the authorization of the Division of Family and Children's Services of the State Department of Public Welfare.

(5) The primary purpose of the fund is to encourage and provide financial assistance in the provision of direct services to prevent child abuse and neglect.

HISTORY:

Laws, 1989, ch. 509, § 3, eff from and after July 1, 1989.

Editor's Notes —

Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

Cross References —

Additional fee for each original and each copy of a birth certificate to be deposited into the Mississippi Children's Trust Fund, see § 41-57-11.

§ 93-21-307. Administration of fund; powers and duties of Division of Family and Children's Services.

The administration of the Mississippi Children's Trust Fund shall be vested in the Division of Family and Children's Services of the State Department of Public Welfare. In carrying out the provisions of Sections 93-21-301 through 93-21-311, the Division of Family and Children's Services shall have the following powers and duties:

(a) To assist in developing programs aimed at discovering and preventing the many factors causing child abuse and neglect;

(b) To prepare and disseminate, including the presentation of, educational programs and materials on child abuse and neglect;

(c) To provide educational programs for professionals required by law to make reports of child abuse and neglect;

(d) To help coordinate child protective services at the state, regional and local levels with the efforts of other state and voluntary social, medical and legal agencies;

(e) To provide advocacy for children in public and private state and local agencies affecting children;

(f) To encourage citizen and community awareness as to the needs and problems of children;

(g) To facilitate the exchange of information between groups concerned with families and children;

(h) To consult with state departments, agencies, commissions and boards to help determine the probable effectiveness, fiscal soundness and need for proposed educational and service programs for the prevention of child abuse and neglect;

(i) To adopt rules and regulations, subject to approval of the State

Board of Public Welfare, in accordance with the Administrative Procedures Law to discharge its responsibilities;

(j) To report annually, through the annual report of the State Department of Public Welfare, to the Governor and the Legislature concerning the division's activities under Sections 93-21-301 through 93-21-311 and the effectiveness of those activities in fostering the prevention of child abuse and neglect;

(k) To recommend to the Governor and the Legislature changes in state programs, statutes, policies and standards which will reduce child abuse and neglect, improve coordination among state agencies which provide services to prevent abuse and neglect, improve the condition of children and assist parents and guardians;

(*l*) To evaluate and strengthen all local, regional and state programs dealing with child abuse and neglect;

(m) To prepare and submit annually to the Governor and the Legislature reports evaluating the level and quality of all programs, services and facilities provided to children by state agencies;

(n) To contract with public or private nonprofit institutions, organizations, agencies or schools or with qualified individuals for the establishment of community-based educational and service programs designed to reduce the occurrence of child abuse and neglect;

(o) To determine the eligibility of programs applying for financial assistance and to make grants and loans from the fund for the purposes set forth in Sections 93-21-301 through 93-21-311;

(p) To develop, within one (1) year after July 1, 1989, a state plan for the distribution of funds from the trust fund which shall assure that an equal opportunity exists for establishment of prevention programs and for receipt of trust fund money among all geographic areas in this state, and to submit the plan to the Governor and the Legislature and annually thereafter submit revisions thereto as needed;

(q) To provide for the coordination and exchange of information on the establishment and maintenance of local prevention programs;

(r) To develop and publicize criteria for the receipt of trust fund money by eligible local prevention programs;

(s) To enter into contracts with public or private agencies to fulfill the requirements of Sections 93-21-301 through 93-21-311; and

(t) Review, monitor and approve the expenditure of trust fund money by eligible local programs.

HISTORY:

Laws, 1989, ch. 509, § 4, eff from and after July 1, 1989.

Editor's Notes —

Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

Cross References —

Additional fee for each original and each copy of a birth certificate to be deposited into the Mississippi Children's Trust Fund, see § 41-57-11.

§ 93-21-309. Purposes for which grants or loans may be made from fund.

(1) The division may authorize the disbursement of money in the trust fund in the form of grants or loans for the following purposes, which are listed in order of preference for expenditure:

(a) To assist a community private, nonprofit organization or a local public organization or agency in the establishment and operation of a program or service for the prevention of child abuse and neglect;

(b) To assist in the expansion of an existing community program or service for the prevention of child abuse and neglect;

(c) To assist a community private, nonprofit organization or a local public organization or agency in the establishment and operation of an educational program regarding the problems of child abuse and neglect and the problems of families and children;

(d) To assist in the expansion of an existing community educational program regarding the problems of child abuse and neglect and the problems of families and children;

(e) To study and evaluate community-based prevention programs, projects or services and educational programs for the problems of families and children; and

(f) Any other similar and related programs, projects, services and educational programs that the division declares will implement the purposes and provisions of Sections 93-21-301 through 93-21-311.

(2) For the purposes of this section, the term "educational programs" includes instructional and demonstration projects the main purpose of which is to disseminate information and techniques for the prevention of child abuse and neglect and the prevention of problems of families and children.

(3) No money in the trust fund shall be expended to provide services, counseling or direct assistance for the voluntary termination of any pregnancy.

HISTORY:

Laws, 1989, ch. 509, § 5, eff from and after July 1, 1989.

Cross References —

Additional fee for each original and each copy of a birth certificate to be deposited into the Mississippi Children's Trust Fund, see § 41-57-11.

§ 93-21-311. Criteria for making grant or loan.

In making grants or loans from the trust fund, the division shall consider the degree to which the applicant's proposal meets the following criteria:

(a) Has as its primary purpose the development and facilitation of a community-based prevention program in a specific geographical area, which program shall utilize trained volunteers and existing community resources where practicable;

(b) Is administered by an organization or group which is composed of or has participation by the county department of public welfare, the county health department, the youth court or chancery court, the office of the district attorney, county or municipal law enforcement personnel, county or municipal school officials, local public or private organizations or agencies which provide programs or services for the prevention of child abuse and neglect and educational programs for the prevention of problems of families and children; and

(c) Demonstrates a willingness and ability and has a plan to provide prevention program models and consultations to appropriate organizations within the community regarding prevention program development and maintenance.

HISTORY:

Laws, 1989, ch. 509, § 6, eff from and after July 1, 1989.

Cross References —

Additional fee for each original and each copy of a birth certificate to be deposited into the Mississippi Children's Trust Fund, see § 41-57-11.

CHAPTER 22.

UNIFORM INTERSTATE ENFORCEMENT OF DOMESTIC VIOLENCE PROTECTION ORDERS

Sec.
93-22-1. Short title.
93-22-3. Definitions.
93-22-5. Judicial enforcement of order.
93-22-7. Nonjudicial enforcement of order.
93-22-9. Registration of order.
93-22-11. Immunity.
93-22-13. Transitional provision.
93-22-15. Other remedies.
93-22-17. Severability clause.

§ 93-22-1. Short title.

The provisions of this chapter may be cited as the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

HISTORY:

Laws, 2004, ch. 566, § 1, eff from and after July 1, 2004.

Editor's Notes —

Laws, 2004, ch. 566, § 12, provides:

"SECTION 12. The provisions of Sections 1 through 9 of this act shall be codified as a separate chapter in Title 93, Mississippi Code of 1972."

§ 93-22-3. Definitions.

The following words and phrases shall have the meanings ascribed in this section unless the context clearly indicates otherwise:

(a) "Foreign protection order" means a protection order issued by a tribunal of another state.

(b) "Issuing state" means the state whose tribunal issues a protection order.

(c) "Mutual foreign protection order" means a foreign protection order that includes provisions issued in favor of both the protected individual seeking enforcement of the order and the respondent.

(d) "Protected individual" means an individual protected by a protection order.

(e) "Protection order" means an injunction or other order, issued by a tribunal under the domestic violence laws, family violence laws or anti-stalking laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to another individual.

(f) "Respondent" means the individual against whom enforcement of a protection order is sought.

(g) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an American Indian tribe or band that has jurisdiction to issue protection orders.

(h) "Tribunal" means a court, agency, or other entity authorized by law to issue or modify a protection order.

HISTORY:

Laws, 2004, ch. 566, § 2, eff from and after July 1, 2004.

Cross References —

Protective order as defined in this section issued by another jurisdiction to be accorded full faith and credit, see § 93-21-16.

§ 93-22-5. Judicial enforcement of order.

(1) A tribunal of this state shall enforce the terms of a valid foreign protection order, including terms that provide relief that a tribunal of this state would lack power to provide but for this section. A tribunal of this state shall enforce a valid foreign protection order issued by a tribunal, whether the order was obtained by independent action or in another proceeding, if it is an order issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection. A tribunal of this state may not enforce an order issued by a tribunal that does not recognize the standing of a protected individual to seek enforcement of the order. In a proceeding to enforce a foreign protection order, the tribunal shall follow the procedures of this state for the enforcement of protection orders.

(2) A tribunal of this state shall enforce the provisions of a valid foreign protection order which governs custody and visitation. The custody and visitation provisions of the order must have been issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation orders in the issuing state.

(3) A tribunal of this state may not enforce under this chapter an order or provision of an order with respect to support.

(4) A protection order is valid if it:

(a) Identifies the protected individual and the respondent;

(b) Is in effect at the time enforcement is being sought;

(c) Was issued by a tribunal that had jurisdiction over the parties and matter under the law of the issuing state; and

(d) Was issued after the respondent was provided with reasonable notice and had an opportunity to be heard before the tribunal issued the order or, in the case of an order ex parte, the respondent was given notice and afforded an opportunity to be heard within a reasonable time after the issuing of the order, consistent with the rights of the respondent to due process.

(5) A person authorized under the law of this state to seek enforcement of a foreign protection order establishes a prima facie case for its validity by presenting an order valid on its face.

(6) Absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order.

(7) A tribunal of this state may enforce the provisions of a mutual foreign protection order which favor a respondent only if:

(a) The respondent filed a written pleading seeking a protection order from the tribunal of the issuing state; and

(b) The tribunal of the issuing state made specific findings in favor of the respondent.

HISTORY:
Laws, 2004, ch. 566, § 3, eff from and after July 1, 2004.

Cross References —
Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

§ 93-22-7. Nonjudicial enforcement of order.

(1) A law enforcement officer of this state, upon determining that there is probable cause to believe that a valid foreign protection order exists and that the order has been violated, shall enforce the order as if it were the order of a tribunal of this state. Presentation of a protection order that identifies both the protected individual and the respondent, and on its face is in effect at the time enforcement is being sought, constitutes probable cause to believe that a valid foreign protection order exists. For the purposes of this section, the protection order may be inscribed on a tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form. Presentation of a certified copy of a protection order is not required for enforcement.

(2) If the protection order is not presented, the officer may consider other information in determining whether there is probable cause to believe that a valid foreign protection order exists.

(3) If a law enforcement officer of this state determines that an otherwise valid foreign protection order cannot be enforced because the respondent has not been notified or served with the order, the officer shall inform the respondent of the order and make a reasonable effort to serve the order upon the respondent. After informing the respondent and serving the order, the officer shall allow the respondent a reasonable opportunity to comply with the order before enforcing the order.

(4) Registration or filing of an order in this state is not required for the enforcement of a valid foreign protection order under the provisions of this chapter.

HISTORY:
Laws, 2004, ch. 566, § 4, eff from and after July 1, 2004.

Cross References —
For purposes of enforcement by Mississippi law enforcement officers, certain protective orders from other jurisdictions are presumed valid if they meet the requirements of this section, see § 93-21-16.

§ 93-22-9. Registration of order.

(1) It is not required that any foreign protection order be registered in Mississippi; however, any individual may register a foreign protection order in

this state on behalf of the individual or any protected person. To register a foreign protection order, an individual shall present a certified copy of the order to the chancery clerk's office of any county in this state.

(2) Upon presentation of a protection order, the chancery clerk shall enter the order into the Mississippi Protection Order Registry as provided in Section 93-21-25.

(3) At the time of registration, an individual registering a foreign protection order shall file an affidavit by the protected individual that, to the best of the individual's knowledge, the order is in effect at the time of the registration.

(4) The failure to register a foreign protection order pursuant to the provisions of this section shall have no effect on the validity or enforceability of the order by Mississippi law enforcement or courts.

HISTORY:
Laws, 2004, ch. 566, § 5; Laws, 2012, ch. 514, § 7, eff from and after July 1, 2012.

Joint Legislative Committee Note —
Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in subsection (2) by substituting "Mississippi Protection Order Registry" for "Mississippi Domestic Abuse Protection Order Registry." The Joint Committee ratified the correction at its August 16, 2012, meeting.

Cross References —
Mississippi Protection Order Registry, see § 93-21-25.

§ 93-22-11. Immunity.

This state or a local governmental agency, or a law enforcement officer, prosecuting attorney, clerk of court, or any state or local governmental official acting in an official capacity, is immune from civil and criminal liability for an act or omission arising out of the registration or enforcement of a foreign protection order or the detention or arrest of an alleged violator of a foreign protection order if the act or omission is done in good faith in an effort to comply with this chapter.

HISTORY:
Laws, 2004, ch. 566, § 6, eff from and after July 1, 2004.

§ 93-22-13. Transitional provision.

This chapter applies to any protection order issued before July 1, 2004, including any continuing action for enforcement of a foreign protection order commenced before July 1, 2004. A request for enforcement of a foreign protection order brought on or after July 1, 2004 for violations of a foreign protection order occurring before July 1, 2004, is governed by the provisions of this chapter.

HISTORY:
Laws, 2004, ch. 566, § 7, eff from and after July 1, 2004.

§ 93-22-15. Other remedies.

Pursuit of remedies under this chapter does not preclude a protected individual from pursuing other legal or equitable remedies against the respondent.

HISTORY:
Laws, 2004, ch. 566, § 8, eff from and after July 1, 2004.

§ 93-22-17. Severability clause.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

HISTORY:
Laws, 2004, ch. 566, § 9, eff from and after July 1, 2004.

CHAPTER 23.

UNIFORM CHILD CUSTODY JURISDICTION ACT [REPEALED]

Sec.
93-23-1 through 93-23-47. Repealed.

§§ 93-23-1 through 93-23-47. Repealed.

Repealed by Laws, 2004, ch. 519, § 39 eff July 1, 2004.
§ 93-23-1. [Laws, 1982, ch. 414, § 1, eff from and after July 1, 1982.]
§ 93-23-3. [Laws, 1982, ch. 414, § 2, eff from and after July 1, 1982.]
§ 93-23-5. [Laws, 1982, ch. 414, § 3, eff from and after July 1, 1982.]
§ 93-23-7. [Laws, 1982, ch. 414, § 4, eff from and after July 1, 1982.]
§ 93-23-9. [Laws, 1982, ch. 414, § 5, eff from and after July 1, 1982.]
§ 93-23-11. [Laws, 1982, ch. 414, § 6, eff from and after July 1, 1982.]
§ 93-23-13. [Laws, 1982, ch. 414, § 7, eff from and after July 1, 1982.]
§ 93-23-15. [Laws, 1982, ch. 414, § 8, eff from and after July 1, 1982.]
§ 93-23-17. [Laws, 1982, ch. 414, § 9, eff from and after July 1, 1982.]
§ 93-23-19. [Laws, 1982, ch. 414, § 10, eff from and after July 1, 1982.]
§ 93-23-21. [Laws, 1982, ch. 414, § 11, eff from and after July 1, 1982.]
§ 93-23-23. [Laws, 1982, ch. 414, § 12, eff from and after July 1, 1982.]
§ 93-23-25. [Laws, 1982, ch. 414, § 13, eff from and after July 1, 1982.]
§ 93-23-27. [Laws, 1982, ch. 414, § 14, eff from and after July 1, 1982.]
§ 93-23-29. [Laws, 1982, ch. 414, § 15, eff from and after July 1, 1982.]
§ 93-23-31. [Laws, 1982, ch. 414, § 16, eff from and after July 1, 1982.]
§ 93-23-33. [Laws, 1982, ch. 414, § 17, eff from and after July 1, 1982.]
§ 93-23-35. [Laws, 1982, ch. 414, § 18, eff from and after July 1, 1982.]
§ 93-23-37. [Laws, 1982, ch. 414, § 19, eff from and after July 1, 1982.]
§ 93-23-39. [Laws, 1982, ch. 414, § 20, eff from and after July 1, 1982.]
§ 93-23-41. [Laws, 1982, ch. 414, § 21, eff from and after July 1, 1982.]
§ 93-23-43. [Laws, 1982, ch. 414, § 22, eff from and after July 1, 1982.]
§ 93-23-45. [Laws, 1982, ch. 414, § 23, eff from and after July 1, 1982.]
§ 93-23-47. [Laws, 1982, ch. 414, § 24, eff from and after July 1, 1982.]

Editor's Notes —

Former §§ 93-23-1 through 93-23-47 was entitled the Uniform Child Custody Jurisdiction Act. For present similar provisions, see the Uniform Child Custody Jurisdiction and Enforcement Act, §§ 93-27-101 et seq.

CHAPTER 25.

UNIFORM INTERSTATE FAMILY SUPPORT ACT

Sec.
93-25-1 through 93-25-99. Repealed.
Article 1. General Provisions. 93-25-101
Article 2. Jurisdiction. 93-25-201
Article 3. Civil Provisions of General Application. 93-25-301
Article 4. Establishment of Support Order or Determination of Parentage. .. 93-25-401
Article 5. Enforcement of Support Order Without Registration. 93-25-501
Article 6. Registration, Enforcement, and Modification of Support Order. 93-25-601
Article 7. Support Proceeding Under Convention. 93-25-701
Article 8. Interstate Rendition. 93-25-801
Article 9. Miscellaneous Provisions. 93-25-901

Editor's Notes —

Laws of 2015, ch. 367, § 2, which repealed the Uniform Interstate Family Support Act (codified in Chapter 25 of Title 93), effective July 1, 2015, provides:

SECTION 2. Sections 93-25-1, 93-25-3, 93-25-5, 93-25-7, 93-25-9, 93-25-11, 93-25-13, 93-25-15, 93-25-17, 93-25-19, 93-25-21, 93-25-23, 93-25-25, 93-25-26, 93-25-26.1, 93-25-27, 93-25-29, 93-25-31, 93-25-33, 93-25-35, 93-25-37, 93-25-39, 93-25-41, 93-25-43, 93-25-45, 93-25-47, 93-25-49, 93-25-51, 93-25-53, 93-25-55, 93-25-57, 93-25-59, 93-25-61, 93-25-63, 93-25-65, 93-25-67, 93-25-69, 93-25-71, 93-25-73, 93-25-75, 93-25-77, 93-25-79, 93-25-81, 93-25-83, 93-25-85, 93-25-87, 93-25-89, 93-25-91, 93-25-93, 93-25-95, 93-25-97, 93-25-99, 93-25-101, 93-25-103, 93-25-105, 93-25-107, 93-25-108, 93-25-109, 93-25-111, 93-25-113, 93-25-115 and 93-25-117, Mississippi Code of 1972, which comprise the Uniform Interstate Family Support Act adopted in 1997, are repealed.

Former Chapter 25 of Title 93 contained the following undesignated headings:

General Provisions, which included former §§ 93-25-1 through 93-25-7.

Jurisdiction, which included former §§ 93-25-9 through 93-25-6.1.

Civil Provisions of General Application, which included §§ 93-25-27 through 93-25-63.

Establishment of Support Order, which included former § 93-25-65.

Enforcement of Out-of-State Order, which included former §§ 93-25-67 through 93-25-79.

Registered Support Orders, which included former §§ 93-25-81 through 93-25-108.

Determination of Parentage, which included former § 93-25-109.

Interstate Rendition, which included former §§ 93-25-111 and 93-25-113.

Miscellaneous Provisions, which included §§ 93-25-115 and 93-25-117.

Laws of 2015, ch. 367, § 1, effective July 1, 2015, enacted a new Chapter 25 of Title 93 (§§ 93-25-101 through 93-25-903), which contains similar provisions.

§§ 93-25-1 through 93-25-99. Repealed.

Repealed by Laws of 2015, ch. 367, § 2, effective July 1, 2015.

Editor's Notes —

Former § 93-25-1 provided the short title for former Chapter 25. For present similar provisions, see § 93-25-101.

Former § 93-25-3 provided the definitions for former Chapter 25. For present similar provisions, see § 93-25-102.

Former § 93-25-5 provided that certain courts were tribunals of Mississippi. For present similar provisions, see § 93-25-103.

Former § 93-25-7 provided that the remedies provided by former Chapter 25 were cumulative. For present similar provisions, see § 93-25-104.

Former § 93-25-9 provided the bases for jurisdiction over nonresidents. For present similar provisions, see § 93-25-201.

Former § 93-25-11 provided the duration of personal jurisdiction. For present similar provisions, see § 93-25-202.

Former § 93-25-13 provided that a tribunal of Mississippi could serve as an initiating and responding tribunal. For present similar provisions, see § 93-25-203.

Former § 93-25-15 related to simultaneous proceedings in another state. For present similar provisions, see § 93-25-204.

Former § 93-25-17 related to continuing, exclusive jurisdiction. For present similar provisions, see § 93-25-205.

Former § 93-25-19 related to the enforcement and modification of a support order by a tribunal having continuing jurisdiction. For present similar provisions, see § 93-25-206.

Former § 93-25-21 related to the recognition of a controlling child support order. For present similar provisions, see § 93-25-207.

Former § 93-25-23 related to multiple child support orders for two or more obliges. For present similar provisions, see § 93-25-208.

Former § 93-25-25 related to credit for payments. For present similar provisions, see § 93-25-209.

Former § 93-25-26 provided that a Mississippi tribunal exercising personal jurisdiction over a nonresident may seek assistance from another state. For present similar provisions, see § 93-25-210.

Former § 93-25-26.1 related to continuing, exclusive jurisdiction to modify spousal-support orders. For present similar provisions, see § 93-25-211.

Former § 93-25-27 related to proceedings under former Chapter 25. For present similar provisions, see § 93-25-301.

Former § 93-25-29 related to a proceeding by a minor parent. For present similar provisions, see § 93-25-302.

Former § 93-25-31 related to the application of the law of the state. For present similar provisions, see § 93-25-303.

Former §93-25-33 related to the duties of an initiating tribunal. For present similar provisions, see § 93-25-304.

Former § 93-25-35 related to the duties and powers of a responding tribunal. For present similar provisions, see § 93-25-305.

Former § 93-25-37 provided that an inappropriate tribunal of the state that received a petition or comparable pleading mush forward it to an appropriate tribunal. For present similar provisions, see § 93-25-306.

Former § 93-25-39 related to the duties of a support enforcement agency. For present similar provisions, see § 93-25-307.

Former § 93-25-41 related to the duties of state officials and agencies. For present similar provisions, see § 93-25-308.

Former § 93-25-43 provided that an individual could be represented in proceedings by private counsel. For present similar provisions, see § 93-25-309.

Former § 93-25-45 related to the duties of the Department of Human Services. For present similar provisions, see § 93-25-310.

Former § 93-25-47 related to pleadings and accompanying documents. For present similar provisions, see § 93-25-311.

Former § 93-25-49 related to when certain information could remain sealed and not be disclosed. For present similar provisions, see § 93-25-312.

Former § 93-25-51 related to costs and fees. For present similar provisions, see § 93-25-313.

Former § 93-25-53 provided limited immunity to petitioner. For present similar provisions, see § 93-25-314.

Former § 93-25-55 provided that a party whose parentage of a child had been previously determined could not plead nonparentage as a defense. For present similar provisions, see § 93-25-315.

Former § 93-25-57 related to special rules of evidence and procedure. For present similar provisions, see § 93-25-316.

Former § 93-25-59 related to communications between tribunals. For present similar provisions, see § 93-25-317.

Former § 93-25-61 provided that Mississippi tribunals could request assistance from or provide assistance to a tribunal of another state in obtaining discovery. For present similar provisions, see § 93-25-318.

Former § 93-25-63 related to the receipt and disbursement of payments. For present similar provisions, see § 93-25-319.

Former § 93-25-65 related to a petition to establish a support order. For present similar provisions, see § 93-25-401.

Former § 93-25-67 related to an employer's receipt of income-withholding order of another state. For present similar provisions, see § 93-25-501.

Former § 93-25-69 related to an employer's compliance with an income-withholding order of another state. For present similar provisions, see § 93-25-502.

Former § 93-25-71 related to compliance with multiple income-withholding orders. For present similar provisions, see § 93-25-503.

Former § 93-25-73 related to immunity from civil liability. For present similar provisions, see §93-25-504.

Former § 93-25-75 provided penalties for noncompliance. For present similar provisions, see § 93-25-505.

Former § 93-25-77 provided an obligor could contest the validity or enforcement of an income-withholding order. For present similar provisions, see § 93-25-506.

Former § 93-25-79 related to administrative enforcement of orders. For present similar provisions, see § 93-25-507.

Former § 93-25-81 related to the registration of an income-withholding order for enforcement. For present similar provisions, see § 93-25-601.

Former § 93-25-83 provided the procedure for registering a support order or income-withholding order of another state. For present similar provisions, see § 93-25-602.

Former § 93-25-85 related to the effect of registration for enforcement. For present similar provisions, see § 93-25-603.

Former § 93-25-87 related to choice of law. For present similar provisions, see § 93-25-604.

Former § 93-25-89 related to notice of registration of order. For present similar provisions, see § 93-25-605.

Former § 93-25-91 provided the procedure for contesting the validity or enforcement of a registered order. For present similar provisions, see § 93-25-606.

Former § 93-25-93 related to contesting the validity or enforcement of a registered order. For present similar provisions, see §93-25-607.

Former §93-25-95 related to the confirmation of a registered order precluding further contest. For present similar provisions, see § 93-25-608.

Former § 93-25-97 provided the procedure for registering child support orders of another state for modification. For present similar provisions, see 93-25-609.

Former § 93-25-99 related to the effect of the registration for modification. For present similar provisions, see § 93-25-610.

ARTICLE 1.

GENERAL PROVISIONS.

Sec.
93-25-101. Short title.
93-25-102. Definitions.
93-25-103. State tribunal and support enforcement agency.
93-25-104. Remedies cumulative.
93-25-105. Application of chapter to resident of foreign country and foreign support proceeding.
93-25-107 through 93-25-117. Repealed.

§ 93-25-101. Short title.

This chapter may be cited as the "Uniform Interstate Family Support Act."

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Editor's Notes —

A former § 93-25-101 [Laws, 1997, ch. 588, § 121; Laws, 2004, ch. 406, § 33, effective from and after July 1, 2004; Repealed by Laws, 2015, ch. 367, § 2, effective July 1, 2015] related to the enforcement and modification of a child support order of another state after registration. For present similar provisions, see § 93-25-611.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

Comparable Laws from other States —

Alabama: Code of Ala. §§ 30-3D-101 through 30-3D-902.

Alaska: Alaska Stat. §§ 25.25.101 through 25.25.903.

Arizona: A.R.S. §§ 25-1201 through 25-1342.

Arkansas: A.C.A. §§ 9-17-101 through 9-17-902.

California: California Fam. Code §§ 5700.101 through 5700.905.

Colorado: C.R.S. §§ 14-13.5-101 through 14-13.5-112.

Delaware: 13 Del. C. §§ 6-101 through 6-903.

District of Columbia: D.C. Code §§ 16-4604.01 through 16-4604.10.

Florida: Fla. Stat. §§ 88.0011 through 88.9031.

Georgia: Ga. Code §§ 19-11-100 through 19-11-191.

Hawaii: H.R.S. §§ 576B-101 through 576B-902.

Idaho: Idaho Code §§ 7-1001 through 7-1062.

Illinois: 750 I.L.C.S. 22/100 through 22/999.

Indiana: Burns Ind. Code Ann. 31-18.5-1-1 through 31-18.5-9-1.

Iowa: Iowa Code §§ 252K.101 through 252K.904.

Kansas: K.S.A. §§ 23-3801 through 23-3812.

Kentucky: K.R.S. 407.5101 through 407.5902.

Louisiana: La. Ch.C. Art. 1301.1 — 1309.3.

Maine: 19-A M.R.S. §§ 2801 through 3401.

Maryland: Family Law §§ 10-301 through 10-371.

Massachusetts: Mass. Ann. Laws c. 209D §§ 1-101 through 9-902.

Michigan: MCLS §§ 722.1521 through 722.1532.

Minnesota: Minn. Stat. §§ 518C.101 through 518C.902.

Missouri: §§ 454.849 through 454.999 R.S.Mo.

Montana: Mont. Code Anno. §§ 40-5-1001 through 40-5-1092.

Nebraska: R.R.S. Neb. §§ 43-3901 through 43-3912.

Nevada: Nev. Rev. Stat. Ann. §§ 125D.010 through 125D.230.

New Hampshire: R.S.A.. §§ 546-B:1 through 546-B:59.

New Jersey: N.J. Stat. 2A:4-30.65 through 2A:4-30.122.

New Mexico: N.M. Stat. Ann. §§ 40-10C-1 through 40-10C-12.

New York: NY CLS Family Ct. Act §§ 580-101 through 580-905.

North Carolina: N.C. Gen. Stat. §§ 52C-1-100 through 52C-9-902.

North Dakota: N.D. Cent. Code 14-12.2-01 through 14-12.2-49.

Ohio: O.R.C. Ann. §§ 3115.101 through 3115.903.

Oklahoma: 43 Okl. St. Ann. §§ 601-101 through 601-903.

Pennsylvania: 23 Pa. C.S.A. §§ 7101 through 7902.

Rhode Island: R.I. Gen. Laws §§ 15-23.1-100 through 15-23.1-907.

South Carolina: S.C. Code Ann. §§ 63-17-2900 through 63-17-4040.

South Dakota: S.D. Codified Laws §§ 26-18-1 through 26-18-12.

Tennessee: Tenn. Code Ann. §§ 36-6-601 through 36-6-612.

Texas: Tex. Fam. Code §§ 159.001 through 159.902.

Utah: Utah Code Ann. §§ 78B-16-101 through 78B-16-112.

Vermont: 15B V.S.A §§ 1101 through 1903.

Virgin Islands: 16 V.I.C. §§ 391 through 451.

Virginia: Va. Code Ann. §§ 20-88.32 through 20-88.95.

Washington: Rev. Code Wash. §§ 26.21A.005 through 26.21A.915.

West Virginia: W. Va. Code §§ 48-16-101 through 48-16-903.

Wisconsin: Wis. Stat. §§ 769.101 through 769.903.

Wyoming: Wyo. Stat. §§ 20-4-139 through 20-4-194.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1. Jurisdiction.
2-5. [Reserved for future use.]

II. Under Former § 93-25-1.

6. Applicability.

I. Under Current Law.

Chancery court erred in denying a father's motion to dismiss a mother's complaint for modification of an Ohio divorce decree because the father resided in the state with continuing and exclusive jurisdiction over the matter, and neither the parties nor the Ohio court consented to transferring jurisdiction to the chancery court; thus, the Ohio court neither waived nor relinquished its control over matters pertaining to the parties' divorce decree or the care of the minor child. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

1. Jurisdiction.

Chancery court erred in denying a father's motion to dismiss a mother's complaint for modification of an Ohio divorce decree because its assertion of jurisdiction over child-support agreements failed under the Uniform Interstate Family Support Act (UIFSA); the father maintained continued residence in Ohio since the divorce decree was entered, and his residence in Ohio fulfilled the requirement for that state to maintain jurisdiction under the UIFSA. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

2-5. [Reserved for future use.]

II. Under Former § 93-25-1.

6. Applicability.

There is nothing within the language of the act that indicates a legislative intent that the act not apply to all support orders registered in Mississippi after the date of the act, and it is not the case that only child support orders entered after the adoption of reciprocal statutes may be enforced pursuant to the act. Department of Human Servs. v. Shelnut, 772 So. 2d 1041, 2000 Miss. LEXIS 243 (Miss. 2000).

§ 93-25-102. Definitions.

In this chapter:

(1) "Child" means an individual, whether over or under the age of

majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent.

(2) "Child-support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state or foreign country.

(3) "Convention" means the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007.

(4) "Duty of support" means an obligation imposed or imposable by law to provide support for a child, spouse or former spouse, including an unsatisfied obligation to provide support.

(5) "Foreign country" means a country, including a political subdivision thereof, other than the United States, that authorizes the issuance of support orders and:

(A) Which has been declared under the law of the United States to be a foreign reciprocating country;

(B) Which has established a reciprocal arrangement for child support with this state as provided in Section 93-25-308;

(C) Which has enacted a law or established procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this chapter; or

(D) In which the Convention is in force with respect to the United States.

(6) "Foreign support order" means a support order of a foreign tribunal.

(7) "Foreign tribunal" means a court, administrative agency, or quasi-judicial entity of a foreign country which is authorized to establish, enforce, or modify support orders or to determine parentage of a child. The term includes a competent authority under the Convention.

(8) "Home state" means the state or foreign country in which a child lived with a parent or a person acting as parent for at least six (6) consecutive months immediately preceding the time of filing of a complaint or comparable pleading for support and, if a child is less than six (6) months old, the state or foreign country in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

(9) "Income" includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the laws of this state.

(10) "Income-withholding order" means an order or other legal process directed to an obligor's employer or other debtor, as defined by Sections 93-11-101 through 93-11-119 to withhold support from the income of the obligor.

(11) "Initiating tribunal" means the tribunal of a state or foreign country from which a complaint or comparable pleading is forwarded or in which a complaint or comparable pleading is filed for forwarding to another state or foreign country.

(12) "Issuing foreign country" means the foreign country in which a tribunal issues a support order or a judgment determining parentage of a child.

(13) "Issuing state" means the state in which a tribunal issues a support order or a judgment determining parentage of a child.

(14) "Issuing tribunal" means the tribunal of a state or foreign country that issues a support order or a judgment determining parentage of a child.

(15) "Law" includes decisional and statutory law and rules and regulations having the force of law.

(16) "Obligee" means:

(A) An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order or a judgment determining parentage of a child has been issued;

(B) A foreign country, state, or political subdivision of a state to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee in place of child support;

(C) An individual seeking a judgment determining parentage of the individual's child; or

(D) A person that is a creditor in a proceeding under Article 7.

(17) "Obligor" means an individual or the estate of a decedent that:

(A) Owes or is alleged to owe a duty of support;

(B) Is alleged but has not been adjudicated to be a parent of a child;

(C) Is liable under a support order; or

(D) Is a debtor in a proceeding under Article 7.

(18) "Outside this state" means a location in another state or a country other than the United States, whether or not the country is a foreign country.

(19) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(20) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(21) "Register" means to record in a tribunal of this state a support order or judgment determining parentage of a child issued in another state or a foreign country.

(22) "Registering tribunal" means a tribunal in which a support order or judgment determining parentage of a child is registered.

(23) "Responding state" means a state in which a complaint or comparable pleading for support or to determine parentage of a child is filed or to which a complaint or comparable pleading is forwarded for filing from another state or a foreign country.

(24) "Responding tribunal" means the authorized tribunal in a responding state or foreign country.

(25) "Spousal-support order" means a support order for a spouse or former spouse of the obligor.

(26) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession under the jurisdiction of the United States. The term includes an Indian nation or tribe.

(27) "Support enforcement agency" means a public official, governmental entity, or private agency authorized to:

(A) Seek enforcement of support orders or laws relating to the duty of support;

(B) Seek establishment or modification of child support;

(C) Request determination of parentage of a child;

(D) Attempt to locate obligors or their assets; or

(E) Request determination of the controlling child-support order.

(28) "Support order" means a judgment, decree, order, decision, or directive, whether temporary, final or subject to modification, issued in a state or foreign country for the benefit of a child, a spouse or a former spouse, which provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. The term may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorney's fees and other relief.

(29) "Tribunal" means a court, administrative agency or quasi-judicial entity authorized to establish, enforce or modify support orders or to determine parentage of a child.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-103. State tribunal and support enforcement agency.

(a) The chancery courts, circuit and county courts, and tribal courts are the tribunals of this state.

(b) The Department of Human Services is the support enforcement agency of this state.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Editor's Notes —

A former § 93-25-103 [Laws, 1997, ch. 588, § 122; Laws, 2004, ch. 406, § 34, effective from and after July 1, 2004; Repealed by Laws, 2015, ch. 367, § 2, effective July 1, 2015] related to the recognition of a child support order issued in Mississippi modified by another state. For similar present provisions, see § 93-25-612.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-104. Remedies cumulative.

(a) Remedies provided by this chapter are cumulative and do not affect the availability of remedies under other law or the recognition of a foreign support order on the basis of comity.

(b) This chapter does not:

(1) Provide the exclusive method of establishing or enforcing a support order under the law of this state; or

(2) Grant a tribunal of this state jurisdiction to render judgment or issue an order relating to child custody or visitation in a proceeding under this chapter.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-105. Application of chapter to resident of foreign country and foreign support proceeding.

(a) A tribunal of this state shall apply Articles 1 through 6 and, as applicable, Article 7, to a support proceeding involving:

(1) A foreign support order;

(2) A foreign tribunal; or

(3) An obligee, obligor, or child residing in a foreign country.

(b) A tribunal of this state that is requested to recognize and enforce a support order on the basis of comity may apply the procedural and substantive provisions of Articles 1 through 6.

(c) Article 7 applies only to a support proceeding under the Convention. In such a proceeding, if a provision of Article 7 is inconsistent with Articles 1 through 6, Article 7 controls.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Editor's Notes —

A former § 93-25-105 [Laws, 1997, ch. 588, § 123, effective from and after July 1, 1997; Repealed by Laws, 2015, ch. 367, § 2, effective July 1, 2015] related to notice to the issuing tribunal of the modification of a child support order. For present similar provisions, see § 93-25-614.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§§ 93-25-107 through 93-25-117. [Repealed].

Repealed by Laws of 2015, ch. 367, § 2, effective July 1, 2015.

§ 93-25-107. [Laws, 1997, ch. 588, § 124, eff from and after July 1, 1997.]

§ 93-25-108. [Laws, 2004, ch. 406, § 35, eff from and after July 1, 2004.]

§ 93-25-109. [Laws, 1997, ch. 588, § 125; Laws, 2004, ch. 406, § 36, eff from and after July 1, 2004.]

§ 93-25-111. [Laws, 1997, ch. 588, § 126, eff from and after July 1, 1997.]

§ 93-25-113. [Laws, 1997, ch. 588, § 127; Laws, 2004, ch. 406, § 37, eff from and after July 1, 2004.]

§ 93-25-115. [Laws, 1997, ch. 588, § 128, eff from and after July 1, 1997.]

§ 93-25-117. [Laws, 1997, ch. 588, § 130, eff from and after July 1, 1997.]

Editor's Notes —

Former § 93-25-107 related to jurisdiction to modify the support order of another state when individual parties reside in Mississippi. For present similar provisions, see § 93-25-613.

Former § 93-25-108 related to the authority to modify a foreign child support order. For present similar provisions, see § 93-25-615.

Former § 93-25-109 related to a proceeding to determine parentage. For present similar provisions, see § 93-25-402.

Former § 93-25-111 related to the grounds for rendition. For present similar provisions, see § 93-25-801.

Former § 93-25-113 related to conditions of rendition. For present similar provisions, see § 93-25-802.

Former § 93-25-115 provided for uniformity of application and construction of former Chapter 25. For present similar provisions, see § 93-25-901.

Former § 93-25-117 was a severability clause. For present similar provisions, see § 93-25-903.

ARTICLE 2.

JURISDICTION.

Sec.

93-25-201. Bases for jurisdiction over nonresident.
93-25-202. Duration of personal jurisdiction.
93-25-203. Initiating and responding tribunal of state.
93-25-204. Simultaneous proceedings.
93-25-205. Continuing, exclusive jurisdiction.
93-25-206. Continuing jurisdiction to enforce child-support order.
93-25-207. Determination of controlling child-support order.
93-25-208. Child-support orders for two or more obligees.
93-25-209. Credit for payments.
93-25-210. Application of chapter to nonresident subject to personal jurisdiction.
93-25-211. Continuing, exclusive jurisdiction to modify spousal-support order.

§ 93-25-201. Bases for jurisdiction over nonresident.

(a) In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(1) The individual is personally served with process within this state;

(2) The individual submits to the jurisdiction of this state by consent in a record, by entering a general appearance or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(3) The individual resided with the child in this state;

(4) The individual resided in this state and provided prenatal expenses or support for the child;

(5) The child resides in this state as a result of the acts or directives of the individual;

(6) The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;

(7) The individual asserted parentage of a child as provided by law in this state; or

(8) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

(b) The bases of personal jurisdiction set forth in subsection (a) or in any other law of this state may not be used to acquire personal jurisdiction for a tribunal of this state to modify a child-support order of another state unless the requirements of Section 93-25-611 are met, or, in the case of a foreign support order, unless the requirements of Section 93-25-615 are met.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

JUDICIAL DECISIONS

ANALYSIS

I. Under current law.

1-5. [Reserved for future use.]

II. Under former § 93-25-9.

6. In general.

I. Under current law.

1-5. [Reserved for future use.]

II. Under former § 93-25-9.

6. In general.

Where a mother filed a complaint for custody and support, the Mississippi court lacked personal jurisdiction over the father sufficient to enter a child support award because the father had no contact with Mississippi and agreeing to an order setting the case for trial did not act as a general appearance or otherwise waive the defense of lack of personal jurisdiction. Richardson v. Stogner, 958 So. 2d 235, 2007 Miss. App. LEXIS 373 (Miss. Ct. App. 2007).

Lone action of agreeing to an order setting the case for trial does not act as a general appearance or otherwise waive the defense that the court lacks personal jurisdiction. Richardson v. Stogner, 958 So. 2d 235, 2007 Miss. App. LEXIS 373 (Miss. Ct. App. 2007).

Notwithstanding Miss. Code Ann. § 93-25-9(b), the chancellor could have exercised jurisdiction over the child support question if the father, a resident of California, had voluntarily entered a general appearance, or filed a responsive pleading that effectively waived the issue of jurisdiction. However, while it was correct that the father filed a written answer, with leave of court, he filed an amended answer, which contested jurisdiction; same related back to the filing date of the original answer, and despite his written entry of appearance, and a motion for guardian ad litem, the facts did not suffice for a general appearance or for personal jurisdiction over the father for the purpose of modifying child support. Scaife v. Scaife, 880 So. 2d 1089, 2004 Miss. App. LEXIS 851 (Miss. Ct. App. 2004).

Mississippi trial court lacked subject matter jurisdiction over a petition brought by an ex-wife residing in Mississippi who sought to enforce and modify the child support provisions of a divorce decree entered by the State of Texas, where the ex-husband resided in Texas when the wife filed the action, because continuing exclusive jurisdiction remained with the State of Texas under the provisions of the Uniform Interstate Family Support Act. Gowdey v. Gowdey, 825 So. 2d 67, 2002 Miss. App. LEXIS 476 (Miss. Ct. App. 2002).

§ 93-25-202. Duration of personal jurisdiction.

Personal jurisdiction acquired by a tribunal of this state in a proceeding under this chapter or other law of this state relating to a support order continues as long as a tribunal of this state has continuing, exclusive jurisdiction to modify its order or continuing jurisdiction to enforce its order as provided by Sections 93-25-205, 93-25-206 and 93-25-211.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-203. Initiating and responding tribunal of state.

Under this chapter, a tribunal of this state may serve as an initiating tribunal to forward proceedings to a tribunal of another state and as a responding tribunal for proceedings initiated in another state or a foreign country.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-204. Simultaneous proceedings.

(a) A tribunal of this state may exercise jurisdiction to establish a support order if the complaint or comparable pleading is filed after a complaint or comparable pleading is filed in another state or a foreign country only if:

(1) The complaint or comparable pleading in this state is filed before the expiration of the time allowed in the other state or the foreign country for filing a responsive pleading challenging the exercise of jurisdiction by the other state or the foreign country;

(2) The contesting party timely challenges the exercise of jurisdiction in the other state or the foreign country; and

(3) If relevant, this state is the home state of the child.

(b) A tribunal of this state may not exercise jurisdiction to establish a support order if the complaint or comparable pleading is filed before a complaint or comparable pleading is filed in another state or a foreign country if:

(1) The complaint or comparable pleading in the other state or foreign country is filed before the expiration of the time allowed in this state for filing a responsive pleading challenging the exercise of jurisdiction by this state;

(2) The contesting party timely challenges the exercise of jurisdiction in this state; and

(3) If relevant, the other state or foreign country is the home state of the child.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

JUDICIAL DECISIONS

ANALYSIS

I. Under current law.

1-5. [Reserved for future use.]

II. Under former § 93-25-15.

6. Subject matter jurisdiction.

I. Under current law.

1-5. [Reserved for future use.]

II. Under former § 93-25-15.

6. Subject matter jurisdiction.

Where a mother filed a complaint for custody and support, the Mississippi court lacked subject matter jurisdiction to enter a child support award because there was an active request for a determination of child support and custody between the parties in Louisiana, which had not been abandoned, and the mother did not challenge the jurisdiction of the Louisiana courts to establish child support. Richardson v. Stogner, 958 So. 2d 235, 2007 Miss. App. LEXIS 373 (Miss. Ct. App. 2007).

§ 93-25-205. Continuing, exclusive jurisdiction.

(a) A tribunal of this state that has issued a child-support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child-support order if the order is the controlling order and:

(1) At the time of the filing of a request for modification this state is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(2) Even if this state is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order.

(b) A tribunal of this state that has issued a child-support order consistent with the law of this state may not exercise continuing exclusive jurisdiction to modify the order if:

(1) All of the parties who are individuals file consent in a record with the tribunal of this state that a tribunal of another state that has jurisdiction over at least one (1) of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction; or

(2) Its order is not the controlling order.

(c) If a tribunal of another state has issued a child-support order pursuant to the Uniform Interstate Family Support Act or to a law substantially similar to this chapter which modifies a child-support order of a tribunal of this state, tribunals of this state shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state.

(d) A tribunal of this state that lacks continuing, exclusive jurisdiction to modify a child-support order may serve as an initiating tribunal to request a tribunal of another state to modify a support order issued in that state.

(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

JUDICIAL DECISIONS

ANALYSIS

I. Under current law.

1. Jurisdiction.
2-5. [Reserved for future use.]

II. Under former § 93-25-17.

6. In general.

I. Under current law.

1. Jurisdiction.

Chancery court erred in denying a father's motion to dismiss a mother's complaint for modification of an Ohio divorce decree because its assertion of jurisdiction over child-support agreements failed under the Uniform Interstate Family Support Act (UIFSA); the father maintained continued residence in Ohio since the divorce decree was entered, and his residence in Ohio fulfilled the requirement for that state to maintain jurisdiction under the UIFSA. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

2-5. [Reserved for future use.]

II. Under former § 93-25-17.

6. In general.

Chancery court lacked subject matter jurisdiction to hear a mother's motion for contempt relating to a father's apparent refusal to pay for a child's college expenses because Mississippi lost continuing, exclusive jurisdiction over the matter when a 1990 order was modified in Virginia in 1998 after the parties and children had left the state; moreover, Mississippi was unable to reclaim jurisdiction since the Virginia order was not registered in Mississippi. McLean v. Kohnle, 940 So. 2d 975, 2006 Miss. App. LEXIS 788 (Miss. Ct. App. 2006).

Where chancery court in Mississippi ordered father to pay child support, which he failed to do, and both parents subsequently moved, mother to Texas and father to Georgia, and mother used the Uniform Reciprocal Enforcement of Support Act (URESA) to force father to comply by filing with an office in Texas, and the Georgia Office of Ancillary Domestic Legal Services filed a URESA petition against father for child support, the Mississippi chancery court properly found that it lacked jurisdiction for child support owed to the mother after Georgia took jurisdiction, because the appellant mother failed to follow the statutory provisions set forth pursuant to Miss. Code Ann. § 93-25-83, which required her to register the Georgia orders for enforcement in Mississippi. Williams v. Smith, 915 So. 2d 1114, 2005 Miss. App. LEXIS 990 (Miss. Ct. App. 2005).

Since the husband was a Mississippi resident, the wife was a nonresident, and neither they, nor the child resided in the issuing state of Guam, the trial court had jurisdiction to register, enforce, and modify the foreign child support decree Grumme v. Grumme, 871 So. 2d 1288, 2004 Miss. LEXIS 466 (Miss. 2004).

Mississippi trial court lacked subject matter jurisdiction over a petition brought by an ex-wife residing in Mississippi who sought to enforce and modify the child support provisions of a divorce decree entered by the State of Texas, where the ex-husband resided in Texas when the wife filed the action, because continuing exclusive jurisdiction remained with the State of Texas under the provisions of the Uniform Interstate Family Support Act. Gowdey v. Gowdey, 825 So. 2d 67, 2002 Miss. App. LEXIS 476 (Miss. Ct. App. 2002).

Orders entered by a North Carolina court which decreased the former husband's child support obligation were not enforceable where the former wife and the parties' minor child still resided in Mississippi, the original divorce decree was entered in Mississippi, and the former wife never filed a written consent to North Carolina's assumption of jurisdiction with any court in Mississippi. Thrift v. Thrift, 760 So. 2d 732, 2000 Miss. LEXIS 122 (Miss.), cert. denied, 531 U.S. 944, 121 S. Ct. 341, 148 L. Ed. 2d 274, 2000 U.S. LEXIS 6922 (U.S. 2000).

The fact that a temporary child support order was issued by the Mississippi chancery court during the pendency of a divorce proceeding did not create continuing, exclusive jurisdiction in the issuing tribunal. Peters v. Peters, 744 So. 2d 803, 1999 Miss. App. LEXIS 147 (Miss. Ct. App. 1999).

§ 93-25-206. Continuing jurisdiction to enforce child-support order.

(a) A tribunal of this state that has issued a child-support order consistent with the law of this state may serve as an initiating tribunal to request a tribunal of another state to enforce:

(1) The order, if the order is the controlling order and has not been modified by a tribunal of another state which assumed jurisdiction pursuant to the Uniform Interstate Family Support Act; or

(2) A money judgment for support arrearages and interest on the order accrued before a determination that an order of a tribunal of another state is the controlling order.

(b) A tribunal of this state having continuing jurisdiction over a support order may act as a responding tribunal to enforce the order.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-207. Determination of controlling child-support order.

(a) If a proceeding is brought under this chapter, and only one (1) tribunal has issued a child-support order, the order of that tribunal controls and must be recognized.

(b) If a proceeding is brought under this chapter, and two (2) or more child-support orders have been issued by tribunals of this state, another state, or foreign country with regard to the same obligor and the same child, a tribunal of this state having personal jurisdiction over both the obligor and individual obligee shall apply the following rules and by order shall determine which order controls and must be recognized:

(1) If only one (1) of the tribunals would have continuing, exclusive jurisdiction under this chapter, the order of that tribunal controls.

(2) If more than one (1) of the tribunals would have continuing, exclusive jurisdiction under this chapter:

(A) An order issued by a tribunal in the current home state of the child controls; or

(B) If an order has not been issued in the current home state of the child, the order most recently issued controls.

(3) If none of the tribunals would have continuing, exclusive jurisdiction under this chapter, the tribunal of this state shall issue a child-support order, which controls.

(c) If two (2) or more child-support orders have been issued for the same obligor and the same child, upon request of a party who is an individual or that is a support enforcement agency, a tribunal of this state having personal jurisdiction over both the obligor and the obligee who is an individual shall determine which order controls under subsection (b). The request may be filed with a registration for enforcement or registration for modification pursuant to Article 6, or may be filed as a separate proceeding.

(d) A request to determine which is the controlling order must be accompanied by a copy of every child-support order in effect and the applicable record of payments. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

(e) The tribunal that issued the controlling order under subsection (a), (b) or (c) has continuing jurisdiction to the extent provided in Section 93-25-205 or 93-25-206.

(f) A tribunal of this state that determines by order which is the controlling order under subsection (b)(1) or (2) or subsection (c), or that issues a new controlling order under subsection (b)(3), shall state in that order:

(1) The basis upon which the tribunal made its determination;

(2) The amount of prospective support, if any; and

(3) The total amount of consolidated arrearages and accrued interest, if any, under all of the orders after all payments made are credited as provided by Section 93-25-209.

(g) Within thirty (30) days after issuance of an order determining which is the controlling order, the party obtaining the order shall file a certified copy of it in each tribunal that issued or registered an earlier order of child support. A party or support enforcement agency obtaining the order that fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order.

(h) An order that has been determined to be the controlling order, or a judgment for consolidated arrearages of support and interest, if any, made pursuant to this section must be recognized in proceedings under this chapter.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-208. Child-support orders for two or more obligees.

In responding to registrations or complaints for enforcement of two (2) or more child-support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one (1) of which was issued by a tribunal of another state or foreign country, a tribunal of this state shall enforce those orders in the same manner as if the orders had been issued by a tribunal of this state.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-209. Credit for payments.

A tribunal of this state shall credit amounts collected for a particular period pursuant to any child-support order against the amounts owed for the same period under any other child-support order for support of the same child issued by a tribunal of this state, another state, or a foreign country.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-210. Application of chapter to nonresident subject to personal jurisdiction.

A tribunal of this state exercising personal jurisdiction over a nonresident in a proceeding under this chapter, under other law of this state relating to a support order, or recognizing a foreign support order may receive evidence from outside this state pursuant to Section 93-25-316, communicate with a tribunal outside this state pursuant to Section 93-25-317, and obtain discovery through a tribunal outside this state pursuant to Section 93-25-318. In all other respects, Articles 3 through 6 do not apply and the tribunal shall apply the procedural and substantive law of this state.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-211. Continuing, exclusive jurisdiction to modify spousal-support order.

(a) A tribunal of this state issuing a spousal-support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal-support order throughout the existence of the support obligation.

(b) A tribunal of this state may not modify a spousal-support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country.

(c) A tribunal of this state that has continuing, exclusive jurisdiction over a spousal-support order may serve as:

(1) An initiating tribunal to request a tribunal of another state to enforce the spousal-support order issued in this state; or

(2) A responding tribunal to enforce or modify its own spousal-support order.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

ARTICLE 3.

CIVIL PROVISIONS OF GENERAL APPLICATION.

Sec.

93-25-301. Proceedings under chapter.
93-25-302. Proceeding by minor parent.
93-25-303. Application of law of state.
93-25-304. Duties of initiating tribunal.
93-25-305. Duties and powers of responding tribunal.
93-25-306. Inappropriate tribunal.
93-25-307. Duties of support enforcement agency.
93-25-308. Duty of the Executive Director of the Department of Human Services.
93-25-309. Private counsel.
93-25-310. Duties of Department of Human Services.
93-25-311. Pleadings and accompanying documents.
93-25-312. Nondisclosure of information in exceptional circumstances.
93-25-313. Costs and fees.
93-25-314. Limited immunity of complainant.
93-25-315. Nonparentage as defense.
93-25-316. Special rules of evidence and procedure.
93-25-317. Communications between tribunals.
93-25-318. Assistance with discovery.
93-25-319. Receipt and disbursement of payments.

§ 93-25-301. Proceedings under chapter.

(a) Except as otherwise provided in this chapter, this article applies to all proceedings under this chapter.

(b) An individual complainant or a support enforcement agency may initiate a proceeding authorized under this chapter by filing a complaint in an initiating tribunal for forwarding to a responding tribunal or by filing a complaint or a comparable pleading directly in a tribunal of another state or a foreign country which has or can obtain personal jurisdiction over the defendant.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-302. Proceeding by minor parent.

A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the minor's child.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-303. Application of law of state.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

JUDICIAL DECISIONS

1. Child support.
Chancery court erred in finding that a father (a Mississippi resident) was not obligated to pay child support for his daughter (an Illinois resident) because jurisdiction was proper in Mississippi under the Uniform Interstate Family Support Act, child support was to be determined in accordance with Mississippi law, including Mississippi's 21-year age of majority, and not Illinois's 19-year age of majority. Miss. Dep't of Human Servs. v. Porter, — So. 3d —, 2017 Miss. App. LEXIS 389 (Miss. Ct. App. June 27, 2017).

§ 93-25-304. Duties of initiating tribunal.

(a) Upon the filing of a complaint authorized by this chapter, an initiating tribunal of this state shall forward the complaint and its accompanying documents:

(1) To the responding tribunal or appropriate support enforcement agency in the responding state; or

(2) If the identity of the responding tribunal is unknown, to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) If requested by the responding tribunal, a tribunal of this state shall issue a certificate or other document and make findings required by the law of the responding state. If the responding tribunal is in a foreign country, upon request the tribunal of this state shall specify the amount of support sought, convert that amount into the equivalent amount in the foreign currency under applicable official or market exchange rate as publicly reported, and provide any other documents necessary to satisfy the requirements of the responding foreign tribunal.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-305. Duties and powers of responding tribunal.

(a) When a responding tribunal of this state receives a complaint or comparable pleading from an initiating tribunal or directly pursuant to Section 93-25-301(b), it shall cause the complaint or pleading to be filed and shall notify the complainant where and when it was filed.

(b) A responding tribunal of this state, to the extent not prohibited by other law, may do one or more of the following:

(1) Establish or enforce a support order, modify a child-support order, determine the controlling child-support order, or determine parentage of a child;

(2) Order an obligor to comply with a support order, specifying the amount and the manner of compliance;

(3) Order income withholding;

(4) Determine the amount of any arrearage and specify a method of payment;

(5) Enforce orders by civil or criminal contempt, or both;

(6) Set aside property for satisfaction of the support order;

(7) Place liens and order execution on the obligor's property;

(8) Order an obligor to keep the tribunal informed of the obligor's current residential address, electronic-mail address, telephone number, employer, address of employment and telephone number at the place of employment;

(9) Issue a bench warrant or capias for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the bench warrant or capias in any local and state computer systems for criminal warrants;

(10) Order the obligor to seek appropriate employment by specified methods;

(11) Award reasonable attorney's fees and other fees and costs; and

(12) Grant any other available remedy.

(c) A responding tribunal of this state shall include in a support order issued under this chapter, or in the documents accompanying the order, the calculations on which the support order is based.

(d) A responding tribunal of this state may not condition the payment of a support order issued under this chapter upon compliance by a party with provisions for visitation.

(e) If a responding tribunal of this state issues an order under this chapter, the tribunal shall send a copy of the order to the complainant and the defendant and to the initiating tribunal, if any.

(f) If requested to enforce a support order, arrearage, or judgment or modify a support order stated in a foreign currency, a responding tribunal of this state shall convert the amount stated in the foreign currency to the equivalent amount in dollars under the applicable official or market exchange rate as publicly reported.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-306. Inappropriate tribunal.

If a complaint or comparable pleading is received by an inappropriate tribunal of this state, the tribunal shall forward the pleading and accompanying documents to an appropriate tribunal of this state or another state and notify the complainant where and when the pleading was sent.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-307. Duties of support enforcement agency.

(a) In a proceeding under this chapter, a support enforcement agency of this state, upon request:

(1) Shall provide services to a complainant residing in a state;

(2) Shall provide services to a complainant requesting services through a central authority of a foreign country as described in Section 93-25-102(5)(A) or (D); and

(3) May provide services to a complainant who is an individual not residing in a state.

(b) A support enforcement agency of this state that is providing services to the complainant as appropriate shall:

(1) Take all steps necessary to enable an appropriate tribunal of this state, another state, or a foreign country to obtain jurisdiction over the defendant;

(2) Request an appropriate tribunal to set a date, time and place for a hearing;

(3) Make a reasonable effort to obtain all relevant information, including information as to income and property of the parties;

(4) Within two (2) days, exclusive of Saturdays, Sundays and legal holidays, after receipt of a notice in a record from an initiating, responding or registering tribunal, send a copy of the notice to the complainant;

(5) Within two (2) days, exclusive of Saturdays, Sundays and legal holidays, after receipt of a communication in a record from the defendant or the defendant's attorney, send a copy of the communication to the complainant; and

(6) Notify the complainant if jurisdiction over the defendant cannot be obtained.

(c) A support enforcement agency of this state that requests registration of a child-support order in this state for enforcement or for modification shall make reasonable efforts:

(1) To ensure that the order to be registered is the controlling order; or

(2) If two (2) or more child-support orders exist and the identity of the controlling order has not been determined, to ensure that a request for such a determination is made in a tribunal having jurisdiction to do so.

(d) A support enforcement agency of this state that requests registration and enforcement of a child-support order, arrearages or judgment stated in a foreign currency shall convert the amounts stated in the foreign currency into the equivalent amounts in dollars under the applicable official or market exchange rate as publicly reported.

(e) A support enforcement agency of this state shall request a tribunal of this state to issue a child-support order and an income-withholding order that redirect payment of current support, arrearages and interest if requested to do so by a support enforcement agency of another state pursuant to Section 93-25-319.

(f) This chapter does not create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-308. Duty of the Executive Director of the Department of Human Services.

(a) If the Executive Director of the Department of Human Services determines that the support enforcement agency is neglecting or refusing to provide services to an individual, the executive director may order the agency to perform its duties under this chapter or may provide those services directly to the individual.

(b) The Executive Director of the Department of Human Services may determine that a foreign country has established a reciprocal arrangement for child support with this state and take appropriate action for notification of the determination.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-309. Private counsel.

An individual may employ private counsel to represent the individual in proceedings authorized by this chapter.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-310. Duties of Department of Human Services.

(a) The Department of Human Services is the state information agency under this chapter.

(b) The state information agency shall:

(1) Compile and maintain a current list, including addresses, of the tribunals in this state which have jurisdiction under this chapter and any support enforcement agencies in this state, and transmit a copy to the state information agency of every other state;

(2) Maintain a register of names and addresses of tribunals and support enforcement agencies received from other states;

(3) Forward to the appropriate tribunal in the county in this state in which the obligee who is an individual or the obligor resides, or in which the obligor's property is believed to be located, all documents concerning a proceeding under this chapter received from another state or a foreign country; and

(4) Obtain information concerning the location of the obligor and the obligor's property within this state not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, driver's licenses and social security.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-311. Pleadings and accompanying documents.

(a) In a proceeding under this chapter, a complainant seeking to establish a support order, to determine parentage of a child, or to register and modify a support order of a tribunal of another state or a foreign country must file a complaint. Unless otherwise ordered under Section 93-25-312, the complaint or accompanying documents must provide, so far as known, the name, residential address and social security numbers of the obligor and the obligee or the parent and alleged parent, and the name, sex, residential address, social security number and date of birth of each child for whose benefit support is sought or whose parentage is to be determined. Unless filed at the time of registration, the complaint must be accompanied by a copy of any support order known to have been issued by another tribunal. The complaint may include any other information that may assist in locating or identifying the defendant.

(b) The complaint must specify the relief sought. The complaint and accompanying documents must conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-312. Nondisclosure of information in exceptional circumstances.

If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of specific identifying information, that information must be sealed and may not be disclosed to the other party or the public. After a hearing in which a tribunal takes into consideration the health, safety or liberty of the party or child, the tribunal may order disclosure of information that the tribunal determines to be in the interest of justice.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-313. Costs and fees.

(a) The complainant may not be required to pay a filing fee or other costs.

(b) If an obligee prevails, a responding tribunal of this state may assess against an obligor filing fees, reasonable attorney's fees, other costs and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs or expenses against the obligee or the support enforcement agency of either the initiating or responding state or foreign country, except as provided by other law. Attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs and expenses.

(c) The tribunal shall order the payment of costs and reasonable attorney's fees if it determines that a hearing was requested primarily for delay. In a proceeding under Article 6, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-314. Limited immunity of complainant.

(a) Participation by a complainant in a proceeding under this chapter before a responding tribunal, whether in person, by private attorney or through services provided by the support enforcement agency, does not confer personal jurisdiction over the complainant in another proceeding.

(b) A complainant is not amenable to service of civil process while physically present in this state to participate in a proceeding under this chapter.

(c) The immunity granted by this section does not extend to civil litigation based on acts unrelated to a proceeding under this chapter committed by a party while physically present in this state to participate in the proceeding.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-315. Nonparentage as defense.

A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this chapter.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-316. Special rules of evidence and procedure.

(a) The physical presence of a nonresident party who is an individual in a tribunal of this state is not required for the establishment, enforcement or modification of a support order or the rendition of a judgment determining parentage of a child.

(b) An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this state.

(c) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it, and is admissible to show whether payments were made.

(d) Copies of bills for testing for parentage of a child, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least ten (10) days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary and customary.

(e) Documentary evidence transmitted from outside this state to a tribunal of this state by telephone, telecopier or other electronic means that do not provide an original record may not be excluded from evidence on an objection based on the means of transmission.

(f) In a proceeding under this chapter, a tribunal of this state shall permit a party or witness residing outside this state to be deposed or to testify under penalty of perjury by telephone, audiovisual means or other electronic means at a designated tribunal or other location. A tribunal of this state shall cooperate with other tribunals in designating an appropriate location for the deposition or testimony.

(g) If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

(h) A privilege against disclosure of communications between spouses does not apply in a proceeding under this chapter.

(i) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this chapter.

(j) A voluntary acknowledgement of paternity, certified as a true copy, is admissible to establish parentage of the child.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 93-25-57.

6. Telephonic testimony.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 93-25-57.

6. Telephonic testimony.

In a proceeding seeking to register a Canadian support order, the chancellor did not abuse his discretion in not allowing the wife to testify by telephone from Canada where the Department of Human Services stated only that she should be allowed to testify by telephone because the chancery court would be better assisted in furthering an equitable result in this cause, but the motion did not state a reason why the wife was unable to testify in person. Department of Human Servs. v. Shelnut, 772 So. 2d 1041, 2000 Miss. LEXIS 243 (Miss. 2000).

§ 93-25-317. Communications between tribunals.

A tribunal of this state may communicate with a tribunal outside this state in a record or by telephone, electronic mail, or other means, to obtain information concerning the laws, the legal effect of a judgment, decree or order of that tribunal, and the status of a proceeding. A tribunal of this state may furnish similar information by similar means to a tribunal outside this state.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-318. Assistance with discovery.

A tribunal of this state may:

(1) Request a tribunal outside this state to assist in obtaining discovery; and

(2) Upon request, compel a person over which it has jurisdiction to respond to a discovery order issued by a tribunal outside this state.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-319. Receipt and disbursement of payments.

(a) A support enforcement agency or tribunal of this state shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The agency or tribunal shall furnish to a requesting party or tribunal of another state or a foreign country a certified statement by the custodian of the record of the amounts and dates of all payments received.

(b) If neither the obligor, nor the obligee who is an individual, nor the child resides in this state, upon request from the support enforcement agency of this state or another state, the Department of Human Services or a tribunal of this state shall:

(1) Direct that the support payment be made to the support enforcement agency in the state in which the obligee is receiving services; and

(2) Issue and send to the obligor's employer a conforming income-withholding order or an administrative notice of change of payee, reflecting the redirected payments.

(c) The support enforcement agency of this state receiving redirected payments from another state pursuant to a law similar to subsection (b) shall furnish to a requesting party or tribunal of the other state a certified statement by the custodian of the record of the amount and dates of all payments received.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

ARTICLE 4.

ESTABLISHMENT OF SUPPORT ORDER OR DETERMINATION OF PARENTAGE.

Sec.
93-25-401. Establishment of support order.
93-25-402. Proceeding to determine parentage.

§ 93-25-401. Establishment of support order.

(a) If a support order entitled to recognition under this chapter has not been issued, a responding tribunal of this state with personal jurisdiction over the parties may issue a support order if:

(1) The individual seeking the order resides outside this state; or

(2) The support enforcement agency seeking the order is located outside this state.

(b) The tribunal may issue a temporary child-support order if the tribunal determines that such an order is appropriate and the individual ordered to pay is:

(1) A presumed father of the child;

(2) Petitioning to have his paternity adjudicated;

(3) Identified as the father of the child through genetic testing;

(4) An alleged father who has declined to submit to genetic testing;

(5) Shown by clear and convincing evidence to be the father of the child;

(6) An acknowledged father as provided by applicable state law;

(7) The mother of the child; or

(8) An individual who has been ordered to pay child support in a previous proceeding and the order has not been reversed or vacated.

(c) Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to Section 93-25-305.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising juris-

diction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-402. Proceeding to determine parentage.

A tribunal of this state authorized to determine parentage of a child may serve as a responding tribunal in a proceeding to determine parentage of a child brought under this chapter or a law or procedure substantially similar to this chapter.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

ARTICLE 5.

ENFORCEMENT OF SUPPORT ORDER WITHOUT REGISTRATION.

Sec.
93-25-501. Employer's receipt of income-withholding order of another state.
93-25-502. Employer's compliance with income-withholding order of another state.
93-25-503. Employer's compliance with two or more income-withholding orders of another state.
93-25-504. Immunity from civil liability.
93-25-505. Penalties for noncompliance.
93-25-506. Contest by obligor.
93-25-507. Administrative enforcement of orders.

§ 93-25-501. Employer's receipt of income-withholding order of another state.

An income-withholding order issued in another state may be sent by or on behalf of the obligee, or by the support enforcement agency to the person defined as the obligor's employer under Sections 93-11-101 through 93-11-119 without first filing a complaint or comparable pleading or registering the order with a tribunal of this state.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-502. Employer's compliance with income-withholding order of another state.

(a) Upon receipt of an income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this state.

(c) Except as otherwise provided in subsection (d) and Section 93-25-503, the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order which specify:

(1) The duration and amount of periodic payments of current child support, stated as a sum certain;

(2) The person designated to receive payments and the address to which the payments are to be forwarded;

(3) Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(4) The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and

(5) The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

(d) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:

(1) The employer's fees for processing an income-withholding order;

(2) The maximum amount permitted to be withheld from the obligor's income; and

(3) The times within which the employer must implement the withholding order and forward the child-support payment.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-503. Employer's compliance with two or more income-withholding orders of another state.

If an obligor's employer receives two (2) or more income-withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for two (2) or more child-support obligees.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-504. Immunity from civil liability.

An employer that complies with an income-withholding order issued in another state in accordance with this article is not subject to civil liability to an individual or agency with regard to the employer's withholding of child support from the obligor's income.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-505. Penalties for noncompliance.

An employer that willfully fails to comply with an income-withholding order issued in another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this state.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-506. Contest by obligor.

(a) An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in this state by registering the order in a tribunal of this state and filing a contest to that order as provided in Article 6, or otherwise contesting the order in the same manner as if the order had been issued by a tribunal of this state.

(b) The obligor shall give notice of the contest to:

(1) A support enforcement agency providing services to the obligee;

(2) Each employer that has directly received an income-withholding order relating to the obligor; and

(3) The person designated to receive payments in the income-withholding order, or if no person is designated, to the obligee.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-507. Administrative enforcement of orders.

(a) A party or support enforcement agency seeking to enforce a support order or an income-withholding order, or both, issued in another state or a foreign support order may send the documents required for registering the order to a support enforcement agency of this state.

(b) Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this state to enforce a support order or an income-withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to this chapter.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

ARTICLE 6.

REGISTRATION, ENFORCEMENT, AND MODIFICATION OF SUPPORT ORDER.

Part
1. Registration for Enforcement of Support Order..
2. Contest of Validity or Enforcement..
3. Registration and Modification of Child-Support Order of Another State..
4. Registration and Modification of Foreign Child-Support Order..

PART 1.

REGISTRATION FOR ENFORCEMENT OF SUPPORT ORDER.

Sec.
93-25-601. Registration of order for enforcement.
93-25-602. Procedure to register order for enforcement.
93-25-603. Effect of registration for enforcement.
93-25-604. Choice of law.

§ 93-25-601. Registration of order for enforcement.

A support order or income-withholding order issued in another state or a foreign support order may be registered in this state for enforcement.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-602. Procedure to register order for enforcement.

(a) Except as provided in Section 93-25-706, a support order or income-withholding order of another state or a foreign support order may be registered in this state by sending the following records to the appropriate tribunal in this state:

(1) A letter of transmittal to the tribunal requesting registration and enforcement;

(2) Two (2) copies, including one (1) certified copy, of the order to be registered, including any modification of the order;

(3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;

(4) The name of the obligor and, if known:

(A) The obligor's address and social security number;

(B) The name and address of the obligor's employer and any other source of income of the obligor; and

(C) A description and the location of property of the obligor in this state not exempt from execution; and

(5) Except as otherwise provided in Section 93-25-312, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.

(b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as an order of a tribunal of another state or a foreign support order, together with one (1) copy of the documents and information, regardless of their form.

(c) A complaint or comparable pleading seeking a remedy that must be affirmatively sought under other law of this state may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought.

(d) If two (2) or more orders are in effect, the person requesting registration shall:

(1) Furnish to the tribunal a copy of every support order asserted to be in effect in addition to the documents specified in this section;

(2) Specify the order alleged to be the controlling order, if any; and

(3) Specify the amount of consolidated arrearages, if any.

(e) A request for a determination of which is the controlling order may be filed separately or with a request for registration and enforcement or for registration and modification. The person requesting registration shall give notice of the request to each party whose rights may be affected by the determination.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-5. [Reserved for future use.]

II. Under former § 93-25-83.

6. In general.

I. Under Current Law.

1-5. [Reserved for future use.]

II. Under former § 93-25-83.

6. In general.

Chancery court did not err in dismissing a mother's request to modify child support because the mother could have taken the appropriate steps under the Uniform Interstate Family Support Act to ensure the chancery court had jurisdiction, first by registering the Tennessee judgment in Mississippi; it is not within the power of the court of appeals to disregard jurisdictional requirements set forth by the Legislature. Nurkin v. Nurkin, 171 So. 3d 561, 2015 Miss. App. LEXIS 181 (Miss. Ct. App. 2015).

Where chancery court in Mississippi ordered father to pay child support, which he failed to do, and both parents subsequently moved, mother to Texas and father to Georgia, and mother used the Uniform Reciprocal Enforcement of Support Act (URESA) to force father to comply by filing with an office in Texas, and the Georgia Office of Ancillary Domestic Legal Services filed a URESA petition against father for child support, the Mississippi chancery court properly found that it lacked jurisdiction for child support owed to the mother after Georgia took jurisdiction, because the appellant mother failed to follow the statutory provisions set forth pursuant to Miss. Code Ann. § 93-25-83, which required her to register the Georgia orders for enforcement in Mississippi. Williams v. Smith, 915 So. 2d 1114, 2005 Miss. App. LEXIS 990 (Miss. Ct. App. 2005).

§ 93-25-603. Effect of registration for enforcement.

(a) A support order or income-withholding order issued in another state or a foreign support order is registered when the order is filed in the registering tribunal of this state.

(b) A registered support order issued in another state or a foreign country is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state.

(c) Except as otherwise provided in this chapter, a tribunal of this state shall recognize and enforce, but may not modify, a registered support order if the issuing tribunal had jurisdiction.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-604. Choice of law.

(a) Except as otherwise provided in subsection (d), the law of the issuing state or foreign country governs:

(1) The nature, extent, amount and duration of current payments under a registered support order;

(2) The computation and payment of arrearages and accrual of interest on the arrearages under the support order; and

(3) The existence and satisfaction of other obligations under the support order.

(b) In a proceeding for arrearages under a registered support order, the statute of limitation of this state or of the issuing state or foreign country, whichever is longer, applies.

(c) A responding tribunal of this state shall apply the procedures and remedies of this state to enforce current support and collect arrearages and interest due on a support order of another state or a foreign country registered in this state.

(d) After a tribunal of this state or another state determines which is the controlling order and issues an order consolidating arrearages, if any, a tribunal of this state shall prospectively apply the law of the state or foreign country issuing the controlling order, including its law on interest on arrearages, on current and future support and on consolidated arrearages.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

PART 2.

CONTEST OF VALIDITY OR ENFORCEMENT

Sec.

93-25-605. Notice of registration of order.

93-25-606. Procedure to contest validity or enforcement of registered support order.

93-25-607. Contest of registration or enforcement.

93-25-608. Confirmed order.

§ 93-25-605. Notice of registration of order.

(a) When a support order or income-withholding order issued in another state or a foreign support order is registered, the registering tribunal of this state shall notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice must inform the nonregistering party:

(1) That a registered support order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this state;

(2) That a hearing to contest the validity or enforcement of the registered order must be requested within twenty (20) days after notice unless the registered order is under Section 93-25-707;

(3) That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages; and

(4) Of the amount of any alleged arrearages.

(c) If the registering party asserts that two (2) or more orders are in effect, a notice must also:

(1) Identify the two (2) or more orders and the order alleged by the registering party to be the controlling order and the consolidated arrearages, if any;

(2) Notify the nonregistering party of the right to a determination of which is the controlling order;

(3) State that the procedures provided in subsection (b) apply to the determination of which is the controlling order; and

(4) State that failure to contest the validity or enforcement of the order alleged to be the controlling order in a timely manner may result in confirmation that the order is the controlling order.

(d) Upon registration of an income-withholding order for enforcement, the support enforcement agency or the registering tribunal shall notify the obligor's employer pursuant to Sections 93-11-101 through 93-11-119.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

Applicability of this section to a contest of a registered Convention support order, see § 93-25-707.

§ 93-25-606. Procedure to contest validity or enforcement of registered support order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered support order in this state shall request a hearing within the time required by Section 93-25-605. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearage pursuant to Section 93-25-607.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered support order in a timely manner, the order is confirmed by operation of law.

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered support order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time and place of the hearing.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

Applicability of this section to a contest of a registered Convention support order, see § 93-25-707.

§ 93-25-607. Contest of registration or enforcement.

(a) A party contesting the validity or enforcement of a registered support order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(1) The issuing tribunal lacked personal jurisdiction over the contesting party;

(2) The order was obtained by fraud;

(3) The order has been vacated, suspended or modified by a later order;

(4) The issuing tribunal has stayed the order pending appeal;

(5) There is a defense under the law of this state to the remedy sought;

(6) Full or partial payment has been made;

(7) The statute of limitation under Section 93-25-604 precludes enforcement of some or all of the alleged arrearage; or

(8) The alleged controlling order is not the controlling order.

(b) If a party presents evidence establishing a full or partial defense under subsection (a), a tribunal may stay enforcement of a registered support order, continue the proceeding to permit production of additional relevant evidence and issue other appropriate orders. An uncontested portion of the registered support order may be enforced by all remedies available under the law of this state.

(c) If the contesting party does not establish a defense under subsection (a) to the validity or enforcement of a registered support order, the registering tribunal shall issue an order confirming the order.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

Applicability of this section to a contest of a registered Convention support order, see § 93-25-707.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-5. [Reserved for future use.]

II. Under former § 93-25-93.

6. In general.

I. Under Current Law.

1-5. [Reserved for future use.]

II. Under former § 93-25-93.

6. In general.

Since the husband was a Mississippi resident, the wife was a nonresident, and neither they, nor the child resided in the issuing state of Guam, the trial court had jurisdiction to register, enforce, and modify the foreign child support decree. The husband's objection to registration of the order for enforcement did not fall within the objections in Miss. Code Ann. § 93-25-93. Grumme v. Grumme, 871 So. 2d 1288, 2004 Miss. LEXIS 466 (Miss. 2004).

§ 93-25-608. Confirmed order.

Confirmation of a registered support order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

Applicability of this section to a contest of a registered Convention support order, see § 93-25-707.

PART 3.

REGISTRATION AND MODIFICATION OF CHILD-SUPPORT ORDER OF ANOTHER STATE

Sec.
93-25-609. Procedure to register child-support order of another state for modification.
93-25-610. Effect of registration for modification.
93-25-611. Modification of child-support order of another state.
93-25-612. Recognition of order modified in another state.
93-25-613. Jurisdiction to modify child-support order of another state when individual parties reside in this state.
93-25-614. Notice to issuing tribunal of modification.

§ 93-25-609. Procedure to register child-support order of another state for modification.

A party or support enforcement agency seeking to modify, or to modify and enforce, a child-support order issued in another state shall register that order in this state in the same manner provided in Sections 93-25-601 through 93-25-608 if the order has not been registered. A complaint for modification may be filed at the same time as a request for registration or later. The pleading must specify the grounds for modification.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-610. Effect of registration for modification.

A tribunal of this state may enforce a child-support order of another state registered for purposes of modification in the same manner as if the order had been issued by a tribunal of this state, but the registered support order may be modified only if the requirements of Section 93-25-611 or Section 93-25-613 have been met.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-611. Modification of child-support order of another state.

(a) If Section 93-25-613 does not apply, upon complaint, a tribunal of this state may modify a child-support order issued in another state which is registered in this state, if, after notice and hearing, it finds that:

(1) The following requirements are met:

(A) Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;

(B) A complainant who is a nonresident of this state seeks modification; and

(C) The defendant is subject to the personal jurisdiction of the tribunal of this state; or

(2) This state is the residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.

(b) Modification of a registered child-support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.

(c) A tribunal of this state may not modify any aspect of a child-support order that may not be modified under the law of the issuing state, including the duration of the obligation of support. If two (2) or more tribunals have issued child-support orders for the same obligor and the same child, the order that controls and must be so recognized under Section 93-25-207 establishes the aspects of the support order which are nonmodifiable.

(d) In a proceeding to modify a child-support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

(e) On the issuance of an order by a tribunal of this state modifying a child-support order issued in another state, the tribunal of this state becomes the tribunal having continuing, exclusive jurisdiction.

(f) Notwithstanding subsections (a) through (e) and Section 93-25-201(b), a tribunal of this state retains jurisdiction to modify an order issued by a tribunal of this state if:

(1) One (1) party resides in another state; and

(2) The other party resides outside the United States.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1-5. [Reserved for future use.]

II. Under former § 93-25-101.

6. In general.

I. Under Current Law.

1-5. [Reserved for future use.]

II. Under former § 93-25-101.

6. In general.

It was error to deny a mother's petition to increase child support on the ground she failed to develop the factors relevant to the modification of support under the law of the issuing court because the issue should have been decided under Mississippi law; the mother did not seek to modify the Iowa court's order that was non-modifiable under Iowa law, but rather, her request was based on alleged increases in the father's income and the child's expenses and was governed by subsection (b). Heisinger v. Riley, 243 So. 3d 248, 2018 Miss. App. LEXIS 154 (Miss. Ct. App. 2018).

Because the chancellor lacked subject matter jurisdiction to modify the child support provisions of the parties' New Hampshire divorce decree under Miss. Code Ann. § 93-25-101, the modifications concerning health insurance premiums and other health expenses were reversed. Patterson v. Patterson, 20 So. 3d 65, 2009 Miss. App. LEXIS 718 (Miss. Ct. App. 2009).

Mississippi trial court chancellor's application of a public policy amendment to a California support order, stating that it was against public policy to permit support for a child to end before age 21, was incorrect and was reversed; the California order was not modifiable by Miss. Code Ann. § 93-25-21 because in interstate support modification cases, the law of the issuing state prevails and to register an order, consent from the initiating state is required, therefore, the law of Mississippi could not prevail even though both parents and the children had left California, whose law as to the age for termination of support remained determinative. Nelson v. Halley, 827 So. 2d 42, 2002 Miss. App. LEXIS 522 (Miss. Ct. App. 2002).

§ 93-25-612. Recognition of order modified in another state.

If a child-support order issued by a tribunal of this state is modified by a tribunal of another state which assumed jurisdiction pursuant to the Uniform Interstate Family Support Act, a tribunal of this state:

(1) May enforce its order that was modified only as to arrearages and interest accruing before the modification;

(2) May provide appropriate relief for violations of its order which occurred before the effective date of the modification; and

(3) Shall recognize the modifying order of the other state, upon registration, for the purpose of enforcement.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-613. Jurisdiction to modify child-support order of another state when individual parties reside in this state.

(a) If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child-support order in a proceeding to register that order.

(b) A tribunal of this state exercising jurisdiction under this section shall apply the provisions of Articles 1 and 2, this article, and the procedural and substantive law of this state to the proceeding for enforcement or modification. Articles 3, 4, 5, 7, and 8 do not apply.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

§ 93-25-614. Notice to issuing tribunal of modification.

Within thirty (30) days after issuance of a modified child-support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order, and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

PART 4.

REGISTRATION AND MODIFICATION OF FOREIGN CHILD-SUPPORT ORDER

Sec.
93-25-615. Jurisdiction to modify child-support order of foreign country.
93-25-616. Procedure to register child-support order of foreign country for modification.

§ 93-25-615. Jurisdiction to modify child-support order of foreign country.

(a) Except as otherwise provided in Section 93-25-711, if a foreign country lacks or refuses to exercise jurisdiction to modify its child-support order pursuant to its laws, a tribunal of this state may assume jurisdiction to modify the child-support order and bind all individuals subject to the personal jurisdiction of the tribunal whether the consent to modification of a child-support order otherwise required of the individual pursuant to Section 93-25-611 has been given or whether the individual seeking modification is a resident of this state or of the foreign country.

(b) An order issued by a tribunal of this state modifying a foreign child-support order pursuant to this section is the controlling order.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-616. Procedure to register child-support order of foreign country for modification.

A party or support enforcement agency seeking to modify, or to modify and enforce, a foreign child-support order not under the Convention may register that order in this state under Sections 93-25-601 through 93-25-608 if the order has not been registered. A complaint for modification may be filed at the same time as a request for registration, or at another time. The complaint must specify the grounds for modification.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 1, 2 and 6 of this chapter apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

ARTICLE 7.

SUPPORT PROCEEDING UNDER CONVENTION.

Sec.
93-25-701. Definitions.
93-25-702. Applicability.
93-25-703. Relationship of the Department of Human Services to United States central authority.
93-25-704. Initiation by the Department of Human Services of support proceeding under Convention.
93-25-705. Direct request.
93-25-706. Registration of Convention support order.
93-25-707. Contest of registered Convention support order.
93-25-708. Recognition and enforcement of registered Convention support order.
93-25-709. Partial enforcement.
93-25-710. Foreign support agreement.
93-25-711. Modification of Convention child-support order.
93-25-712. Personal information; limit on use.
93-25-713. Record in original language; English translation.

§ 93-25-701. Definitions.

In this article:

(1) "Application" means a request under the Convention by an obligee or obligor, or on behalf of a child, made through a central authority for assistance from another central authority.

(2) "Central authority" means the entity designated by the United States or a foreign country described in Section 93-25-102(5)(D) to perform the functions specified in the Convention.

(3) "Convention support order" means a support order of a tribunal of a foreign country described in Section 93-25-102(5)(D).

(4) "Direct request" means a complaint filed by an individual in a tribunal of this state in a proceeding involving an obligee, obligor, or child residing outside the United States.

(5) "Foreign central authority" means the entity designated by a foreign country described in Section 93-25-102(5)(D) to perform the functions specified in the Convention.

(6) "Foreign support agreement":

(A) Means an agreement for support in a record that:

(i) Is enforceable as a support order in the country of origin;

(ii) Has been:

(I) Formally drawn up or registered as an authentic instrument by a foreign tribunal; or

(II) Authenticated by, or concluded, registered, or filed with a foreign tribunal; and

(iii) May be reviewed and modified by a foreign tribunal; and

(B) Includes a maintenance arrangement or authentic instrument under the Convention.

(7) "United States central authority" means the Secretary of the United States Department of Health and Human Services.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-702. Applicability.

This article applies only to a support proceeding under the Convention. In such a proceeding, if a provision of this article is inconsistent with Articles 1 through 6, this article controls.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-703. Relationship of the Department of Human Services to United States central authority.

The Department of Human Services of this state is recognized as the agency designated by the United States central authority to perform specific functions under the Convention.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-704. Initiation by the Department of Human Services of support proceeding under Convention.

(a) In a support proceeding under this article, the Department of Human Services of this state shall:

(1) Transmit and receive applications; and

(2) Initiate or facilitate the institution of a proceeding regarding an application in a tribunal of this state.

(b) The following support proceedings are available to an obligee under the Convention:

(1) Recognition or recognition and enforcement of a foreign support order;

(2) Enforcement of a support order issued or recognized in this state;

(3) Establishment of a support order if there is no existing order, including, if necessary, determination of parentage of a child;

(4) Establishment of a support order if recognition of a foreign support order is refused under Section 93-25-708(b) (2), (4), or (9);

(5) Modification of a support order of a tribunal of this state; and

(6) Modification of a support order of a tribunal of another state or a foreign country.

(c) The following support proceedings are available under the Convention to an obligor against which there is an existing support order:

(1) Recognition of an order suspending or limiting enforcement of an existing support order of a tribunal of this state;

(2) Modification of a support order of a tribunal of this state; and

(3) Modification of a support order of a tribunal of another state or a foreign country.

(d) A tribunal of this state may not require security, bond, or deposit, however described, to guarantee the payment of costs and expenses in proceedings under the Convention.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-705. Direct request.

(a) A complainant may file a direct request seeking establishment or modification of a support order or determination of parentage of a child. In the proceeding, the law of this state applies.

(b) A complainant may file a direct request seeking recognition and enforcement of a support order or support agreement. In the proceeding, Sections 93-25-706 through 93-25-713 apply.

(c) In a direct request for recognition and enforcement of a Convention support order or foreign support agreement:

(1) A security, bond, or deposit is not required to guarantee the payment of costs and expenses; and

(2) An obligee or obligor that in the issuing country has benefited from free legal assistance is entitled to benefit, at least to the same extent, from any free legal assistance provided for by the law of this state under the same circumstances.

(d) A complainant filing a direct request is not entitled to assistance from the Department of Human Services.

(e) This article does not prevent the application of laws of this state that provide simplified, more expeditious rules regarding a direct request for recognition and enforcement of a foreign support order or foreign support agreement.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-706. Registration of Convention support order.

(a) Except as otherwise provided in this article, a party who is an individual or a support enforcement agency seeking recognition of a Convention support order shall register the order in this state as provided in Article 6.

(b) Notwithstanding Sections 93-25-311 and 93-25-602(a), a request for registration of a Convention support order must be accompanied by:

(1) A complete text of the support order or an abstract or extract of the support order drawn up by the issuing foreign tribunal, which may be in the form recommended by The Hague Conference on Private International Law;

(2) A record stating that the support order is enforceable in the issuing country;

(3) If the respondent did not appear and was not represented in the proceedings in the issuing country, a record attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard or that the respondent had proper notice of the support order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal;

(4) A record showing the amount of arrearages, if any, and the date the amount was calculated;

(5) A record showing a requirement for automatic adjustment of the amount of support, if any, and the information necessary to make the appropriate calculations; and

(6) If necessary, a record showing the extent to which the applicant received free legal assistance in the issuing country.

(c) A request for registration of a Convention support order may seek recognition and partial enforcement of the order.

(d) A tribunal of this state may vacate the registration of a Convention support order without the filing of a contest under Section 93-25-707 only if, acting on its own motion, the tribunal finds that recognition and enforcement of the order would be manifestly incompatible with public policy.

(e) The tribunal shall promptly notify the parties of the registration or the order vacating the registration of a Convention support order.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-707. Contest of registered Convention support order.

(a) Except as otherwise provided in this article, Sections 93-25-605 through 93-25-608 apply to a contest of a registered Convention support order.

(b) A party contesting a registered Convention support order shall file a contest not later than thirty (30) days after notice of the registration, but if the contesting party does not reside in the United States, the contest must be filed not later than sixty (60) days after notice of the registration.

(c) If the nonregistering party fails to contest the registered Convention support order by the time specified in subsection (b), the order is enforceable.

(d) A contest of a registered Convention support order may be based only on grounds set forth in Section 93-25-708. The contesting party bears the burden of proof.

(e) In a contest of a registered Convention support order, a tribunal of this state:

(1) Is bound by the findings of fact on which the foreign tribunal based its jurisdiction; and

(2) May not review the merits of the order.

(f) A tribunal of this state deciding a contest of a registered Convention support order shall promptly notify the parties of its decision.

(g) A challenge or appeal, if any, does not stay the enforcement of a Convention support order unless there are exceptional circumstances.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising juris-

diction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-708. Recognition and enforcement of registered Convention support order.

(a) Except as otherwise provided in subsection (b), a tribunal of this state shall recognize and enforce a registered Convention support order.

(b) The following grounds are the only grounds on which a tribunal of this state may refuse recognition and enforcement of a registered Convention support order:

(1) Recognition and enforcement of the order is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard;

(2) The issuing tribunal lacked personal jurisdiction consistent with Section 93-25-201;

(3) The order is not enforceable in the issuing country;

(4) The order was obtained by fraud in connection with a matter of procedure;

(5) A record transmitted in accordance with Section 93-25-706 lacks authenticity or integrity;

(6) A proceeding between the same parties and having the same purpose is pending before a tribunal of this state and that proceeding was the first to be filed;

(7) The order is incompatible with a more recent support order involving the same parties and having the same purpose if the more recent support order is entitled to recognition and enforcement under this chapter in this state;

(8) Payment, to the extent alleged arrearages have been paid in whole or in part;

(9) In a case in which the defendant neither appeared nor was represented in the proceeding in the issuing foreign country:

(A) If the law of that country provides for prior notice of proceedings, the defendant did not have proper notice of the proceedings and an opportunity to be heard; or

(B) If the law of that country does not provide for prior notice of the proceedings, the defendant did not have proper notice of the order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal; or

(10) The order was made in violation of Section 93-25-711.

(c) If a tribunal of this state does not recognize a Convention support order under subsection (b)(2), (4), or (9):

(1) The tribunal may not dismiss the proceeding without allowing a reasonable time for a party to request the establishment of a new Convention support order; and

(2) The Department of Human Services shall take all appropriate measures to request a child-support order for the obligee if the application for recognition and enforcement was received under Section 93-25-704.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-709. Partial enforcement.

If a tribunal of this state does not recognize and enforce a Convention support order in its entirety, it shall enforce any severable part of the order. An application or direct request may seek recognition and partial enforcement of a Convention support order.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-710. Foreign support agreement.

(a) Except as otherwise provided in subsections (c) and (d), a tribunal of this state shall recognize and enforce a foreign support agreement registered in this state.

(b) An application or direct request for recognition and enforcement of a foreign support agreement must be accompanied by:

(1) A complete text of the foreign support agreement; and

(2) A record stating that the foreign support agreement is enforceable as an order of support in the issuing country.

(c) A tribunal of this state may vacate the registration of a foreign support agreement only if, acting on its own motion, the tribunal finds that recognition and enforcement would be manifestly incompatible with public policy.

(d) In a contest of a foreign support agreement, a tribunal of this state may refuse recognition and enforcement of the agreement if it finds:

(1) Recognition and enforcement of the agreement is manifestly incompatible with public policy;

(2) The agreement was obtained by fraud or falsification;

(3) The agreement is incompatible with a support order involving the same parties and having the same purpose in this state, another state, or a foreign country if the support order is entitled to recognition and enforcement under this chapter in this state; or

(4) The record submitted under subsection (b) lacks authenticity or integrity.

(e) A proceeding for recognition and enforcement of a foreign support agreement must be suspended during the pendency of a challenge to or appeal of the agreement before a tribunal of another state or a foreign country.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-711. Modification of Convention child-support order.

(a) A tribunal of this state may not modify a Convention child-support order if the obligee remains a resident of the foreign country where the support order was issued unless:

(1) The obligee submits to the jurisdiction of a tribunal of this state, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or

(2) The foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order.

(b) If a tribunal of this state does not modify a Convention child-support order because the order is not recognized in this state, Section 93-25-708(c) applies.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-712. Personal information; limit on use.

Personal information gathered or transmitted under this article may be used only for the purposes for which it was gathered or transmitted.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

§ 93-25-713. Record in original language; English translation.

A record filed with a tribunal of this state under this article must be in the original language and, if not in English, must be accompanied by an English translation.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising juris-

diction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

This Article 7 applies only to support proceedings under the Convention, see § 93-25-702.

ARTICLE 8.

INTERSTATE RENDITION.

Sec.
93-25-801. Grounds for rendition.
93-25-802. Conditions of rendition.

§ 93-25-801. Grounds for rendition.

(a) For purposes of this chapter, "governor" includes an individual performing the functions of governor or the executive authority of a state covered by this chapter.

(b) The governor of this state may:

(1) Demand that the governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to provide for the support of an obligee; or

(2) On the demand of the governor of another state, surrender an individual found in this state who is charged criminally in the other state with having failed to provide for the support of an obligee.

(c) A provision for extradition of individuals not inconsistent with this chapter applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled therefrom.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —

Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

§ 93-25-802. Conditions of rendition.

(a) Before making a demand that the governor of another state surrender an individual charged criminally in this state with having failed to provide for the support of an obligee, the governor of this state may require a prosecutor of this state to demonstrate that at least sixty (60) days previously the obligee had initiated proceedings for support pursuant to this chapter or that the proceeding would be of no avail.

(b) If, under this chapter or a law substantially similar to this chapter, the governor of another state makes a demand that the governor of this state surrender an individual charged criminally in that state with having failed to provide for the support of a child or other individual to whom a duty of support is owed, the governor may require a prosecutor to investigate the demand and report whether a proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the governor may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the governor may decline to honor the demand. If the complainant prevails and the individual whose rendition is demanded is subject to a support order, the governor may decline to honor the demand if the individual is complying with the support order.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

Cross References —
Articles 3, 4, 5, 7, and 8 of this chapter do not apply to Mississippi tribunal exercising jurisdiction to enforce or modify child-support order of another state when individual parties reside in Mississippi, see § 93-25-613.

ARTICLE 9.

MISCELLANEOUS PROVISIONS.

Sec.
93-25-901. Uniformity of application and construction.
93-25-902. Transitional provision.
93-25-903. Severability.

§ 93-25-901. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

§ 93-25-902. Transitional provision.

This chapter applies to proceedings begun on or after July 1, 2015, to establish a support order or determine parentage of a child or to register, recognize, enforce, or modify a prior support order, determination, or agreement, whenever issued or entered.

HISTORY:
Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

§ 93-25-903. Severability.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

HISTORY:

Laws, 2015, ch. 367, § 1, eff from and after July 1, 2015.

CHAPTER 27.

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Article 1. General Provisions. 93-27-101
Article 2. Jurisdiction. 93-27-201
Article 3. Enforcement. 93-27-301
Article 4. Miscellaneous. 93-27-401

ARTICLE 1.

GENERAL PROVISIONS.

Sec.
93-27-101. Short title.
93-27-102. Definitions.
93-27-103. Proceedings governed by other law.
93-27-104. Application to Indian tribes.
93-27-105. International application.
93-27-106. Effect of child-custody determination.
93-27-107. Priority.
93-27-108. Notice to persons outside state.
93-27-109. Appearance and limited immunity.
93-27-110. Communication between courts.
93-27-111. Taking testimony in another state.
93-27-112. Cooperation between courts; preservation of records.

§ 93-27-101. Short title.

The provisions of this chapter may be cited as the Uniform Child Custody Jurisdiction and Enforcement Act.

HISTORY:

Laws, 2004, ch. 519, § 1, eff from and after July 1, 2004.

Editor's Notes —

Laws, 2004, ch. 519, § 42, provides:

"SECTION 42. The provisions of Sections 1 through 41 of this act shall be codified as a separate chapter in Title 93, Mississippi Code of 1972."

§ 93-27-102. Definitions.

In this chapter, the following words and phrases shall have the meanings ascribed in this section unless the context clearly indicates otherwise:

(a) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(b) "Child" means an individual who has not attained eighteen (18) years of age.

(c) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(d) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Article 3.

(e) "Commencement" means the filing of the first pleading in a proceeding.

(f) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.

(g) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six (6) months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(h) "Initial determination" means the first child custody determination concerning a particular child.

(i) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this chapter.

(j) "Issuing state" means the state in which a child custody determination is made.

(k) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(*l*) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(m) "Person acting as a parent" means a person, other than a parent, who:

(i) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and

(ii) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(n) "Petitioner" means a person who seeks enforcement of (i) an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or (ii) a child custody determination.

(o) "Physical custody" means the physical care and supervision of a child.

(p) "Respondent" means a person against whom a proceeding has been commenced for enforcement of (i) an order for return of a child under the

Hague Convention on the Civil Aspects of International Child Abduction or (ii) a child custody determination.

(q) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(r) "Tribe" means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a state.

(s) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

HISTORY:

Laws, 2004, ch. 519, § 2, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

1. Child custody determination.
2. Home state.
3. Jurisdiction.

1. Child custody determination.

Temporary visitation order was a "child-custody determination" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), La. Rev. Stat. Ann. § 13:1802(3), Miss. Code Ann. § 93-27-102(c), requiring UCCJEA jurisdiction because the father's filing of a petition to establish parentage, custody, and visitation initiated a "child custody proceeding" pursuant to the UCCJEA, La. Rev. Stat. Ann. § 13:1802(4), Miss. Code Ann. § 93-27-102(d). Miller v. Mills, 64 So. 3d 1023, 2011 Miss. App. LEXIS 249 (Miss. Ct. App. 2011).

Temporary visitation order was a "child-custody determination" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), La. Rev. Stat. Ann. § 13:1802(3), Miss. Code Ann. § 93-27-102(c), requiring UCCJEA jurisdiction because the father's filing of a petition to establish parentage, custody, and visitation initiated a "child custody proceeding" pursuant to the UCCJEA, La. Rev. Stat. Ann. § 13:1802(4), Miss. Code Ann. § 93-27-102(d). Miller v. Mills, 64 So. 3d 1023, 2011 Miss. App. LEXIS 249 (Miss. Ct. App. 2011).

While the Uniform Child Custody Jurisdiction and Enforcement Act's definition of "child custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child", Miss. Code Ann. § 93-27-102(c), does not explicitly require a court to make a finding as to a specific visitation schedule, it is logical that when a court grants custody to one parent, it must address whether the non-custodial parent receives visitation rights and to what extent. Benal v. Benal, 22 So. 3d 369, 2009 Miss. App. LEXIS 805 (Miss. Ct. App. 2009).

Although a chancery court had temporary emergency jurisdiction to hear the complaint of a father, who had kidnapped his children from their mother, alleging substantial neglect and abuse, the court erred when it continued to exercise jurisdiction over the matter after it should reasonably have become apparent that there was no clear and present danger to the children from permitting adjudication of modification, if any, of their custody in the courts of another state which originally granted custody of the children to the mother. Mississippi was not the children's "home state," even though they had lived in Mississippi for over 6 consecutive months, since the father brought the children to Mississippi in contravention of a valid custody decree of another state and the children remained in Mississippi by virtue of the chancery court's custody and protective order; such court-ordered involuntary residence does not generate "so much as a single tick of the UCCJA's 6 consecutive months clock." Additionally, the father and the children did not have a "significant connection" with Mississippi, within the meaning of § 93-23-5, by virtue of the fact that they had lived in Mississippi for over 6 months at the time of the hearing, where they had been in Mississippi for only one or 2 days prior to the time the father filed the original application for modification of custody. In light of the UCCJA's dominant purpose of preventing interstate parental kidnapping and § 93-23-15's strong injunction against wrongfully taking children from one state to another, the father and the children were required to "have a significant connection" with Mississippi prior to the filing of the application for custody modification, and their presence in Mississippi for one or 2 days was not a "significant connection" within the meaning of § 93-23-5(1)(b). Curtis v. Curtis, 574 So. 2d 24, 1990 Miss. LEXIS 850 (Miss. 1990).

2. Home state.

Because a mother and child moved to Mississippi soon after an Ohio divorce decree was entered and remained within the State consecutively for more than six months prior to the decree's registration in Mississippi, the chancery court was correct in determining that Mississippi was the child's home state. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

Temporary visitation order was unenforceable in Mississippi because the record did not support Louisiana's exercise of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); Louisiana made no finding that it was the children's home state under the UCCJEA, La. Rev. Stat. Ann. § 13:1812(7)(a), Miss. Code Ann. § 93-27-102(g), and the evidence showed that the children had lived in Mississippi for more than six consecutive months before the father commenced his child-custody proceeding in Louisiana. Miller v. Mills, 64 So. 3d 1023, 2011 Miss. App. LEXIS 249 (Miss. Ct. App. 2011).

3. Jurisdiction.

Chancery court had continuing jurisdiction to modify a custody award under Miss. Code Ann. § 93-27-201(1)(a)-(b) (Rev. 2013) where the divorce decree provided for the father to have visitation, and was thus a child custody determination under Miss. Code Ann. § 93-27-102(c). Welton v. Westmoreland, 180 So. 3d 738, 2015 Miss. App. LEXIS 595 (Miss. Ct. App. 2015).

RESEARCH REFERENCES

ALR.

Applicability of Uniform Child Custody Jurisdiction Act (UCCJA) to temporary custody orders. 81 A.L.R.4th 1101.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 A.L.R.4th 742.

Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(A). 40 A.L.R.5th 227.

Law Reviews.

1989 Mississippi Supreme Court Review: Custody of Child. 59 Miss. L. J. 897, Winter, 1989.

1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-103. Proceedings governed by other law.

This chapter does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

HISTORY:

Laws, 2004, ch. 519, § 3, eff from and after July 1, 2004.

§ 93-27-104. Application to Indian tribes.

(1) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 USCS Section 1901 et seq., is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act.

(2) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying Articles 1 and 2.

(3) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Article 3.

HISTORY:
Laws, 2004, ch. 519, § 4, eff from and after July 1, 2004.

Federal Aspects—
Indian Child Welfare Act, see 25 USCS §§ 1901 et seq.

§ 93-27-105. International application.

(1) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying Articles 1 and 2.

(2) Except as otherwise provided in subsection (3), a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Article 3.

(3) A court of this state need not apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights.

HISTORY:
Laws, 2004, ch. 519, § 5, eff from and after July 1, 2004.

RESEARCH REFERENCES

ALR.
Applicability and Application of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to International Child Custody and Support Actions. 66 A.L.R.6th 269.

§ 93-27-106. Effect of child-custody determination.

A child custody determination made by a court of this state that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this state or notified in accordance with Section 93-27-108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard.

As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

HISTORY:
Laws, 2004, ch. 519, § 6, eff from and after July 1, 2004.

Joint Legislative Committee Note —
Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a publishing error in the first paragraph. The words "of this act" were deleted following "Section 93-27-108."

§ 93-27-107. Priority.

If a question of existence or exercise of jurisdiction under this chapter is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

HISTORY:
Laws, 2004, ch. 519, § 7, eff from and after July 1, 2004.

§ 93-27-108. Notice to persons outside state.

(1) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(2) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

HISTORY:
Laws, 2004, ch. 519, § 8, eff from and after July 1, 2004.

§ 93-27-109. Appearance and limited immunity.

(1) A party to a child custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child custody determination, is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(2) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(3) The immunity granted by subsection (1) does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this chapter committed by an individual while present in this state.

HISTORY:
Laws, 2004, ch. 519, § 9, eff from and after July 1, 2004.

§ 93-27-110. Communication between courts.

(1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(3) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(4) Except as otherwise provided in subsection (3), a record must be made

of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

HISTORY:

Laws, 2004, ch. 519, § 10, eff from and after July 1, 2004.

Cross References —

Applicability of this section to §§ 93-29-1 through 93-29-23, see § 93-29-5.

§ 93-27-111. Taking testimony in another state.

(1) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(2) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence transmitted from another state to a court of this state by technological means which do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

HISTORY:

Laws, 2004, ch. 519, § 11, eff from and after July 1, 2004.

Cross References —

Applicability of this section to §§ 93-29-1 through 93-29-23, see § 93-29-5.

§ 93-27-112. Cooperation between courts; preservation of records.

(1) A court of this state may request the appropriate court of another state to:

(a) Hold an evidentiary hearing;

(b) Order a person to produce or give evidence pursuant to procedures of that state;

(c) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(d) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and

(e) Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(2) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (1).

(3) Travel and other necessary and reasonable expenses incurred under subsections (1) and (2) may be assessed against the parties according to the law of this state.

(4) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding until the child attains eighteen (18) years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

HISTORY:

Laws, 2004, ch. 519, § 12, eff from and after July 1, 2004.

Cross References —

Applicability of this section to §§ 93-29-1 through 93-29-23, see § 93-29-5.

ARTICLE 2.

JURISDICTION.

Sec.

93-27-201.	Initial child-custody jurisdiction.
93-27-202.	Exclusive, continuing jurisdiction.
93-27-203.	Jurisdiction to modify determination.
93-27-204.	Temporary emergency jurisdiction.
93-27-205.	Notice; opportunity to be heard; joinder.
93-27-206.	Simultaneous proceedings.
93-27-207.	Inconvenient forum.
93-27-208.	Jurisdiction declined because of conduct.
93-27-209.	Information to be submitted to court.
93-27-210.	Appearance of parties and child.

§ 93-27-201. Initial child-custody jurisdiction.

(1) Except as otherwise provided in Section 93-27-204, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) A court of another state does not have jurisdiction under paragraph (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 93-27-207 or 93-27-208; and:

(i) The child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) All courts having jurisdiction under paragraph (a) or (b) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 93-27-207 or 93-27-208; or

(d) No court of any other state would have jurisdiction under the criteria specified in paragraph (a), (b), or (c) of this section.

(2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

HISTORY:

Laws, 2004, ch. 519, § 13, eff from and after July 1, 2004.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a publishing error in the introductory paragraph of (1). "Section 93-27-204" was substituted for "Section 16 of this act."

Cross References —

Abduction prevention order to remain in effect until the earliest of the time the order is modified, revoked, vacated or superseded by a court with jurisdiction under this section or certain other events, see § 93-29-19.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1. In general.
2. Jurisdiction.
3. Home state.
4.–5. [Reserved for future use.]

II. Under Former Law.

6. In general.

I. Under Current Law.

1. In general.

Chancellor properly denied the mother's motion to dismiss for forum non conveniens because the court had jurisdiction where Mississippi was the home state of the child on the date of the commencement of the proceedings, all of the witnesses, including two of the mother's witnesses, resided in Mississippi, all of the issues that were raised in both parties' claims occurred in Mississippi, and the motion to dismiss for forum non conveniens was made on the day of trial, when both parties and their witnesses were present and ready to proceed. Adams v. Rice, 196 So. 3d 1086, 2016 Miss. App. LEXIS 435 (Miss. Ct. App. 2016).

2. Jurisdiction.

Chancery court lacked authority to modify an Arizona custody determination based on the mother's residence in Arizona because Mississippi did not have the ability to make an initial custody determination; Arizona had been the children's home for the entirety of their lives until they came to Mississippi, and at the time the father filed his suit, he and the children had been in Mississippi for only a couple of months and had not established a connection with Mississippi beyond their presence. Edwards v. Zyla, 207 So. 3d 1232, 2016 Miss. LEXIS 474 (Miss. 2016).

3. Home state.

When the initial action began, the parties resided in Mississippi; thus Mississippi was considered the home state under the statute, even though one party moved to Alabama sometime after she was served. Adams v. Rice, — So. 3d —, 2018 Miss. App. LEXIS 295 (Miss. Ct. App. June 12, 2018).

Because a mother and child moved to Mississippi soon after an Ohio divorce decree was entered and remained within the State consecutively for more than six months prior to the decree's registration in Mississippi, the chancery court was correct in determining that Mississippi was the child's home state. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

Mississippi was not the home state of the children because they had not lived in Mississippi for six consecutive months at the time the father filed his initial action in chancery court. Edwards v. Zyla, 207 So. 3d 1232, 2016 Miss. LEXIS 474 (Miss. 2016).

4.–5. [Reserved for future use.]

II. Under Former Law.

6. In general.

Pursuant to former Miss. Code Ann. § 93-

23-5 of the Uniform Child Custody Jurisdiction and Enforcement Act, Miss. Code Ann. §§ 93-23-1 through 93-23-47 Mississippi did not have jurisdiction over a child custody dispute where Arkansas had retained jurisdiction over the matter and shown an interest in the welfare of the children; the children had resided with the mother in Arkansas for a period greater than six months and other than their father and other family members, the children had no connection to Mississippi. Bridges v. Bridges, 910 So. 2d 1156, 2005 Miss. App. LEXIS 227 (Miss. Ct. App. 2005).

In the mother's child custody modification action, while personal jurisdiction was an affirmative defense, which was waived if not affirmatively pled, the Uniform Child Custody Jurisdiction Act (UCCJA), specifically Miss. Code Ann. § 93-23-5(1), [repealed] required personal jurisdiction of the minor child and the contestant. The father, who had custody and resided with the child in California, properly raised the issue of lack of jurisdiction over the child in his amended complaint, and the chancellor's finding that she lacked jurisdiction over the child rendered the issue of jurisdiction over the father moot. Scaife v. Scaife, 880 So. 2d 1089, 2004 Miss. App. LEXIS 851 (Miss. Ct. App. 2004).

Notwithstanding the presence of his mother and siblings in Mississippi, the older child who was in the father's custody in California had no connection with Mississippi. Nor was there present in Mississippi any substantial evidence concerning the present or future care, protection, training or personal relations affecting that child; all information concerning the health and welfare of the older child was located in California, and the chancellor correctly found that Mississippi lacked jurisdiction in the mother's modification action. Scaife v. Scaife, 880 So. 2d 1089, 2004 Miss. App. LEXIS 851 (Miss. Ct. App. 2004).

While Mississippi was not the home state of an adopted child or her natural mother, and neither had lived there for six months before the adoption complaint was filed, a Mississippi trial court had jurisdiction to grant the adoption since the child was present in Mississippi and the mother had abandoned her by signing the adoption complaint. C.T. v. R.D.H., 843 So. 2d 690, 2003 Miss. LEXIS 201 (Miss. 2003).

Where parents were divorced in Louisiana, and the father moved to Mississippi where he lived with two of the children, and the mother moved to Texas where she lived with the third child, the Mississippi trial court erred in relinquishing jurisdiction over custody issues because, inter alia, Mississippi was a more appropriate forum than Louisiana for deciding custody. Marr v. Adair, 841 So. 2d 1195, 2003 Miss. App. LEXIS 283 (Miss. Ct. App. 2003).

Mississippi had subject matter jurisdiction in divorce and child custody case under Miss. Code Ann. § 93-23-5(1)(b), where the parents had met and married in Mississippi, continued to live there for a year, moved back and forth to the state numerous times, and the mother returned to Mississippi where she found a job, a place to live, enrolled the children in school, began receiving Medicaid assistance, and filed her taxes. Jundoosing v. Jundoosing, 826 So. 2d 85, 2002 Miss. LEXIS 283 (Miss. 2002).

The fact that a child lived with her mother in Connecticut for 10 months did not create jurisdiction there on the basis that Connecticut was the child's home state since the father, who lived in Mississippi, was entitled to custody by court order and the child only spent that 10 months in Connecticut because the mother wrongfully refused to send the child back to Mississippi. Mitchell v. Mitchell, 767 So. 2d 1078, 2000 Miss. App. LEXIS 450 (Miss. Ct. App. 2000).

A Mississippi court did not have jurisdiction over child custody and visitation issues where (1) the child had been living with his mother in Virginia since June, 1995, and (2) the child was not a resident of Mississippi and, notwithstanding his father's presence in the state, he had no connections to the state. Peters v. Peters, 744 So. 2d 803, 1999 Miss. App. LEXIS 147 (Miss. Ct. App. 1999).

Both California and Mississippi had jurisdiction to modify a custody decree where (1) the original divorce decree was entered in Mississippi and a contempt proceeding was heard in Mississippi, and (2) the mother and daughter had moved to, and lived in, California; however, the chancellor should have relinquished jurisdiction to California based on the fact that California was the "home state" of the child. Ortega v. Lovell, 725 So. 2d 199, 1998 Miss. LEXIS 617 (Miss. 1998).

Chancery court had authority to exercise jurisdiction on child custody matter, though Texas court that rendered divorce decree retained exclusive jurisdiction over child support issues, where child resided in state. Caples v. Caples, 686 So. 2d 1071, 1996 Miss. LEXIS 688 (Miss. 1996).

Chancery court's loss of former husband's case file containing pleadings, orders, decrees and any record made of out-of-state court hearings for custody decree did not result in injustice to former husband in his challenge to proposed modification of joint custody, where major contribution of files would have been to give court notice of out-of-state order granting subject matter to state court. Caples v. Caples, 686 So. 2d 1071, 1996 Miss. LEXIS 688 (Miss. 1996).

A Mississippi court had continuing jurisdiction over 2 children in a child custody action, even though Mississippi was not the "home state" of either child, since a court that enters the original custody decree has jurisdiction to subsequently modify the decree separate and apart from the jurisdictional section of the Uniform Child Custody Jurisdiction Act. Jones v. Starr, 586 So. 2d 788, 1991 Miss. LEXIS 755 (Miss. 1991).

The application of the Uniform Child Custody Jurisdiction Act in a dispute over jurisdiction between 2 states is a 3 step process. A court must first determine if it has authority, or jurisdiction, to act following the guidelines of § 93-23-5. If a court determines that it does not have jurisdiction, the process stops there. However, if that hurdle is cleared, a determination is made as to which court is the more appropriate and convenient forum under the guidelines of § 93-23-13. A court may decline to exercise jurisdiction if it is not the most appropriate or convenient forum. If the court accepts jurisdiction as the convenient forum, the court must determine if the action to be taken is foreclosed by an order or judgment of the other state court. Stowers v. Humphrey, 576 So. 2d 138, 1991 Miss. LEXIS 56 (Miss. 1991).

While a court that enters an original custody decree has jurisdiction to subsequently modify the decree separate and apart from the jurisdictional section of the Uniform Child Custody Jurisdiction Act, (UCCJA), the continuing jurisdiction of a court is affected by the application of the UCCJA. Thus, although the Mississippi court that entered the original divorce and custody decree, which gave the mother custody of the parties' 2 minor children, had continuing jurisdiction over the case, the court properly stayed proceedings to modify the custody decree on the finding that Mississippi was an inconvenient forum under § 93-23-13 and that Alabama was the most appropriate forum, where the mother and children had lived in Alabama for 2 ½ years, and evidence concerning the effects of visitation with the father was more readily available in Alabama than in Mississippi. Stowers v. Humphrey, 576 So. 2d 138, 1991 Miss. LEXIS 56 (Miss. 1991).

A chancery court had continuing jurisdiction of a child custody matter, despite the fact that the mother and the children had established residency in Louisiana, where pleadings had been pending before the court almost constantly since the parties were initially divorced, the mother had continued to use the court to enforce her rights under the decrees, and the Mississippi court had assumed jurisdiction before any proceeding was begun in Louisiana. Cooley v. Cooley, 574 So. 2d 694, 1991 Miss. LEXIS 15 (Miss. 1991), overruled, Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

In interstate custody conflicts, the Uniform Child Custody Jurisdiction Act (UCCJA) provides the exclusive state law source for determining state court subject matter jurisdiction. The chancery courts have no power under the Protection From Domestic Abuse Law that are inconsistent with the jurisdictional injunctions of the UCCJA. Curtis v. Curtis, 574 So. 2d 24, 1990 Miss. LEXIS 850 (Miss. 1990).

Although a chancery court had temporary emergency jurisdiction to hear the complaint of a father, who had kidnapped his children from their mother, alleging substantial neglect and abuse, the court erred when it continued to exercise jurisdiction over the matter after it should reasonably have become apparent that there was no clear and present danger to the children from permitting adjudication of modification, if any, of their custody in the courts of another state which originally granted custody of the children to the mother. Mississippi was not the children's "home state," even though they had lived in Mississippi for over 6 consecutive months, since the father brought the children to Mississippi in contravention of a valid custody decree of another state and the children remained in Mississippi by virtue of the chancery court's custody and protective order; such court-ordered involuntary residence does not generate "so much as a single tick of the UCCJA's 6 consecutive months clock." Additionally, the father and the children did not have a "significant connection" with Mississippi, within the meaning of § 93-23-5, by virtue of the fact that they had lived in Mississippi for over 6 months at the time of the hearing, where they had been in Mississippi for only one or 2 days prior to the time the father filed the original application for modification of custody. In light of the UCCJA's dominant purpose of preventing interstate parental kidnapping and § 93-23-15's strong injunction against wrongfully taking children from one state to another, the father and the children were required to "have a significant connection" with Mississippi prior to the filing of the application for custody modification, and their presence in Mississippi for one or 2 days was not a "significant connection" within the meaning of § 93-23-5(1)(b). Curtis v. Curtis, 574 So. 2d 24, 1990 Miss. LEXIS 850 (Miss. 1990).

A Mississippi court improperly assumed jurisdiction over a child custody matter where an Indiana court had properly adjudicated the matter under the Uniform Child Custody Jurisdiction Act, the mother and the parties' child had lived in Mississippi for less than one month prior to the time the father's petition to enforce the Indiana decree was filed, and the mother and the child had no significant connection with Mississippi prior to moving to the state. In re Custody of Jackson, 562 So. 2d 1271, 1990 Miss. LEXIS 263 (Miss. 1990).

A Mississippi court had subject matter jurisdiction, pursuant to § 93-23-5(1)(c), to hear a child custody modification petition brought by the children's father, even though the children resided with their mother in California, where the children were present in Mississippi for a vacation visit at the time the petition was filed and the petition alleged an emergency to protect the children from abuse. Castleberry v. Castleberry, 541 So. 2d 457, 1989 Miss. LEXIS 164 (Miss. 1989).

A defendant father was not subject to in personam jurisdiction in Mississippi consistent with due process in an action brought by the mother regarding his child support obligations, even though an Ohio court had transferred jurisdiction over the case to a chancery court in Mississippi in accordance with the Uniform Child Custody Jurisdiction Act and the child resided in Mississippi, where the father had no minimum contacts with Mississippi and had not purposely availed himself of the benefits of the laws of the state of Mississippi or derived personal or commercial benefit from his child's presence in Mississippi. Carpenter v. Allen, 540 So. 2d 1334, 1989 Miss. LEXIS 163 (Miss. 1989).

The provisions of the Uniform Child Custody Jurisdiction Act governed a child custody action even though the complaint stated that custody was sought pursuant to § 93-11-65, which provides for chancery jurisdiction in child custody cases. Walters v. Walters, 519 So. 2d 427, 1988 Miss. LEXIS 43 (Miss. 1988).

First question chancellor should address in action for modification of child custody involving child no longer living in state is whether Mississippi is proper state to exercise jurisdiction, and should not rely solely upon fact that original custody decree had been rendered in his court, where Uniform Child Custody Jurisdiction Act may have applied. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

Chancellor should first determine, before considering actions taken by Louisiana court, whether Mississippi Chancery Court has authority to act under § 93-23-5; if this section gives him authority to exercise jurisdiction, Chancellor must next determine which state is more appropriate and convenient forum under § 93-23-13; if both requirements would otherwise be sufficiently present to give Chancery Court jurisdiction, in view of posture of this case in Louisiana court, Chancellor under Act is further required to determine whether modification of original custody decree by Chancery Court is foreclosed by order or judgment of Louisiana court. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

There is nothing in the Uniform Child Custody Jurisdiction Act that would prohibit a state court from requiring a ne exeat writ and bond. Roberts v. Fuhr, 523 So. 2d 20, 1987 Miss. LEXIS 2891 (Miss. 1987).

Texas is appropriate forum and Mississippi should decline jurisdiction in case in which noncustodial parent files motion to modify Mississippi child custody judgment where children have resided in Texas for period of year prior to initiation of action and for 2 years prior to date of trial, notwithstanding presence of one child in Mississippi prior to trial or at time of filing, which child has been retained in Mississippi in violation of existing, valid decree, and where practically all witnesses and evidence of any substantial change adversely affecting children's future care, protection and training lie within borders of Texas. Siegel v. Alexander, 477 So. 2d 1345, 1985 Miss. LEXIS 2259 (Miss. 1985).

Emergency jurisdiction of court under §§ 3(a)(3)(ii) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.S. §§ 1738A(c)(2)(C)(ii) and 1738A(f), to protect interests of child notwithstanding existence of prior, valid custody decree rendered by another state. 80 A.L.R.5th 117.

RESEARCH REFERENCES

ALR.

What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA). 78 A.L.R.4th 1028.

Applicability of Uniform Child Custody Jurisdiction Act (UCCJA) to temporary custody orders. 81 A.L.R.4th 1101.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 A.L.R.4th 742.

Significant connection jurisdiction of court under § 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(B). 5 A.L.R.5th 550.

Abandonment and emergency jurisdiction of court under § 3(a)(3) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(C). 5 A.L.R.5th 788.

Home state jurisdiction of court under

§ 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A). 6 A.L.R.5th 1.

Default jurisdiction of court under § 3(a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(D). 6 A.L.R.5th 69.

Continuity of residence as factor in contest between parent and nonparent for custody of child who has been residing with nonparent – modern status. 15 A.L.R.5th 692.

Parties misconduct as ground for declining jurisdiction under § 8 of the Uniform Child Custody Jurisdiction Act (UCCJA). 16 A.L.R.5th 650.

Pending proceeding in another state as ground for declining jurisdiction under § 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(g). 20 A.L.R.5th 700.

Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(A). 40 A.L.R.5th 227.

Significant connection jurisdiction of court to modify foreign child custody decree under §§ 3(a)(2) and 14(b) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.S. §§ 1738(c)(2)(b) and 1738A(f)(1). 67 A.L.R.5th 1.

Home state jurisdiction of court to modify foreign child custody decree under §§ 3(a)(1) and 14(a)(2) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.S. §§ 1738A(c)(2)(A) and 1738A(f)(1). 72 A.L.R.5th 249.

Declining jurisdiction to modify prior child custody decree under § 14(a)(1) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.S. § 1738A(f)(2). 73 A.L.R.5th 185.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 U.S.C.S. §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state. 78 A.L.R.5th 465.

Law Reviews.

1989 Mississippi Supreme Court Review: Custody of Child. 59 Miss. L. J. 897, Winter, 1989.

1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-202. Exclusive, continuing jurisdiction.

(1) Except as otherwise provided in Section 93-27-204, a court of this state which has made a child custody determination consistent with Sections 93-27-201 or 93-27-203 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent currently do not reside in this state.

(2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 93-27-201.

HISTORY:

Laws, 2004, ch. 519, § 14, eff from and after July 1, 2004.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and

Publication of Legislation corrected a publishing error in the introductory paragraph of (1). "Section 93-27-204" was substituted for "Section 16 of this act."

Cross References —

Abduction prevention order to remain in effect until the earliest of the time the order is modified, revoked, vacated or superseded by a court with jurisdiction under this section or certain other events, see § 93-29-19.

JUDICIAL DECISIONS

ANALYSIS

1. Significant connection with the state.
2. Motion to dismiss.
3. Jurisdiction proper

1. Significant connection with the state.

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, the chancery court erred in assuming jurisdiction over custody matters because the father had not moved from the county since the divorce decree was entered, and thus, an Ohio court maintained continuing and exclusive jurisdiction; there was no information indicating the Ohio court's consideration under the statute, nor did the parties assert that a motion was made to determine whether the Ohio court was a convenient forum. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

Chancery court properly retained continuous, exclusive jurisdiction over a modification of custody proceeding because it was within the chancellor's discretion to determine that both the child and the father had a significant connection with the State since the father had continuously resided in Mississippi. White v. White, 26 So. 3d 342, 2010 Miss. LEXIS 43 (Miss. 2010).

2. Motion to dismiss.

Father's motion to dismiss a mother's complaint for modification of an Ohio divorce decree was timely filed because the chancery court did not properly assume jurisdiction over the matter, and thus, the father could not have waived his ability to challenge it; therefore, finding that the mother's request for registration did not require a response, and the chancery court's assumption of jurisdiction was improper. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

3. Jurisdiction proper

Chancery court had exclusive, continuing jurisdiction over the action; there was no order from a Mississippi court determining a lack of significant connections with this state, plus Miss. Code Ann. § 93-27-202(1)(b) was inapplicable, as the father still resided in Mississippi, and thus it was within the chancellor's discretion to determine that Mississippi should retain jurisdiction even though the mother and child had moved to Alabama. Adams v. Rice, — So. 3d —, 2018 Miss. App. LEXIS 295 (Miss. Ct. App. June 12, 2018).

§ 93-27-203. Jurisdiction to modify determination.

Except as otherwise provided in Section 93-27-204, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 93-27-201(1)(a) or (b); and:

(a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under Section 93-27-202 or that a court of this state would be a more convenient forum under Section 93-27-207; or

(b) A court of this state or a court of the other state determines that neither the child, the child's parents, nor any person acting as a parent presently does not reside in the other state.

HISTORY:

Laws, 2004, ch. 519, § 15, eff from and after July 1, 2004.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the introductory language. The words "of this act" were deleted following "Section 93-27-204" and "Section 93-27-201(1)(a) or (b)."

Cross References —

Abduction prevention order to remain in effect until the earliest of the time the order is modified, revoked, vacated or superseded by a court with jurisdiction under this section or certain other events, see § 93-29-19.

JUDICIAL DECISIONS

ANALYSIS

1. Subject matter jurisdiction.
2. Modification of out-of-state order proper.

1. Subject matter jurisdiction.

Father's motion to dismiss a mother's complaint for modification of an Ohio divorce decree was timely filed because the chancery court did not properly assume jurisdiction over the matter, and thus, the father could not have waived his ability to challenge it; therefore, finding that the mother's request for registration did not require a response, and the chancery court's assumption of jurisdiction was improper. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, the chancery court erred in assuming jurisdiction over custody matters because the father had not moved from the county since the divorce decree was entered, and thus, an Ohio court maintained continuing and exclusive jurisdiction; there was no information indicating the Ohio court's consideration under the statute, nor did the parties assert that a motion was made to determine whether the Ohio court was a convenient forum. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, the chancery court erred in assuming jurisdiction over custody matters because the father had not moved from the county since the divorce decree was entered, and thus, an Ohio court maintained continuing and exclusive jurisdiction; there was no information indicating the Ohio court's consideration under the statute, nor did the parties assert that a motion was made to determine whether the Ohio court was a convenient forum. Hamilton v. Young, 213 So. 3d 69, 2017 Miss. LEXIS 66 (Miss. 2017).

Chancery court lacked authority to modify an Arizona custody determination based on the mother's residence in Arizona because Mississippi did not have the ability to make an initial custody determination; Arizona had been the children's home for the entirety of their lives until they came to Mississippi, and at the time the father filed his suit, he and the children had been in Mississippi for only a couple of months and had not established a connection with Mississippi beyond their presence. Edwards v. Zyla, 207 So. 3d 1232, 2016 Miss. LEXIS 474 (Miss. 2016).

Jurisdiction over a mother's visitation claim was proper in Mississippi under the Uniform Child Custody Jurisdiction and Enforcement Act because the chancery court had jurisdiction to make an initial determination, and no one involved lived in Tennessee. Nurkin v. Nurkin, 171 So. 3d 561, 2015 Miss. App. LEXIS 181 (Miss. Ct. App. 2015).

Mother's petition to confirm jurisdiction of the parties' children and for relief from a foreign judgment was dismissed for lack of jurisdiction as the other state made the initial determination of custody, retained jurisdiction, and ruled on a custody modification petition filed by a father. Shadden v. Shadden, 11 So. 3d 761, 2009 Miss. App. LEXIS 258 (Miss. Ct. App. 2009).

2. Modification of out-of-state order proper.

Chancellor was not obligated to stay the Mississippi proceedings to modify the New York visitation order simply because the father had taken preliminary steps to perfect his New York appeal, and the chancellor did not err when he heard the mother's complaint despite the father's then-unperfected New York appeal as, under Mississippi law, a chancellor could modify another state's visitation order under certain circumstances; and it was within a Mississippi court's discretion to go forward with a proceeding to modify a child custody determination – which included aspects of a noncustodial parent's visitation – when there was a similar proceeding in another state. McKeown v. Estes, 230 So. 3d 741, 2017 Miss. App. LEXIS 128 (Miss. Ct. App.), cert. denied, 229 So. 3d 122, 2017 Miss. LEXIS 497 (Miss. 2017).

§ 93-27-204. Temporary emergency jurisdiction.

(1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(2) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(3) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Sections 93-27-201 through 93-27-203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(4) A court of this state which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under Sections 93-27-201 through 93-27-203, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to Sections 93-27-201 through 93-27-203, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

HISTORY:

Laws, 2004, ch. 519, § 16, eff from and after July 1, 2004.

§ 93-27-205. Notice; opportunity to be heard; joinder.

(1) Before a child custody determination is made under this chapter, notice and an opportunity to be heard in accordance with the standards of Section 93-27-108 must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any

parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(2) This chapter does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(3) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the law of this state as in child custody proceedings between residents of this state.

HISTORY:

Laws, 2004, ch. 519, § 17, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former Law.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former Law.

6. In general.

Wife who moved to Canada, married Canadian citizen and gave birth to child in Canada, subsequently absconding with child to Mississippi incident to separation from husband, had reasonable notice of divorce and child custody proceedings in Canada, where her Canadian counsel was notified of and present at divorce hearing and at hearing ordering her return to Canada; delay by wife's counsel until after temporary award of child custody to husband in informing court of her discontinuing wife's representation could not affect validity of Canadian court's order. Laskosky v. Laskosky, 504 So. 2d 726, 1987 Miss. LEXIS 2411 (Miss. 1987).

RESEARCH REFERENCES

ALR.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 A.L.R.4th 742.

Continuity of residence as factor in contest between parent and nonparent for custody of child who has been residing with nonparent-modern status. 15 A.L.R.5th 692.

Law Reviews.

1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-206. Simultaneous proceedings.

(1) Except as otherwise provided in Section 93-27-204, a court of this state may not exercise its jurisdiction under this chapter if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 93-27-207.

(2) Except as otherwise provided in Section 93-27-204, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 93-27-209. If the court determines that a child custody proceeding has been

commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(a) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(b) Enjoin the parties from continuing with the proceeding for enforcement; or

(c) Proceed with the modification under conditions it considers appropriate.

HISTORY:

Laws, 2004, ch. 519, § 18, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1. Jurisdiction.
2. Modification of out-of-state order proper.
3.-5. [Reserved for future use.]

II. Under former § 93-23-11.

6. Jurisdiction.

I. Under Current Law.

1. Jurisdiction.

Mother's petition to confirm jurisdiction of the parties' children and for relief from a foreign judgment was dismissed for lack of jurisdiction as the other state made the initial determination of custody, retained jurisdiction, and ruled on a custody modification petition filed by a father. Shadden v. Shadden, 11 So. 3d 761, 2009 Miss. App. LEXIS 258 (Miss. Ct. App. 2009).

Where a mother filed a complaint for custody and support, the Mississippi court lacked subject matter jurisdiction to enter a child custody award because Louisiana was the home state of the parties' child at the time of commencement of the Louisiana divorce action, which had not been abandoned or terminated. Richardson v. Stogner, 958 So. 2d 235, 2007 Miss. App. LEXIS 373 (Miss. Ct. App. 2007).

2. Modification of out-of-state order proper.

Chancellor was not obligated to stay the Mississippi proceedings to modify the New York visitation order simply because the father had taken preliminary steps to perfect his New York appeal, and the chancellor did not err when he heard the mother's complaint despite the father's then-unperfected New York appeal as, under Mississippi law, a chancellor could modify another state's visitation order under certain circumstances; and it was within a Mississippi court's discretion to go forward with a proceeding to modify a child custody determination – which included aspects of a noncustodial parent's visitation – when there was a similar proceeding in another state. McKeown v. Estes, 230 So. 3d 741, 2017 Miss. App. LEXIS 128 (Miss. Ct. App.), cert. denied, 229 So. 3d 122, 2017 Miss. LEXIS 497 (Miss. 2017).

3.-5. [Reserved for future use.]

II. Under former § 93-23-11.

6. Jurisdiction.

Where a maternal grandmother's Arizona guardianship of her grandchild had been terminated, and there was no evidence of other pending proceedings in foreign courts concerning custody of of that child, Miss. Code Ann.

§ 93-23-11 did not prohibit assertion of jurisdiction by the Mississippi courts over the temporary custody and adoption of the child. C.T. v. R.D.H., 843 So. 2d 690, 2003 Miss. LEXIS 201 (Miss. 2003).

A chancery court had continuing jurisdiction of a child custody matter, despite the fact that the mother and the children had established residency in Louisiana, where pleadings had been pending before the court almost constantly since the parties were initially divorced, the mother had continued to use the court to enforce her rights under the decrees, and the Mississippi court had assumed jurisdiction before any proceeding was begun in Louisiana. Cooley v. Cooley, 574 So. 2d 694, 1991 Miss. LEXIS 15 (Miss. 1991), overruled, Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

Chancellor should first determine, before considering actions taken by Louisiana court, whether Mississippi Chancery Court has authority to act under § 93-23-5; if this section gives him authority to exercise jurisdiction, Chancellor must next determine which state is more appropriate and convenient forum under § 93-23-13; if both requirements would otherwise be sufficiently present to give Chancery Court jurisdiction, in view of posture of this case in Louisiana court, Chancellor under Act is further required to determine whether modification of original custody decree by Chancery Court is foreclosed by order or judgment of Louisiana court. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

Chancellor is required to stay custody proceedings and communicate with court of other state before assuming jurisdiction when apprised of pending proceeding in another state. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

Mere filing of petition does not mean court has assumed jurisdiction under statute, because ordinarily there must be some order of court indicating that it has assumed jurisdiction following filing of pleading. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

Arizona court lacks jurisdiction under either Parental Kidnapping Prevention Act (28 USCS § 1738A) or under Mississippi Uniform Child Custody Jurisdiction Act (§§ 93-23-1 et seq.) over child custody proceeding, and any custody decree entered by Arizona court is not entitled to full faith and credit, where prior to commencement of Arizona action, child custody proceeding has been commenced under act in Mississippi and child involved in proceeding has been abducted from natural mother in Mississippi by grandparent and stepgrandparent; result is not changed by fact that Arizona decree is entered by stipulation where Arizona decree is entered without hearing on best interests of child and Arizona proceedings are not substantially in accordance with act and do not meet its jurisdictional standards. Owens v. Huffman, 481 So. 2d 231, 1985 Miss. LEXIS 2381 (Miss. 1985).

Mississippi court lacks jurisdiction to entertain petition to modify Wisconsin order granting child custody to mother where petition has been filed by grandparents who have wrongfully detained children in Mississippi. Hill v. Hill, 481 So. 2d 227, 1985 Miss. LEXIS 2375 (Miss. 1985).

RESEARCH REFERENCES

ALR.

Applicability of Uniform Child Custody Jurisdiction Act (UCCJA) to temporary custody orders. 81 A.L.R.4th 1101.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 A.L.R.4th 742.

Pending proceeding in another state as ground for declining jurisdiction under § 6(a) of the of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(g). 20 A.L.R.5th 700.

Law Reviews.

1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-207. Inconvenient forum.

(1) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of

inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

HISTORY:

Laws, 2004, ch. 519, § 19, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1. In general.
2.-5. [Reserved for future use.]

II. Under Former § 93-23-13.

6. In general.

I. Under Current Law.

1. In general.

In a case in which a mother appealed an order by a chancery court transferring child custody jurisdiction to Texas under the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), Miss. Code Ann §§ 93-27-101 through 93-27-402, and denying her motion to reconsider the transfer of jurisdiction, under both the UCCJEA and the Parental Kidnapping Prevention Act of 1980, although the chancellor had continuing jurisdiction over the case, substantial evidence in the record supported his finding that Texas was a more convenient forum than Mississippi. The two children suffered domestic violence while in the mother's care; the children had lived in Texas with the father since 2004, only returning to Mississippi for court-ordered visitation; the distance between the court in Mississippi and the court in

Texas was roughly an eight-hour drive; and all of the current evidence relevant to the determination of custody matters was located in Texas. Yeager v. Kittrell, 35 So. 3d 1221, 2009 Miss. App. LEXIS 850 (Miss. Ct. App. 2009).

2.-5. [Reserved for future use.]

II. Under Former § 93-23-13.

6. In general.

In a divorce and child custody case, the husband's argument that Mississippi was an inconvenient state failed because a letter he wrote established that not only was he aware of his family's Mississippi residency, but he was also not opposed to it. Jundoosing v. Jundoosing, 826 So. 2d 85, 2002 Miss. LEXIS 283 (Miss. 2002).

The chancellor improperly found that it would not be in the best interest of the children to exercise jurisdiction in Mississippi where (1) at the time of their divorce, the parents were both on active duty in the Navy, and the decree granted joint custody, with paramount custody and control to the parent with shore duty, and (2) the wife subsequently left the Navy and moved to Maryland with the children; unilateral action by the wife would not be permitted to be used as a valid justification for declining the exercise of jurisdiction in Mississippi. Hasse v. Shane, 717 So. 2d 718, 1998 Miss. LEXIS 339 (Miss. 1998).

The application of the Uniform Child Custody Jurisdiction Act in a dispute over jurisdiction between 2 states is a 3 step process. A court must first determine if it has authority, or jurisdiction, to act following the guidelines of § 93-23-5. If a court determines that it does not have jurisdiction, the process stops there. However, if that hurdle is cleared, a determination is made as to which court is the more appropriate and convenient forum under the guidelines of § 93-23-13. A court may decline to exercise jurisdiction if it is not the most appropriate or convenient forum. If the court accepts jurisdiction as the convenient forum, the court must determine if the action to be taken is foreclosed by an order or judgment of the other state court. Stowers v. Humphrey, 576 So. 2d 138, 1991 Miss. LEXIS 56 (Miss. 1991).

While a court that enters an original custody decree has jurisdiction to subsequently modify the decree separate and apart from the jurisdictional section of the Uniform Child Custody Jurisdiction Act, (UCCJA), the continuing jurisdiction of a court is affected by the application of the UCCJA. Thus, although the Mississippi court that entered the original divorce and custody decree, which gave the mother custody of the parties' 2 minor children, had continuing jurisdiction over the case, the court properly stayed proceedings to modify the custody decree on the finding that Mississippi was an inconvenient forum under § 93-23-13 and that Alabama was the most appropriate forum, where the mother and children had lived in Alabama for 21/2 years, and evidence concerning the effects of visitation with the father was more readily available in Alabama than in Mississippi. Stowers v. Humphrey, 576 So. 2d 138, 1991 Miss. LEXIS 56 (Miss. 1991).

Mississippi was not an inconvenient forum under § 93-23-13 to hear a child custody modification petition brought by the children's father, even though the children resided with their mother in California, where evidence was presented demonstrating that there was an immediate threat to the best interest of the parties' children. Castleberry v. Castleberry, 541 So. 2d 457, 1989 Miss. LEXIS 164 (Miss. 1989).

Chancellor should first determine, before considering actions taken by Louisiana court, whether Mississippi Chancery Court has authority to act under § 93-23-5 if this section gives him authority to exercise jurisdiction, Chancellor must next determine which state is more appropriate and convenient forum under § 93-23-13; if both requirements would otherwise be sufficiently present to give Chancery Court jurisdiction, in view of posture of this case in Louisiana court, Chancellor under Act is further required to determine whether modification of original custody decree by Chancery Court is foreclosed by order or judgment of Louisiana court. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

Texas is appropriate forum and Mississippi should decline jurisdiction in case in which noncustodial parent files motion to modify Mississippi child custody judgment where children have resided in Texas for period of year prior to initiation of action and for 2 years prior to date of trial, notwithstanding presence of one child in Mississippi prior to trial or at time of filing, which child has been retained in Mississippi in violation of existing, valid decree, and where practically all witnesses and evidence of any substantial change adversely affecting children's future care, protection and training lie within borders of Texas. Siegel v. Alexander, 477 So. 2d 1345, 1985 Miss. LEXIS 2259 (Miss. 1985).

RESEARCH REFERENCES

ALR.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 A.L.R.4th 742.

Inconvenience of forum as ground for declining jurisdiction under § 7 of the Uniform child Custody Jurisdiction Act (UCCJA). 21 A.L.R.5th 396.

Law Reviews.

1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-208. Jurisdiction declined because of conduct.

(1) Except as otherwise provided in Section 93-27-204 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) A court of the state otherwise having jurisdiction under Sections 93-27-201 through 93-27-203 determines that this state is a more appropriate forum under Section 93-27-207; or

(c) No court of any other state would have jurisdiction under the criteria specified in Sections 93-27-201 through 93-27-203.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Sections 93-27-201 through 93-27-203.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under subsection (1), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including court costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this chapter.

HISTORY:

Laws, 2004, ch. 519, § 20, eff from and after July 1, 2004.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (1)(c). The words "of this act" were deleted following "Sections 93-27-201 through 93-27-203."

Cross References —

Criminal sanctions against noncustodial parent or relative for removal of child under age of fourteen from state in violation of court order, see § 97-3-51.

JUDICIAL DECISIONS

ANALYSIS

I. Decisions Under Current Law.

1. Jurisdiction properly retained.
2.-5. [Reserved for future use.]

II. Decisions Under Former Law.

6. In general.

I. Decisions Under Current Law.

1. Jurisdiction properly retained.

Chancery court properly retained jurisdiction over a modification of custody case because Mississippi had continuous, exclusive jurisdiction over the matter since it entered the initial child-custody order, not because of any alleged unjustifiable conduct on the part of the father. White v. White, 26 So. 3d 342, 2010 Miss. LEXIS 43 (Miss. 2010).

2.-5. [Reserved for future use.]

II. Decisions Under Former Law.

6. In general.

Although a chancery court had temporary emergency jurisdiction to hear the complaint of a father, who had kidnapped his children from their mother, alleging substantial neglect and abuse, the court erred when it continued to exercise jurisdiction over the matter after it should reasonably have become apparent that there was no clear and present danger to the children from permitting adjudication of modification, if any, of their custody in the courts of another state which originally granted custody of the children to the mother. Mississippi was not the children's "home state," even though they had lived in Mississippi for over 6 consecutive months, since the father brought the children to Mississippi in contravention of a valid custody decree of another state and the children remained in Mississippi by virtue of the chancery court's custody and protective order; such court-ordered involuntary residence does not generate "so much as a single tick of the UCCJA's 6 consecutive months clock." Additionally, the father and the children did not have a "significant connection" with Mississippi, within the meaning of § 93-23-5, by virtue of the fact that they had lived in Mississippi for over 6 months at the time of the hearing, where they had been in Mississippi for only one or 2 days prior to the time the father filed the original application for modification of custody. In light of the UCCJA's dominant purpose of preventing interstate parental kidnapping and § 93-23-15's strong injunction against wrongfully taking children from one state to another, the father and the children were required to "have a significant connection" with Mississippi prior to the filing of the application for custody modification, and their presence in Mississippi for one or 2 days was not a "significant connection" within the meaning of § 93-23-5(1)(b). Curtis v. Curtis, 574 So. 2d 24, 1990 Miss. LEXIS 850 (Miss. 1990).

Arizona court lacks jurisdiction under either Parental Kidnapping Prevention Act (28 USCS § 1738A) or under Mississippi Uniform Child Custody Jurisdiction Act (§§ 93-23-1 et seq.) over child custody proceeding, and any custody decree entered by Arizona court is not entitled to full faith and credit, where prior to commencement of Arizona action, child custody proceeding has been commenced under act in Mississippi and child involved in proceeding has been abducted from natural mother in Mississippi by grandparent and stepgrandparent; result is not changed by fact that Arizona decree is entered by stipulation where Arizona decree is entered without hearing on best interests of child and Arizona proceedings are not substantially in accordance with act and do not meet its jurisdictional standards. Owens v. Huffman, 481 So. 2d 231, 1985 Miss. LEXIS 2381 (Miss. 1985).

Party seeking attorney fees upon dismissal of petition to modify custody decree of another state must prove reasonableness of fees. Walker v. Luckey, 474 So. 2d 608, 1985 Miss. LEXIS 2187 (Miss. 1985).

Parent's wrongful detention of child in Mississippi after agreeing to entry of Florida decree modifying prior Mississippi decree prevents Mississippi court from assuming jurisdiction over parent's petition to modify Florida decree. Walker v. Luckey, 474 So. 2d 608, 1985 Miss. LEXIS 2187 (Miss. 1985).

RESEARCH REFERENCES

ALR.

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis. 20 A.L.R.4th 823.

What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA). 78 A.L.R.4th 1028.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 A.L.R.4th 742.

Parties misconduct as ground for declining jurisdiction under § 8 of the Uniform Child Custody Jurisdiction Act (UCCJA). 16 A.L.R.5th 650.

Law Reviews.

1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-209. Information to be submitted to court.

(1) Subject to any law providing for the confidentiality of procedures, addresses, and other identifying information, in a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five (5) years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(a) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination, if any;

(b) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and

(c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(2) If the information required by subsection (1) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(3) If the declaration as to any of the items described in subsection (1)(a) through (c) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(5) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public, unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

HISTORY:

Laws, 2004, ch. 519, § 21, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

I. Decisions under Current Law.

1. Compliance with procedures.
2.-5. [Reserved for future use.]

II. Decisions under Former § 93-27-17.

6. In general.

I. Decisions under Current Law.

1. Compliance with procedures.

In the father's petition to modify custody, he could not provide the information of the child's whereabouts because he was unaware of where the mother and child were residing at that time, and the mother claimed she did not reveal her addressed due to Alabama protection orders; any failure to provide this information was not fatal to jurisdiction, and it was within the discretion of the chancellor to go forward with the proceeding. Adams v. Rice, — So. 3d —, 2018 Miss. App. LEXIS 295 (Miss. Ct. App. June 12, 2018).

Father's failure to provide information as required by the Uniform Child Custody Jurisdiction and Enforcement Act, Miss. Code Ann. § 93-27-209, did not deprive the chancery court of jurisdiction over a modification of custody action because the issue was not jurisdictional and was within the sound discretion of the chancellor; the chancery court's jurisdiction is set by the Mississippi Constitution, Miss. Const. art. VI, § 159, and cannot be diminished by statute, and the plain language of § 93-27-209(2) provides that, in the event the required disclosures are not filed, the court "may" stay the proceeding. White v. White, 26 So. 3d 342, 2010 Miss. LEXIS 43 (Miss. 2010).

According to Miss. Code Ann. § 93-27-209, certain information must be submitted to the court in matters relating to child custody; this information may be permitted in the first pleadings or in an attached affidavit; the mother's initial petition complied with the dictates of § 93-27-209. Ellzey v. White, 922 So. 2d 40, 2006 Miss. App. LEXIS 125 (Miss. Ct. App. 2006), overruled in part, Daniels v. Bains, 967 So. 2d 77, 2007 Miss. App. LEXIS 714 (Miss. Ct. App. 2007).

2.-5. [Reserved for future use.]

II. Decisions under Former § 93-27-17.

6. In general.

As the Uniform Child Custody Jurisdiction Act (UCCJA) has only limited applicability to contested adoptions in certain cases, the failure to attach the Miss. Code Ann. § 93-23-17 residency affidavit to an adoption complaint did not defeat jurisdiction where the chancellor allowed the adoptive parents to use the natural mother's affidavit which was included in her complaint to revoke consent to the adoption. C.T. v. R.D.H., 843 So. 2d 690, 2003 Miss. LEXIS 201 (Miss. 2003).

Timely compliance with Miss. Code Ann. § 93-23-17 upon filing an initial complaint is essential to facilitate a proper determination of the court's jurisdiction but failure to do so will not necessarily impair the court's exercise of jurisdiction if appropriately cured by a timely amendment; a court may validly exercise its jurisdiction if the omitted information is timely supplied by amendment of the pleading or by affidavit annexed to a motion to amend. Marr v. Adair, 841 So. 2d 1195, 2003 Miss. App. LEXIS 283 (Miss. Ct. App. 2003).

Absence of statutory disclosures was waived by the failure to point it out to the trial court, at least where no indication was given that there were other proceedings that the chancellor needed to consider. Robison v. Lanford, 2001 Miss. App. LEXIS 499 (Miss. Ct. App. Dec. 4, 2001).

Statement in a custody modification motion regarding whether other custody proceedings had been previously held or were currently occurring and whether someone else not a party had physical custody of the child was not required on appeal where no objection had been raised before the trial court, and there was no indication that there actually were other proceedings the trial court needed to consider. Robison v. Lanford, 850 So. 2d 91, 2001 Miss. App. LEXIS 253 (Miss. Ct. App. 2001).

Chancellor should first determine, before considering actions taken by Louisiana court, whether Mississippi Chancery Court has authority to act under § 93-23-5 [repealed]; if this section gives him authority to exercise jurisdiction, Chancellor must next determine which state is more appropriate and convenient forum under § 93-23-13; if both requirements would otherwise be sufficiently present to give Chancery Court jurisdiction, in view of posture of this case in Louisiana court, Chancellor under Act is further required to determine whether modification of original custody decree by Chancery Court is foreclosed by order or judgment of Louisiana court. Hobbs v. Hobbs, 508

So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

RESEARCH REFERENCES

Law Reviews.
1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-210. Appearance of parties and child.

(1) In a child custody proceeding in this state, the court may order a party to the proceeding who is in this state to appear before the court in person with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear in person with the child.

(2) If a party to a child custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given under Section 93-27-108 include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(3) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(4) If a party to a child custody proceeding who is outside this state is directed to appear under subsection (2) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

HISTORY:
Laws, 2004, ch. 519, § 22, eff from and after July 1, 2004.

RESEARCH REFERENCES

Law Reviews.
1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

ARTICLE 3.

ENFORCEMENT.

Sec.
93-27-301. Reserved.
93-27-302. Enforcement under Hague Convention.
93-27-303. Duty to enforce.
93-27-304. Temporary visitation.
93-27-305. Registration of child custody determination.
93-27-306. Enforcement of registered determination.
93-27-307. Simultaneous proceedings.

Sec.	
93-27-308.	Expedited enforcement of child custody determination.
93-27-309.	Service of petition and order.
93-27-310.	Hearing and order.
93-27-311.	Warrant to take physical custody of child.
93-27-312.	Costs, fees, and expenses.
93-27-313.	Recognition and enforcement.
93-27-314.	Appeals.
93-27-315.	Role of prosecutor or public official.
93-27-316.	Role of law enforcement.
93-27-317.	Costs and expenses.

§ 93-27-301. Reserved.

§ 93-27-302. Enforcement under Hague Convention.

Under this Article 3, a court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

HISTORY:
Laws, 2004, ch. 519, § 23, eff from and after July 1, 2004.

RESEARCH REFERENCES

ALR.
Construction and Application of Provision of Hague Convention on Civil Aspects of International Child Abduction Specifying One-Year Period for Parent to File for Return of Child Wrongfully Removed From or Retained Outside Country of Habitual Residence, as Implemented in International Child Abduction Remedies Act, 42 U.S.C. § 11603(b), (f)(3). 79 A.L.R. Fed. 2d 481.

§ 93-27-303. Duty to enforce.

(1) A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

(2) A court of this state may utilize any remedy available under other law of this state to enforce a child custody determination made by a court of another state. The remedies provided in this Article 3 are cumulative and do not affect the availability of other remedies to enforce a child custody determination.

HISTORY:
Laws, 2004, ch. 519, § 24, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

1. Full faith and credit.
2. Order unenforceable.

1. Full faith and credit.

Because a Louisiana court did not base its finding of jurisdiction on a ground allowed by the Uniform Child Custody Jurisdiction and Enforcement Act, the Louisiana temporary visitation order was not entitled to recognition under the Full Faith and Credit Clause. Miller v. Mills, 64 So. 3d 1023, 2011 Miss. App. LEXIS 249 (Miss. Ct. App. 2011).

2. Order unenforceable.

Temporary visitation order was unenforceable in Mississippi because the record did not support Louisiana's exercise of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); Louisiana made no finding that it was the children's home state under the UCCJEA, La. Rev. Stat. Ann. § 13:1812(7)(a), Miss. Code Ann. § 93-27-102(g), and the evidence showed that the children had lived in Mississippi for more than six consecutive months before the father commenced his child-custody proceeding in Louisiana. Miller v. Mills, 64 So. 3d 1023, 2011 Miss. App. LEXIS 249 (Miss. Ct. App. 2011).

§ 93-27-304. Temporary visitation.

(1) A court of this state which does not have jurisdiction to modify a child custody determination, may issue a temporary order enforcing:

(a) A visitation schedule made by a court of another state; or

(b) The visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule.

(2) If a court of this state makes an order under subsection (1)(a), it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in Article 2. The order remains in effect until an order is obtained from the other court or the period expires.

HISTORY:

Laws, 2004, ch. 519, § 25, eff from and after July 1, 2004.

§ 93-27-305. Registration of child custody determination.

(1) A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the chancery clerk's office of any county in this state:

(a) A letter or other document requesting registration;

(b) Two (2) copies, including one (1) certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

(c) Except as otherwise provided in Section 93-27-209, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

(2) On receipt of the documents required by subsection (1), the registering court shall:

(a) Cause the determination to be filed as a foreign judgment, together with one (1) copy of any accompanying documents and information, regardless of their form; and

(b) Serve notice upon the persons named under subsection (1)(c) and provide them with an opportunity to contest the registration in accordance with this section.

(3) The notice required by subsection (2)(b) must state that:

(a) A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(b) A hearing to contest the validity of the registered determination must be requested within twenty (20) days after service of notice; and

(c) Failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(4) A person seeking to contest the validity of a registered order must request a hearing within twenty (20) days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(a) The issuing court did not have jurisdiction under Article 2;

(b) The child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under Article 2; or

(c) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of Section 93-27-108, in the proceedings before the court that issued the order for which registration is sought.

(5) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation.

(6) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

HISTORY:

Laws, 2004, ch. 519, § 26, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1. Registration.
2.-5. [Reserved for future use.]

II. Under Former § 93-23-27.

6. In general.

I. Under Current Law.

1. Registration.

County court erred in registering an Arizona judgment, and the case was dismissed for a mother to file her registration in chancery court; the Uniform Child Custody Jurisdiction Enforcement Act clearly labels the chancery clerk's office as the entity to register an out-of-state custody determination, and thus, the chancery court would be the proper court to handle the registration and enforcement of out-of-state custody determinations. Edwards v. Zyla, 207 So. 3d 1232, 2016 Miss. LEXIS 474 (Miss. 2016).

2.-5. [Reserved for future use.]

II. Under Former § 93-23-27.

6. In general.

Chancellor should first determine, before considering actions taken by Louisiana court, whether Mississippi Chancery Court has authority to act under § 93-23-5; if this section gives him authority to exercise jurisdiction, Chancellor must next determine which state is more appropriate and convenient forum under § 93-23-13; if both requirements would otherwise be sufficiently present to give Chancery Court jurisdiction, in view of posture of this case in Louisiana court, Chancellor under Act is further required to determine whether modification of original custody decree by Chancery Court is foreclosed by order or judgment of Louisiana court. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

RESEARCH REFERENCES

ALR.

Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child. 49 A.L.R.4th 7.

Applicability of Uniform Child Custody Jurisdiction Act (UCCJA) to temporary custody orders. 81 A.L.R.4th 1101.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 A.L.R.4th 742.

Law Reviews.

1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-306. Enforcement of registered determination.

(1) A court of this state may grant any relief normally available under the law of this state to enforce a registered child custody determination made by a court of another state.

(2) A court of this state shall recognize and enforce, but may not modify, except in accordance with Article 2, a registered child custody determination of a court of another state.

HISTORY:

Laws, 2004, ch. 519, § 27, eff from and after July 1, 2004.

§ 93-27-307. Simultaneous proceedings.

If a proceeding for enforcement under this Article 3 is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Article 2, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

HISTORY:

Laws, 2004, ch. 519, § 28, eff from and after July 1, 2004.

§ 93-27-308. Expedited enforcement of child custody determination.

(1) A petition under this Article 3 must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(2) A petition for enforcement of a child custody determination must state:

(a) Whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(b) Whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this chapter and, if so, identify the court, the case number, and the nature of the proceeding;

(c) Whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding;

(d) The present physical address of the child and the respondent, if known;

(e) Whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(f) If the child custody determination has been registered and confirmed under Section 93-27-305, the date and place of registration.

(3) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(4) An order issued under subsection (3) must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs, and expenses under Section 93-27-312, and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(a) The child custody determination has not been registered and confirmed under Section 93-27-305 and that:

(i) The issuing court did not have jurisdiction under Article 2;

(ii) The child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court having jurisdiction to do so under Article 2;

(iii) The respondent was entitled to notice, but notice was not given in accordance with the standards of Section 93-27-108, in the proceedings before the court that issued the order for which enforcement is sought; or

(b) The child custody determination for which enforcement is sought was registered and confirmed under Section 93-27-304, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Article 2.

HISTORY:
Laws, 2004, ch. 519, § 29, eff from and after July 1, 2004.

§ 93-27-309. Service of petition and order.

Except as otherwise provided in Section 93-27-311, the petition and order must be served, by any method authorized by the law of this state, upon respondent and any person who has physical custody of the child.

HISTORY:
Laws, 2004, ch. 519, § 30, eff from and after July 1, 2004.

§ 93-27-310. Hearing and order.

(1) Unless the court issues a temporary emergency order under Section 93-27-204, upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(a) The child custody determination has not been registered and confirmed under Section 93-27-305 and that:

(i) The issuing court did not have jurisdiction under Article 2;

(ii) The child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Article 2; or

(iii) The respondent was entitled to notice, but notice was not given in accordance with the standards of Section 93-27-108, in the proceedings before the court that issued the order for which enforcement is sought; or

(b) The child custody determination for which enforcement is sought was registered and confirmed under Section 93-27-305 but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Article 2.

(2) The court shall award the fees, costs, and expenses authorized under Section 93-27-312 and may grant additional relief, including a request for the assistance of law enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(3) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(4) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under this Article 3.

HISTORY:
Laws, 2004, ch. 519, § 31, eff from and after July 1, 2004.

§ 93-27-311. Warrant to take physical custody of child.

(1) Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state.

(2) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by Section 93-27-308(2).

(3) A warrant to take physical custody of a child must:

(a) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(b) Direct law enforcement officers to take physical custody of the child immediately; and

(c) Provide for the placement of the child pending final relief.

(4) The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody.

(5) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(6) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

HISTORY:
Laws, 2004, ch. 519, § 32, eff from and after July 1, 2004.

§ 93-27-312. Costs, fees, and expenses.

(1) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(2) The court may not assess fees, costs, or expenses against a state unless authorized by law other than this chapter.

HISTORY:

Laws, 2004, ch. 519, § 33, eff from and after July 1, 2004.

§ 93-27-313. Recognition and enforcement.

A court of this state shall accord full faith and credit to an order issued by another state and consistent with this chapter which enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under Article 2.

HISTORY:

Laws, 2004, ch. 519, § 34, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 93-23-25.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 93-23-25.

6. In general.

Chancellor should first determine, before considering actions taken by Louisiana court, whether Mississippi Chancery Court has authority to act under § 93-23-5; if this section gives him authority to exercise jurisdiction, Chancellor must next determine which state is more appropriate and convenient forum under § 93-23-13; if both requirements would otherwise be sufficiently present to give Chancery Court jurisdiction, in view of posture of this case in Louisiana court, Chancellor under Act is further required to determine whether modification of original custody decree by Chancery Court is foreclosed by order or judgment of Louisiana court. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

Mississippi courts have authority to decline extending full faith and credit to judgment of another state when their proceedings were not substantially in accord with jurisdictional requirements of Uniform Child Custody Jurisdiction Act; case remanded where record did not show whether process was ever served upon husband by Louisiana court or whether that court was informed of Mississippi proceedings at time it entered order modifying original decree, and there was no indication whether Louisiana court held hearing to determine best interest of child. Hobbs v. Hobbs, 508 So. 2d 677, 1987 Miss. LEXIS 2597 (Miss. 1987).

Mother's petition to terminate father's visitation rights with minor on the ground that he had sexually abused child was dismissed, because Mississippi court would give full faith and credit to the judgment of the Ohio court that father had not abused child. In Interest of K.M.G., 500 So. 2d 994, 1987 Miss. LEXIS 2242 (Miss. 1987).

Texas custody decree obtained by withholding from Texas court information, that child is in Texas as result of prior kidnapping in Mississippi and that warrant is outstanding for arrest of person seeking custody decree, is not entitled to full faith and credit. Owens v. Huffman, 481 So. 2d 231, 1985 Miss. LEXIS 2381 (Miss. 1985).

Arizona court lacks jurisdiction under either Parental Kidnapping Prevention Act (28 USCS § 1738A) or under Mississippi Uniform Child Custody Jurisdiction Act (§§ 93-23-1 et seq.) over child custody proceeding, and any custody decree entered by Arizona court is not entitled to full faith and credit, where prior to commencement of Arizona action, child custody proceeding has been commenced under act in Mississippi and child involved in proceeding has been abducted from natural mother in Mississippi by grandparent and stepgrandparent; result is not changed by fact that Arizona decree is entered by stipulation where Arizona decree is entered without hearing on best interests of child and Arizona proceedings are not substantially in accordance with act and do not meet its jurisdictional standards. Owens v. Huffman, 481 So. 2d 231, 1985 Miss. LEXIS 2381 (Miss. 1985).

Mississippi court will recognize Florida custody decree modifying prior Mississippi decree where Florida decree is entered pursuant to response and waiver by respondent in Florida proceedings signed after obtaining advice of attorney. Walker v. Luckey, 474 So. 2d 608, 1985 Miss. LEXIS 2187 (Miss. 1985).

RESEARCH REFERENCES

ALR.

Applicability of Uniform Child Custody Jurisdiction Act (UCCJA) to temporary custody orders. 81 A.L.R.4th 1101.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 A.L.R.4th 742.

Law Reviews.

1982 Mississippi Supreme Court Review: Miscellaneous: Uniform Child Custody Jurisdiction Act. 53 Miss. L. J. 191, March, 1983.

§ 93-27-314. Appeals.

An appeal may be taken from a final order in a proceeding under this Article 3 in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under Section 93-27-204, the enforcing court may not stay an order enforcing a child custody determination pending appeal.

HISTORY:

Laws, 2004, ch. 519, § 35, eff from and after July 1, 2004.

§ 93-27-315. Role of prosecutor or public official.

(1) In a case arising under this chapter or involving the Hague Convention on the Civil Aspects of International Child Abduction, the prosecutor or other appropriate public official may take any lawful action, including resort to a proceeding under this Article 3 or any other available civil proceeding to locate a child, obtain the return of a child, or enforce a child custody determination if there is:

(a) An existing child custody determination;

(b) A request to do so from a court in a pending child custody proceeding;

(c) A reasonable belief that a criminal statute has been violated; or

(d) A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(2) A prosecutor or appropriate public official acting under this section acts on behalf of the court and may not represent any party.

HISTORY:

Laws, 2004, ch. 519, § 36, eff from and after July 1, 2004.

RESEARCH REFERENCES

ALR.

Construction and Application of Provision of Hague Convention on Civil Aspects of International Child Abduction Specifying One-Year Period for Parent to File for Return of Child Wrongfully Removed From or Retained Outside Country of Habitual Residence, as Implemented in International Child Abduction Remedies Act, 42 U.S.C. § 11603(b), (f)(3). 79 A.L.R. Fed. 2d 481.

§ 93-27-316. Role of law enforcement.

At the request of a prosecutor or other appropriate public official acting under Section 93-27-315, a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official with responsibilities under Section 93-27-315.

HISTORY:
Laws, 2004, ch. 519, § 37, eff from and after July 1, 2004.

§ 93-27-317. Costs and expenses.

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or other appropriate public official and law enforcement officers under Section 93-27-315 or 93-27-316.

HISTORY:
Laws, 2004, ch. 519, § 38, eff from and after July 1, 2004.

ARTICLE 4.

MISCELLANEOUS.

Sec.
93-27-401. Codification.
93-27-402. Prior proceedings and determinations.

§ 93-27-401. Codification.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY:
Laws, 2004, ch. 519, § 40, eff from and after July 1, 2004.

Editor's Notes —
Laws of 2004, ch. 519, § 42 provides:

"SECTION 42. The provisions of Articles 1 through 4 shall be codified as a separate chapter in Title 93, Mississippi Code of 1972."

§ 93-27-402. Prior proceedings and determinations.

A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before July 1, 2004, is governed by the law in effect at the time the motion or other request was made.

HISTORY:

Laws, 2004, ch. 519, § 41, eff from and after July 1, 2004.

CHAPTER 29.

UNIFORM CHILD ABDUCTION PREVENTION ACT

Sec.
93-29-1. Short title.
93-29-3. Definitions.
93-29-5. Cooperation and communication among courts.
93-29-7. Actions for abduction prevention measures.
93-29-9. Jurisdiction.
93-29-11. Contents of petition.
93-29-13. Factors to determine risk of abduction.
93-29-15. Provisions and measures to prevent abduction.
93-29-17. Warrant to take physical custody of child.
93-29-19. Duration of abduction prevention order.
93-29-21. Uniformity of application and construction.
93-29-23. Relation to Electronic Signatures in Global and National Commerce Act.

§ 93-29-1. Short title.

This chapter may be cited as the Uniform Child Abduction Prevention Act.

HISTORY:

Laws, 2009, ch. 450, § 1, eff from and after July 1, 2009.

Comparable Laws from other States —

Alabama: Code of Ala. §§ 30-3C-1 through 30-3C-13.

Colorado: C.R.S. §§ 14-13.5-101 through 14-13.5-112.

District of Columbia: D.C. Code §§ 16-4604.01 through 16-4604.10

Kansas: K.S.A. §§ 23-3801 through 23-3812.

Michigan: MCLS §§ 722.1521 through 722.1532.

Nebraska: R.R.S. Neb. §§ 43-3901 through 43-3912.

Nevada: Nev. Rev. Stat. Ann. §§ 125D.010 through 125D.230.

New Mexico: N.M. Stat. Ann. §§ 40-10C-1 through 40-10C-12.

South Dakota: S.D. Codified Laws §§ 26-18-1 through 26-18-12.

Tennessee: Tenn. Code Ann. §§ 36-6-601 through 36-6-612.

Utah: Utah Code Ann. §§ 78B-16-101 through 78B-16-112.

§ 93-29-3. Definitions.

In this chapter:

(1) "Abduction" means the wrongful removal or wrongful retention of a child.

(2) "Child" means an unemancipated individual who is less than eighteen (18) years of age.

(3) "Child-custody determination" means a judgment, decree or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody or visitation with respect to a child is at issue. The term includes a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights or protection from domestic violence.

(5) "Court" means an entity authorized under the law of a state to establish, enforce or modify a child-custody determination.

(6) "Petition" includes a motion or its equivalent.

(7) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(8) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any other territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or nation.

(9) "Travel document" means records relating to a travel itinerary, including travel tickets, passes, reservations for transportation or accommodations. The term does not include a passport or visa.

(10) "Wrongful removal" means the taking of a child that breaches rights of custody or visitation given or recognized under the law of this state.

(11) "Wrongful retention" means the keeping or concealing of a child that breaches rights of custody or visitation given or recognized under the law of this state.

HISTORY:
Laws, 2009, ch. 450, § 2, eff from and after July 1, 2009.

§ 93-29-5. Cooperation and communication among courts.

Sections 93-27-110, 93-27-111 and 93-27-112 apply to cooperation and communications among courts in proceedings under this chapter.

HISTORY:
Laws, 2009, ch. 450, § 3, eff from and after July 1, 2009.

§ 93-29-7. Actions for abduction prevention measures.

(a) A court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.

(b) A party to a child-custody determination or another individual or entity having a right under the law of this state or any other state to seek a child-custody determination for the child may file a petition seeking abduction prevention measures to protect the child under this chapter.

(c) A prosecutor or public authority designated under Section 93-29-315 may seek a warrant to take physical custody of a child under Section 93-29-17 or other appropriate prevention measures.

HISTORY:
Laws, 2009, ch. 450, § 4, eff from and after July 1, 2009.

§ 93-29-9. Jurisdiction.

(a) A petition under this chapter may be filed only in a court that has jurisdiction to make a child-custody determination with respect to the child at issue under the Uniform Child Custody Jurisdiction and Enforcement Act.

(b) A court of this state has temporary emergency jurisdiction under Section 93-27-204 if the court finds a credible risk of abduction.

HISTORY:

Laws, 2009, ch. 450, § 5, eff from and after July 1, 2009.

Cross References —

Uniform Child Custody Jurisdiction and Enforcement Act, see §§ 93-27-101 et seq.

§ 93-29-11. Contents of petition.

A petition under this chapter must be verified and include a copy of any existing child-custody determination, if available. The petition must specify the risk factors for abduction including the relevant factors described in Section 93-29-13. Subject to Section 93-27-209(5), if reasonably ascertainable, the petition must contain:

(1) The name, date of birth and gender of the child;

(2) The customary address and current physical location of the child;

(3) The identity, customary address and current physical location of the respondent;

(4) A statement of whether a prior action to prevent abduction or domestic violence has been filed by a party or other individual or entity having custody of the child and the date, location and disposition of the action;

(5) A statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, child abuse or neglect and the date, location and disposition of the case; and

(6) Any other information required to be submitted to the court for a child-custody determination under Section 93-27-209.

HISTORY:

Laws, 2009, ch. 450, § 6, eff from and after July 1, 2009.

Cross References —

Uniform Child Custody Jurisdiction and Enforcement Act, see §§ 93-27-101 et seq.

§ 93-29-13. Factors to determine risk of abduction.

(a) In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

(1) Has previously abducted or attempted to abduct the child;

(2) Has threatened to abduct the child;

(3) Has recently engaged in activities that may indicate a planned abduction, including:

(A) Abandoning employment;

(B) Selling a primary residence;

(C) Terminating a lease;

(D) Closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents or conducting any unusual financial activities;

(E) Applying for a passport or visa or obtaining travel documents for the respondent, a family member or the child; or

(F) Seeking to obtain the child's birth certificate or school or medical records;

(4) Has engaged in domestic violence, stalking or child abuse or neglect;

(5) Has refused to follow a child-custody determination;

(6) Lacks strong familial, financial, emotional or cultural ties to the state or the United States;

(7) Has strong familial, financial emotional or cultural ties to another state or country;

(8) Is likely to take the child to a country that:

(A) Is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;

(B) Is a party to the Hague Convention on the Civil Aspects of International Child Abduction but:

(i) The Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country;

(ii) Is noncompliant according to the most recent compliance report issued by the United States Department of State; or

(iii) Lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction;

(C) Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;

(D) Has laws or practices that would:

(i) Enable the respondent, without due cause, to prevent the petitioner from contacting the child;

(ii) Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status or religion; or

(iii) Restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality or religion;

(E) Is included by the United States Department of State on a current list of state sponsors of terrorism;

(F) Does not have an official United States diplomatic presence in the country; or

(G) Is engaged in active military action or war, including a civil war, to which the child may be exposed;

(9) Is undergoing a change in immigration or citizenship status that

would adversely affect the respondent's ability to remain in the United States legally;

(10) Has had an application for United States citizenship denied;

(11) Has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license or other government-issued identification card or has made a misrepresentation to the United States government;

(12) Has used multiple names to attempt to mislead or defraud; or

(13) Has engaged in any other conduct the court considers relevant to the risk of abduction.

(b) In the hearing on a petition under this chapter, the court shall consider any evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

HISTORY:

Laws, 2009, ch. 450, § 7, eff from and after July 1, 2009.

Joint Legislative Committee Note —

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected typographical errors in subsection (a)(3)(F), by changing the word "medial" to "medical" and in subsection (a)(8)(B), by inserting the word "a" following "Is" at the beginning of the paragraph. The Joint Committee ratified the correction at its July 22, 2010, meeting.

RESEARCH REFERENCES

ALR.

Construction and Application of Provision of Hague Convention on Civil Aspects of International Child Abduction Specifying One-Year Period for Parent to File for Return of Child Wrongfully Removed From or Retained Outside Country of Habitual Residence, as Implemented in International Child Abduction Remedies Act, 42 U.S.C. § 11603(b), (f)(3). 79 A.L.R. Fed. 2d 481.

§ 93-29-15. Provisions and measures to prevent abduction.

(a) If a petition is filed under this chapter, the court may enter an order that must include:

(1) The basis for the court's exercise of jurisdiction;

(2) The manner in which notice and opportunity to be heard were given to the persons entitled to notice of the proceeding;

(3) A detailed description of each party's custody and visitation rights and residential arrangements for the child;

(4) A provision stating that a violation of the order may subject the party in violation to civil and criminal penalties; and

(5) Identification of the child's country of habitual residence at the time of the issuance of the order.

(b) If, at a hearing on a petition under this chapter or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order. The order must include the provisions required by subsection (a) and measures and conditions, including those in subsections (c), (d) and (e), that are reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties. The court shall consider the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted and the reasons for the potential abduction, including evidence of domestic violence, stalking or child abuse or neglect.

(c) An abduction prevention order may include one or more of the following:

(1) An imposition of travel restrictions that require that a party traveling with the child outside a designated geographical area provide the other party with the following:

(A) The travel itinerary of the child;

(B) A list of physical addresses and telephone numbers at which the child can be reached at specified times; and

(C) Copies of all travel documents;

(2) A prohibition of the respondent directly or indirectly:

(A) Removing the child from this state, the United States or another geographic area without permission of the court or the petitioner's written consent;

(B) Removing or retaining the child in violation of a child-custody determination;

(D) Approaching the child at any location other than a site designated for supervised visitation;

(3) A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;

(4) With regard to the child's passport:

(A) A direction that the petitioner place the child's name in the United States Department of State's Child Passport Issuance Alert Program;

(B) A requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

(C) A prohibition upon the respondent from applying on behalf of the child for a new or replacement passport or visa;

(5) As a prerequisite to exercising custody or visitation, a requirement that the respondent provide:

(A) To the United States Department of State Office of Children's Issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child;

(B) To the court:

(i) Proof that the respondent has provided the information in subparagraph (A); and

(ii) An acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child;

(C) To the petitioner, proof of registration with the United States Embassy or other United States diplomatic presence in the destination country and with the Central Authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that convention is in effect between the United States and the destination country, unless one (1) of the parties objects; and

(D) A written waiver under the Privacy Act, 5 USCS Section 552a as amended, with respect to any document, application or other information pertaining to the child authorizing its disclosure to the court and the petitioner; and

(6) Upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States.

(C) Removing the child from school or a child-care or similar facility; or

(d) In an abduction prevention order, the court may impose conditions on the exercise of custody or visitation that:

(1) Limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and order the respondent to pay the costs of supervision;

(2) Require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney's fees and costs if there is an abduction; and

(3) Require the respondent to obtain education on the potentially harmful effects to the child from abduction.

(e) To prevent imminent abduction of a child, a court may:

(1) Issue a warrant to take physical custody of the child under Section 93-29-17 or the law of this state other than this chapter;

(2) Direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child or enforce a custody determination under this chapter or the law of this state other than this chapter; or

(3) Grant any other relief allowed under the law of this state other than this chapter.

(f) The remedies provided in this chapter are cumulative and do not affect the availability of other remedies to prevent abduction.

HISTORY:

Laws, 2009, ch. 450, § 8, eff from and after July 1, 2009.

RESEARCH REFERENCES

ALR.

Construction and Application of Provision of Hague Convention on Civil Aspects of International Child Abduction Specifying One-Year Period for Parent to File for Return of Child Wrongfully Removed From or Retained Outside Country of Habitual Residence, as Implemented in International Child Abduction Remedies Act, 42 U.S.C. § 11603(b), (f)(3). 79 A.L.R. Fed. 2d 481.

§ 93-29-17. Warrant to take physical custody of child.

(a) If a petition under this chapter contains allegations, and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child.

(b) The respondent on a petition under subsection (a) must be afforded an opportunity to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.

(c) An ex parte warrant under subsection (a) to take physical custody of a child must:

(1) Recite the facts upon which a determination of a credible risk of imminent wrongful removal of the child is based;

(2) Direct law enforcement officers to take physical custody of the child immediately;

(3) State the date and time for the hearing on the petition; and

(4) Provide for the safe interim placement of the child pending further order of the court.

(d) If feasible, before issuing a warrant and before determining the placement of the child after the warrant is executed, the court may order a search of the relevant databases of the National Crime Information Center system and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking or child abuse or neglect.

(e) The petition and warrant must be served on the respondent when or immediately after the child is taken into physical custody.

(f) A warrant to take physical custody of a child, issued by this state or another state, is enforceable throughout this state. If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

(g) If the court finds, after a hearing, that a petitioner sought an ex parte warrant under subsection (a) for the purpose of harassment or in bad faith, the court may award the respondent reasonable attorney's fees, costs and expenses.

(h) This chapter does not affect the availability of relief allowed under the law of this state other than this chapter.

HISTORY:

Laws, 2009, ch. 450, § 9, eff from and after July 1, 2009.

§ 93-29-19. Duration of abduction prevention order.

An abduction prevention order remains in effect until the earliest of:

(1) The time stated in the order;

(2) The emancipation of the child;

(3) The child's attaining eighteen (18) years of age; or

(4) The time the order is modified, revoked, vacated or superseded by a court with jurisdiction under Sections 93-27-201 through 93-27-203.

HISTORY:

Laws, 2009, ch. 450, § 10, eff from and after July 1, 2009.

§ 93-29-21. Uniformity of application and construction.

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY:

Laws, 2009, ch. 450, § 11, eff from and after July 1, 2009.

§ 93-29-23. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 USCS Section 7001, et seq., but does not modify, limit or supersede Section 101(c) of the act, 15 USCS Section 7001(c), of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 USCS Section 7003(b).

HISTORY:

Laws, 2009, ch. 450, § 12, eff from and after July 1, 2009.

Federal Aspects—

Electronic Signatures in Global and National Commerce Act, see 15 USCS §§ 7001 et seq.

CHAPTER 31.

SUPPORTING AND STRENGTHENING FAMILIES ACT

Sec.

93-31-1. Short title.
93-31-3. Delegation of powers regarding care and custody of child to attorney-in-fact; revocation or withdrawal; duration of power of attorney.
93-31-5. Statutory form of power of attorney to delegate parental or legal authority.
93-31-7. Attorney-in-fact not subject to child care facility licensing or foster care licensing statutes.

§ 93-31-1. Short title.

This chapter shall be known and may be cited as the Supporting and Strengthening Families Act.

HISTORY:

Laws, 2016, ch. 501, § 1, eff from and after July 1, 2016.

§ 93-31-3. Delegation of powers regarding care and custody of child to attorney-in-fact; revocation or withdrawal; duration of power of attorney.

(1)(a) A parent or legal custodian of a child, by means of a properly executed power of attorney as provided in Section 93-31-5, may delegate to another willing person or persons as attorney-in-fact any of the powers regarding the care and custody of the child other than the following:

(i) The power to consent to marriage or adoption of the child;

(ii) The performance or inducement of an abortion on or for the child; or

(iii) The termination of parental rights to the child.

(b) A delegation of powers under this section does not:

(i) Change or modify any parental or legal rights, obligations, or authority established by an existing court order;

(ii) Deprive any custodial or noncustodial parent or legal guardian of any parental or legal rights, obligations, or authority regarding the custody, visitation, or support of the child; or

(iii) Affect a court's ability to determine the best interests of a child.

(c) If both parents are living and have shared custody as a matter of law or under an existing court order, both parents must execute the power of attorney.

(d) A power of attorney under this chapter must be facilitated by either a child welfare agency that is licensed to place children for adoption and that is operating under the Safe Families for Children model or another charitable organization that is operating under the Safe Families for Children model. A full criminal history and child abuse and neglect background check must be conducted on any person who is not a grandparent, aunt, uncle, or sibling of the child if the person is:

(i) Designated or proposed to be designated as the attorney-in-fact; or

(ii) Is a person over the age of fifteen (15) who resides in the home of the designated attorney-in-fact.

(2) A power of attorney executed under this chapter shall not be used for the sole purposes of enrolling a child in a school to participate in the academic or interscholastic athletic programs provided by that school or for any other unlawful purposes, except as may be permitted by the federal Every Student Succeeds Act (Public Law 114-95).

(3) The parent or legal custodian of the child has the authority to revoke or withdraw the power of attorney authorized by this section at any time. Upon the termination, expiration, or revocation of the power of attorney, the child must be returned to the custody of the parent or legal custodian as soon as reasonably possible.

(4) Until the authority expires or is revoked or withdrawn by the parent or legal custodian, the attorney-in-fact shall exercise parental or legal authority on a continuous basis without compensation for the duration of the power of attorney.

(5) The execution of a power of attorney by a parent or legal custodian does not, in the absence of other evidence, constitute abandonment, desertion, abuse, neglect, or any evidence of unfitness as a parent unless the parent or legal custodian fails to take custody of the child or execute a new power of attorney after the one-year time limit, or after a longer time period as allowed for a serving parent, has elapsed. Nothing in this subsection prevents the Department of Human Services or law enforcement from investigating allegations of abuse, abandonment, desertion, neglect or other mistreatment of a child.

(6) When the custody of a child is transferred by a power of attorney under this chapter, the child is not considered to have been placed in foster care and the attorney-in-fact will not be subject to any of the requirements or licensing regulations for foster care or other regulations relating to out-of-home care for children and will not be subject to any statutes or regulations dealing with the licensing or regulation of foster care homes.

(7)(a) "Serving parent" means a parent who is a member of the Armed Forces of the United States, including any reserve component thereof, or the National Oceanic and Atmospheric Administration Commissioned Officer Corps or the Public Health Service of the United States Department of Health and Human Services detailed by proper authority for duty with the Armed Forces of the United States, or who is required to enter or serve in the active military service of the United States under a call or order of the President of the United States or to serve on state active duty.

(b) A serving parent may delegate the powers designated in subsection (1) of this section for longer than one (1) year if on active-duty service or if scheduled to be on active-duty service. The term of delegation, however, may not exceed the term of active-duty service plus thirty (30) days.

HISTORY:
Laws, 2016, ch. 501, § 2, eff from and after July 1, 2016.

§ 93-31-5. Statutory form of power of attorney to delegate parental or legal authority.

(1) The following statutory form of power of attorney to delegate parental or legal authority as authorized by Section 93-31-3 is legally sufficient:

Statutory Form for Power of Attorney to
Delegate Parental or Legal
Custodian Powers

1. "I certify that I am the parent or legal custodian of:

______________________________ ____________
(Full name of minor child) (Date of birth)

______________________________ ____________
(Full name of minor child) (Date of birth)

______________________________ ____________
(Full name of minor child) (Date of birth)
who is/are minor children.

2. I designate ____
(Full name of attorney-in-fact)

____
(Street address, city, state and zip code of attorney-in-fact)

____
(Home phone, work phone and cell phone of attorney-in-fact)
as the attorney-in-fact of each minor child named above.

3. [Complete either Section 3(a) or 3(b)].

(a) I delegate to the attorney-in-fact all of my power and authority regarding the care, custody and property of each minor child named above, including, but not limited to, the right to enroll the child in school, inspect and obtain copies of education records and other records concerning the child, the right to attend school activities and other functions concerning the child, and the right to give or withhold any consent or waiver with respect to school activities, medical and dental treatment, and any other activity, function or treatment that may concern the child. This delegation shall not include the power or authority to consent to marriage or adoption of the child, the performance or inducement of an abortion on or for the child, or the termination of parental rights to the child.

OR

(b) I delegate to the attorney-in-fact the following specific powers and responsibilities (write in):

____
[If Section 3(b) is completed, Section 3(a) does not apply.]

This delegation shall not include the power or authority to consent to: marriage or adoption of the child, performing or inducing an abortion on or for the child, or the termination of parental rights to the child.

[Complete either 4(a) or 4(b)]

4.(a) This power of attorney is effective for a period not to exceed one (1) year, beginning, ____________, 20_____, and ending ____________, 20_____. I reserve the right to revoke this authority at any time.

OR

[Complete either 4(a) or 4(b)]

(b) I am a serving parent as defined in Section 93-31-3, Mississippi Code of 1972. My active-duty service is scheduled to begin on ____________, 20_____, and is estimated to end on ____________, 20_____. I reserve the right to revoke this authority at any time. I acknowledge that in no event may this delegation of power last more than one (1) year or the term of my active duty plus thirty (30) days, whichever is longer.

By: ______________________________

(Parent/Legal Custodian signature)

5. I hereby accept my designation as attorney-in-fact for the minor child/children specified in this power of attorney.

____

(Attorney-in-fact signature)

State of ____________________

County of ____________________

ACKNOWLEDGEMENT

Before me, the undersigned, a Notary Public, in and for said county and state on this ________ day of ________________, 20______, personally appeared ____________________ (Name of Parent/Legal Custodian) and ________________ (Name of Attorney-in-fact), known to me to be the persons who executed this instrument and who acknowledged to me that each executed the same as his or her free and voluntary act and deed for the uses and purposes set forth in the instrument.

Witness my hand and official seal the day and year above written.

____

(Signature of notarial officer)

(Seal, if any)

____

(Title and Rank)

My commission expires:________________"

(2) A power of attorney that substantially conforms to the form set forth in this section is legally sufficient if the form is properly completed and acknowledged.

HISTORY:

Laws, 2016, ch. 501, § 3, eff from and after July 1, 2016.

§ 93-31-7. Attorney-in-fact not subject to child care facility licensing or foster care licensing statutes.

When authority is delegated under Section 93-31-3 by a parent or guardian, the attorney-in-fact is not subject to the requirements of any other child care facility licensing statutes or foster care licensing statutes, and delivery of custody to the attorney-in-fact will not constitute an out-of-home child placement under Title 43, Mississippi Code of 1972.

HISTORY:

Laws, 2016, ch. 501, § 4, eff from and after July 1, 2016.

TITLE 95.

TORTS

Chapter 1. Libel and Slander. 95-1-1
Chapter 3. Nuisances. 95-3-1
Chapter 5. Trespass. 95-5-1
Chapter 7. Liability Exemption for Donors of Food. 95-7-1
Chapter 9. Liability Exemption for Volunteers and Sports Officials. 95-9-1
Chapter 11. Liability Exemption for Equine and Livestock Activities. 95-11-1
Chapter 13. Liability Exemption for Noise Pollution by Sport-shooting Ranges. 95-13-1
Chapter 15. Liability Exemption for Report of Suspicious Activity or Behavior. 95-15-1

CHAPTER 1.

LIBEL AND SLANDER

Sec.
95-1-1. Certain words actionable.
95-1-3. Liability of radio and television stations or networks.
95-1-5. Newspapers and radio or television stations to have opportunity to make corrections prior to suit.

§ 95-1-1. Certain words actionable.

All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable; and a plea, exception or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of the power to grant new trials, as in other cases.

HISTORY:

Codes, Hutchinson's 1848, ch. 56, art. 3; 1857, ch. 54, art. 1; 1871, § 1973; 1880, § 1004; 1892, § 10; 1906, § 10; Hemingway's 1917, § 1; 1930, § 11; 1942, § 1059.

Cross References —

Right of defendant in criminal prosecution to show truth of matter written or published, see Miss. Const. Art. 3, § 13 and Code § 97-3-57.

Right of remedy for injury to reputation, see Miss. Const. Art. 3, § 24.

Limitation on right of plaintiff to recover costs in libel and slander action, see § 11-53-33.

Time for bringing action for libel, see § 15-1-35.

Provisions relative to statements, editorials, and news stories which reflect upon the honesty, integrity, or moral character of a candidate for elective office, see §§ 23-15-875 and 23-15-877

Liability of radio and television stations or networks, see § 95-1-3.

Right of newspapers and radio or television stations to have opportunity to make corrections prior to suit, see § 95-1-5.

Punishment upon conviction for libel, see § 97-3-55.

Indictments for libel, see § 99-7-33.

Right to show use of insulting words on part of victim in trials for assault and battery, see § 99-17-19.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Truth as defense.
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4. When publication complete.
5. Actionable words, in general.
6. —Words actionable per se.
7. Privileged communication.
8. Qualified privilege.
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10. —Mitigation.
11. Judicial proceedings.
12. —Pleadings.
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1. In general.

To maintain claim of defamation, plaintiff must establish false and defamatory statement concerning plaintiff, unprivileged publication to third party, fault amounting at least to negligence on part of publisher, and, either actionability of statement irrespective of special harm, or existence of special harm caused by publication. Boone v. Wal-Mart Stores, 680 So. 2d 844, 1996 Miss. LEXIS 500 (Miss. 1996).

Fault in defamation cases involving private persons, regardless of their social standing, or ranks and privileges, may be predicated on negligence of publisher; plaintiff is not required to prove malice. Boone v. Wal-Mart Stores, 680 So. 2d 844, 1996 Miss. LEXIS 500 (Miss. 1996).

In order for merchant to be immune from

liability on defamation claim arising from questioning of customer by merchant for purpose of ascertaining whether or not customer is guilty of shoplifting, pursuant to state merchant immunity statute, merchant must prove that it conducted questioning of suspected shoplifter in reasonable manner. Boone v. Wal-Mart Stores, 680 So. 2d 844, 1996 Miss. LEXIS 500 (Miss. 1996).

"Libel" is method of defamation expressed in writing. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

Claim of defamation requires that plaintiff establish false and defamatory statement which concerns plaintiff, unprivileged publication of statement to third party, fault amounting to at least negligence on part of publisher, and either actionability of statement irrespective of special harm or existence of special harm caused by publication. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

Threshold question in any defamation action is whether published statements are false. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

Action of sheriff in giving license tag number of vehicle which was seized in drug arrest, which had formerly belonged to county chancery clerk and which still had license tag numbers issued in clerk's name despite sale to individual involved in drug arrest, to reporter without indicating conflict as to ownership was false statement and was actionable as result of material omissions on part of sheriff, even though statement that vehicle was registered to clerk was absolutely true; sheriff knew, and failed to state to reporter, that license tags had been expired for 16 months, or that clerk had sold vehicle but that new license tags had not been issued. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

Material omissions from reports of true facts are capable of creating defamatory impression. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

Public figure who brings libel action can only prevail by proving through clear and convincing evidence that publisher acted with actual malice. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

"Actual malice," showing of which on part of publisher must be made in order to allow recovery by public figure in libel action, is defined as ill will or reckless disregard of falsity of statements made. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

Where an author, after tape recording interviews with psychoanalyst, wrote magazine article which was later published as book and which contained lengthy passages in quotation marks attributed to psychoanalyst, some of which had no identical statement appearing in author's taped interviews, author was not entitled to summary judgment in suit by psychoanalyst for libel, because deliberate alteration of words uttered by public figure does not equate with knowledge of falsity for purpose of New York Times standard, unless alteration results in material change in meaning conveyed by statement; and with respect to some of the quotations, evidence presented question for jury whether author acted with knowledge of falsity or with reckless disregard as to truth or falsity. Masson v. New Yorker Magazine, 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447, 1991 U.S. LEXIS 3630 (U.S. 1991).

Fact issue as to whether misleading actions by sheriff in giving license tag number of vehicle seized in drug arrest, which was licensed to county chancery clerk, to reporter without making clear that there was conflict in ownership of vehicle were taken with actual malice precluding summary judgment in libel action brought by clerk after news story was published stating that vehicle belonging to clerk was seized. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

The discovery rule applies to defamation actions in that limited class of libel cases in which, because of the secretive or inherently undiscoverable nature of the publication the plaintiff did not know, or with reasonable diligence could not have discovered, that he or she had been defamed. Staheli v. Smith, 548 So. 2d 1299, 1989 Miss. LEXIS 410 (Miss. 1989), limited, Raddin v. Manchester Educ. Found., 175 So. 3d 1243, 2015 Miss. LEXIS 507 (Miss. 2015).

There are 2 questions which must be answered in determining whether the actual malice standard should be applied in a given defamation case. The first is "Is the plaintiff a public official/public figure or a private figure?" The second is, "Regardless of the plaintiff's status, is the alleged defamation a matter of public concern or interest?" Staheli v. Smith, 548 So. 2d 1299, 1989 Miss. LEXIS 410 (Miss. 1989), limited, Raddin v. Manchester Educ. Found., 175 So. 3d 1243, 2015 Miss. LEXIS 507 (Miss. 2015).

A public employee who was employed as a public university professor involved in geology research and grants was not in that class of higher level, decision-making employees such that he became a public official for purposes of determining whether the actual malice standard applied in a defamation action. Additionally, the professor was not a vortex public figure because the issues involved were not matters of general public concern or interest where the professor alleged that the dean at the university had defamed him in written recommendations against tenure and a pay raise. Staheli v. Smith, 548 So. 2d 1299, 1989 Miss. LEXIS 410 (Miss. 1989), limited, Raddin v. Manchester Educ. Found., 175 So. 3d 1243, 2015 Miss. LEXIS 507 (Miss. 2015).

The purpose of § 95-1-1 is to allow a cause of action where there is usually a face-to-face encounter or where words are uttered to another in an insulting manner and which would precipitate an immediate, forceful and violent reaction by a reasonable person. The statute is designed to punish words spoken (not written) face-to-face with no cooling-off time before a physical altercation occurred. Thus, the statute did not apply where the statement was typewritten and placed on the windshields of cars and in mailboxes. Isaacks v. Reed, 537 So. 2d 409, 1988 Miss. LEXIS 585 (Miss. 1988).

This section [Code 1942, § 1059] indicates no legislative intent that it shall operate beyond the borders of this state, but is designed to maintain peace within the state. Tattis v. Karthans, 215 So. 2d 685, 1968 Miss. LEXIS 1367 (Miss. 1968).

In the absence of a showing of a North Carolina statute similar to this section [Code 1942, § 1059], no cause of action was created by words spoken in that state and not republished in Mississippi. Tattis v. Karthans, 215 So. 2d 685, 1968 Miss. LEXIS 1367 (Miss. 1968).

In actions brought under this section [Code 1942, § 1059], the court has the power to pass on a demurrer where the demurrer is not based upon a construction of the words, but on some other ground evidenced by the declaration. Tattis v. Karthans, 215 So. 2d 685, 1968 Miss. LEXIS 1367 (Miss. 1968).

Where the declaration brought under this section [Code 1942, § 1059] specifically charged that the original statements complained of were made in state of North Carolina but failed to state that there had been a republication of the statements within the state of Mississippi, the plaintiff could not maintain a cause of action in the latter state. Tattis v. Karthans, 215 So. 2d 685, 1968 Miss. LEXIS 1367 (Miss. 1968).

While store and its assistant manager had a legal right to discharge one of its sales clerks for no reason at all and without recommendation if they saw fit to do so, they had no right to slander such sales clerk or other sales clerks without any proof of wrongdoing on their part. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

It has not been deemed requisite to introduce the customers in a store, or bystanders in a place of business, to testify as to their understanding of the meaning of alleged slanderous words, and it is necessary only to prove that such persons or some of them, heard the charges, or that the facts and circumstances would entitle the jury to believe that they heard and understood the same. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

Notwithstanding that slanderous remarks are directed to several persons, recovery may be had by one of them where the charge is made in the alternative to a smaller group, as distinguished from a general class, and especially if the plaintiff is able to satisfy the jury from all the facts and circumstances testified to that injury was intended to be done the plaintiff by the implications from the language used, and especially when the plaintiff is spoken to both separately and collectively with others, depending upon what the hearers might reasonably understand therefrom. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

A literal construction of the statute will not be applied by the court. Huckabee v. Nash, 182 Miss. 754, 183 So. 500, 1938 Miss. LEXIS 203 (Miss. 1938).

The gravamen of the statute is the speaking of the words, whether true or false, in an insulting manner. Huckabee v. Nash, 182 Miss. 754, 183 So. 500, 1938 Miss. LEXIS 203 (Miss. 1938).

Mutual exchange of opprobrious insulting epithets in violation of the statute and occurring in the same altercation is not actionable where the complaining party provoked such exchange. Huckabee v. Nash, 182 Miss. 754, 183 So. 500, 1938 Miss. LEXIS 203 (Miss. 1938).

In action on note, defendant held not entitled to recoup amount of damages arising from use of actionable words by plaintiff because of defendant's failure to pay note, since plea of recoupment was an independent tort. Calhoun v. McNair, 175 Miss. 44, 166 So. 330, 1936 Miss. LEXIS 9 (Miss. 1936).

Railroad company liable where superintendent wrote libelous letter to plaintiff's attorney in reply to claim for damages, where malice or lack of honest belief in truth of statements is shown. Alabama & V. R. Co. v. Brooks, 69 Miss. 168, 13 So. 847, 1891 Miss. LEXIS 172 (Miss. 1891).

Where occasion privileged, plaintiff must establish malice. Alabama & V. R. Co. v. Brooks, 69 Miss. 168, 13 So. 847, 1891 Miss. LEXIS 172 (Miss. 1891).

The immunity of a witness, in a judicial proceeding, from liability for slander is not affected by the statute. Verner v. Verner, 64 Miss. 321, 1 So. 479, 1886 Miss. LEXIS 66 (Miss. 1886).

It is not necessary that the words be spoken to, or in the presence of, the plaintiff. Scott v. Peebles, 10 Miss. 546, 1844 Miss. LEXIS 177 (Miss. 1844); Warren v. Norman, 1 Miss. 387, 1831 Miss. LEXIS 1 (Miss. 1831).

2. Truth as defense.

Truth is complete defense to action for libel. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

The truth of the slanderous words spoken constitutes no defense, and can only go to the jury in mitigation of damages. McLean v. Warring, 13 So. 236 (Miss. 1893).

The truth of the words spoken is no defense; but their truth or falsity is an important consideration for a jury in estimating the damages. Crawford v. Mellton, 20 Miss. 328, 1849 Miss. LEXIS 39 (Miss. 1849); Jefferson v. Bates, 152 Miss. 128, 118 So. 717, 1928 Miss. LEXIS 225 (Miss. 1928).

3. Words uttered or written by agent.

A plaintiff failed to state a cause of action against a corporate employer for violation of Mississippi's actionable words statute (§ 95-1-1) stemming from an incident in which he was cursed by a managerial employee in the presence of a supervisor, since a corporate employer cannot be held liable under the statute for the words of its employee, and there was no indication that the offending employee's words were spoken at the command of the employer. Lawson v. Heidelberg E., 872 F. Supp. 335, 1995 U.S. Dist. LEXIS 212 (N.D. Miss.), aff'd, 70 F.3d 1269, 1995 U.S. App. LEXIS 34896 (5th Cir. Miss. 1995).

But corporation in common-law action was held liable for slanderous words of agent in scope of employment without ratification. Doherty v. L. B. Price Mercantile Co., 132 Miss. 39, 95 So. 790, 1923 Miss. LEXIS 20 (Miss. 1923).

Corporation not liable under this statute [Code 1942, § 1059]. Neely v. Payne, 126 Miss. 854, 89 So. 669, 1921 Miss. LEXIS 85 (Miss. 1921).

Principal not liable under this statute [Code 1942, § 1059] for words of agent. Dixie Fire Ins. Co. v. Betty, 101 Miss. 880, 58 So. 705, 1912 Miss. LEXIS 21 (Miss. 1912).

Railroad company liable where superintendent wrote libelous letter to plaintiff's attorney in reply to claim for damages, where malice or lack of honest belief in truth of statements is shown. Alabama & V. R. Co. v. Brooks, 69 Miss. 168, 13 So. 847, 1891 Miss. LEXIS 172 (Miss. 1891).

Express company not liable for libelous letter written by acting agent upon whom there was no duty to answer correspondence and who acted as a mere volunteer. Southern Express Co. v. Fitzner, 59 Miss. 581, 1882 Miss. LEXIS 166 (Miss. 1882).

4. When publication complete.

If words are spoken only to the complaining party or to his agents, representing him in the matter discussed and invited by him, it is not such a publication as will support an action for slander and this includes one who is interceding for the employee as his authorized agent or representative. Kirk Jewelers, Inc. v. Bynum, 222 Miss. 134, 75 So. 2d 463, 1954 Miss. LEXIS 630 (Miss. 1954).

Right of action for libel against newspaper accrued as soon as paper containing alleged libelous matter was exhibited to third persons. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 1943 Miss. LEXIS 132 (Miss. 1943).

A cause of action for libel against a newspaper accrues where the paper is first published. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 1943 Miss. LEXIS 132 (Miss. 1943).

In libel action against newspaper, having its place of business in Hinds county, cause of action accrued in Hinds county where alleged libelous matter was first published and circulated, and the fact that the alleged libel was also circulated in Sunflower county through a local distributor, did not establish a new and separate cause of action in Sunflower county. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 1943 Miss. LEXIS 132 (Miss. 1943).

The mere dictation of a libelous letter to a stenographer in an office of a corporation is not a publication thereof where the stenographer does not repeat it. Cartwright-Caps Co. v. Fischel & Kaufman, 113 Miss. 359, 74 So. 278, 1917 Miss. LEXIS 109 (Miss. 1917).

Libelous matter contained in a letter written and mailed in this state to an addressee in another state is not published until the letter is received and read. McCarlie v. Atkinson, 77 Miss. 594, 27 So. 641, 1900 Miss. LEXIS 27 (Miss. 1900).

Publication is complete where defamatory letter exceeding privilege of occasion is received and read by attorneys. McCarlie v. Atkinson, 77 Miss. 594, 27 So. 641, 1900 Miss. LEXIS 27 (Miss. 1900).

5. Actionable words, in general.

Even if subject statements were false, plaintiff in order to prevail in defamation action must establish that words employed were clearly directed toward plaintiff, and defamation must be clear and unmistakable from words themselves and not product of innuendo, speculation, or conjecture. McCullough v. Cook, 679 So. 2d 627, 1996 Miss. LEXIS 434 (Miss. 1996).

A statement made by an attorney, who was prosecuting a libel action, regarding the defendants in that action was not actionable where the attorney stated, "Whatever defense they are using, a defense they are not using is that the statements they made were true"; sharp commentary is not actionable libel. Lawrence v. Evans, 573 So. 2d 695, 1990 Miss. LEXIS 819 (Miss. 1990).

A former college employee's allegations regarding the college president's charges of incompetence, if made with malice as the employee alleged, could serve as a basis for a defamation action. Holland v. Kennedy, 548 So. 2d 982, 1989 Miss. LEXIS 411 (Miss. 1989).

Name calling and verbal abuse are to be taken as statements of opinion, not fact, and therefore will not give rise to an action for libel. Johnson v. Delta-Democrat Pub. Co., 531 So. 2d 811, 1988 Miss. LEXIS 486 (Miss. 1988).

Even assuming that words uttered were actionable by reason of context in which they were uttered, person claiming damage as result of slander must allege and prove special damages, and such special damages must be charged with particularity; person alleging slander had no case where he did not in any manner suggest any damages of pecuniary character caused by alleged slander, and had wholly failed to make any substantial showing of injury to reputation. Baugh v. Baugh, 512 So. 2d 1283, 1987 Miss. LEXIS 2813 (Miss. 1987), limited, Speed v. Scott, 787 So. 2d 626, 2001 Miss. LEXIS 111 (Miss. 2001).

Words not within the contemplation of the statute do not become actionable because prompted by anger. Salvo v. Edens, 237 Miss. 734, 116 So. 2d 220, 1959 Miss. LEXIS 526 (Miss. 1959).

The following words in a dentist's letter to a woman who had not paid his bill and who had rejected a denture made by him: "Had I also known that you and your husband had no aversion to your running around toothless and thereby losing permanently your, until now, somewhat pleasant facial contours, I should never have suggested immediate denture service", were held not actionable under this statute [Code 1942, § 1059], in Salvo v. Edens, 237 Miss. 734, 116 So. 2d 220, 1959 Miss. LEXIS 526 (Miss. 1959).

A letter from a general agent of an insurance company advising the local agent that in view of the credit report on a named insured it would be necessary to cancel the insurance policy issued upon insured's business was not libelous, and, even if it was, it would have been qualifiedly privileged. Miley v. Foster, 229 Miss. 106, 90 So. 2d 172, 1956 Miss. LEXIS 591 (Miss. 1956).

While the imputation of a crime needs no innuendo to sustain its status as presumably libelous, its publication in the former category is not absolutely and of necessity defamatory but the particular statements must be adjudged in the light of the particular business. Sheffield v. Journal Pub. Co., 211 Miss. 294, 51 So. 2d 479, 1951 Miss. LEXIS 355 (Miss. 1951).

In slander action by sales clerk against store and its assistant manager, predicated upon the accusation by the assistant manager that plaintiff and two other sales clerks trifled with the store's money with ill intentions, the fact that the accuser may not have carried out his threat to inform any prospective employer concerning such sales clerks was immaterial, the question being how the hearers who were present at the time the accusations were made could have reasonably understood them as reflecting in a defamatory manner upon all of them. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

Notice to the public made by mortgagee in good faith correcting advertised foreclosure of trust deed by pointing out that certain land not owned by the mortgagor should not have been included in the deed of trust or notice of sale, stating that further publication of the notice of sale had been stopped in order to eliminate such land, was not libelous. Barcroft v. Armstrong, 198 Miss. 565, 21 So. 2d 817, 1945 Miss. LEXIS 230 (Miss. 1945).

Declaration against hotel corporation and its manager to recover damages for conduct of manager in cursing, and abusing plaintiff and threatening him with violence and ejection from hotel, held to state cause of action for breach of duty arising from the relationship of innkeeper and guest rather than cause of action under actionable words statute, which would have precluded recovery against corporate defendants, notwithstanding that the words set forth in the declaration were manifestly both insulting and calculated to lead to a breach of the peace. Milner Hotels, Inc. v. Dougherty, 195 Miss. 718, 15 So. 2d 358, 1943 Miss. LEXIS 146 (Miss. 1943).

The prohibition contained in this section [Code 1942, § 1059] against sustaining a plea, exception or demurrer in a case stated thereunder, so as to preclude a jury from passing on the facts complained of, has no application to a corporate defendant. Milner Hotels, Inc. v. Dougherty, 195 Miss. 718, 15 So. 2d 358, 1943 Miss. LEXIS 146 (Miss. 1943).

A liberal construction of the statute requires that the words spoken of another must be insulting from their usual construction and acceptation and must be calculated to lead to a breach of the peace. Huckabee v. Nash, 182 Miss. 754, 183 So. 500, 1938 Miss. LEXIS 203 (Miss. 1938).

A defendant calling the plaintiff a son-of-a-bitch is not liable under the statute where such words were provoked by plaintiff using the same words with reference to defendant, and an instruction to that effect is not erroneous. Huckabee v. Nash, 182 Miss. 754, 183 So. 500, 1938 Miss. LEXIS 203 (Miss. 1938).

Where defendant had rented house to plaintiff and plaintiff took possession of another house, defendant's words that plaintiff used skeleton key to enter house, held not actionable where evidence disclosed mutual mistake as to which house was rented. Cooper v. Davidson, 172 Miss. 74, 157 So. 418, 1935 Miss. LEXIS 92 (Miss. 1935).

Charge in writing by railroad company that station agent overcollected from patrons and took liberties with company's funds, if false, was actionable. Tribble v. Yazoo & M. V. R. Co., 103 Miss. 1, 60 So. 2, 1912 Miss. LEXIS 134 (Miss. 1912).

Not slander where defendant, an election officer, told plaintiff he was a convict and could not vote. Dedeaux v. King, 92 Miss. 38, 45 So. 466, 1907 Miss. LEXIS 1 (Miss. 1907).

However, it was not libelous for insurance company to publish statement that rival company may have settled certain losses before it, but did not pay them first, and that latest accounts were that money for payment of rival company's losses had not shown up, adding: "moral: Insure in this company. Losses paid promptly, not settled." P. L. Hennessey & Co. v. Traders' Ins. Co., 87 Miss. 259, 39 So. 692, 1905 Miss. LEXIS 132 (Miss. 1905).

Where defendant on denial by plaintiff that stolen cotton had been traced to his barn, stated that "people could lie" an action for slander is maintainable. Wiseman v. Parker, 73 Miss. 378, 19 So. 102, 1895 Miss. LEXIS 133 (Miss. 1895).

When, in action for slander, the slanderous words alleged are not in foreign or technical language, and not ambiguous nor uttered in fable, question or enigma or the like, but are such plain, ordinary words as are in common use, an instruction to the jury that unless the words used were understood by the hearers to have been uttered in a malicious or slanderous sense they must find for the defendant, is erroneous. In such case, it is the judgment of the jury, and not the opinion of the hearers of the words, that must determine whether they were slanderous or not. Jarnigan v. Fleming, 43 Miss. 710, 1870 Miss. LEXIS 77 (Miss. 1870).

Words "Plaintiff swore to a lie" spoken of his testimony before a justice of peace, are actionable. Lewis v. Black, 27 Miss. 425, 1854 Miss. LEXIS 73 (Miss. 1854).

The gravamen of the statute is the speaking of the words, whether true or false, in an insulting manner. Crawford v. Mellton, 20 Miss. 328, 1849 Miss. LEXIS 39 (Miss. 1849).

The words, "Crawford swore a lie, and I can prove it," are actionable words under the statute. Crawford v. Mellton, 20 Miss. 328, 1849 Miss. LEXIS 39 (Miss. 1849).

Only two things are necessary to bring words spoken of another within the statute, viz.: First, they must be insulting; and, second, they must be calculated to lead to a breach of the peace. Crawford v. Mellton, 20 Miss. 328, 1849 Miss. LEXIS 39 (Miss. 1849); Scott v. Peebles, 10 Miss. 546, 1844 Miss. LEXIS 177 (Miss. 1844).

Abusive and insulting words not actionable at common law unless special damages alleged in declaration and proven; such words actionable under statute. Cock v. Weatherby, 13 Miss. 333, 1845 Miss. LEXIS 77 (Miss. 1845); Davis v. Farrington, 1 Miss. 304, 1827 Miss. LEXIS 20 (Miss. 1827).

Everything written of another subjecting him to scorn and ridicule and calculated to cause breach of peace is libel. Torrance v. Hurst, 1 Miss. 403, 1831 Miss. LEXIS 6 (Miss. 1831).

6. —Words actionable per se.

Veteran's claim of slander per se was properly dismissed by the trial court, as labeling him as a thief and a dishonest person was an insult that might have lead to a breach of the peace under Miss. Code Ann. § 95-1-1, but it did not relieve the veteran of his obligation to prove special damages. Cook v. Wallot, 172 So. 3d 788, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. 2013).

Mere statements by former daughter-in-law that she had never known former father-in-law to wear neck brace and that she did not know he was disabled did not constitute words that would be slanderous per se, because words in question did not generate clear and unmistakable accusation that former father-in-law had been guilty of fraud in obtaining Social Security disability benefits, nor did words impute crime. Baugh v. Baugh, 512 So. 2d 1283, 1987 Miss. LEXIS 2813 (Miss. 1987), limited, Speed v. Scott, 787 So. 2d 626, 2001 Miss. LEXIS 111 (Miss. 2001).

Generally to orally call a white person a Negro is not actionable per se, but it may be actionable in certain sections of the country under the social habits and customs prevailing in those sections. Natchez Times Pub. Co. v. Dunigan, 221 Miss. 320, 72 So. 2d 681, 1954 Miss. LEXIS 541 (Miss. 1954).

Words which accuse a person of being a thief are actionable per se. Lemonis v. Hogue, 213 Miss. 775, 57 So. 2d 865, 1952 Miss. LEXIS 424 (Miss. 1952).

Where a newspaper story stated that the plaintiff was a two-gun man who is alleged to have threatened to shoot himself, members of family and the whole neighborhood, that story did not charge the plaintiff with a crime; therefore actual damages must be shown. Sheffield v. Journal Pub. Co., 211 Miss. 294, 51 So. 2d 479, 1951 Miss. LEXIS 355 (Miss. 1951).

Language of printed statement by trustees of public school regarding lumber dealer, and descending from defense into abuse, held actionable per se, at common law. Hodges v. Cunningham, 160 Miss. 576, 135 So. 215, 1931 Miss. LEXIS 226 (Miss. 1931).

Defendant's good faith statement he had mortgage on automobile plaintiff traded held not actionable per se though plaintiff, grantor, had trust deed. Winton v. Patterson, 152 Miss. 158, 119 So. 161, 1928 Miss. LEXIS 239 (Miss. 1928).

Words to effect that plaintiff set fire to and burned his house are actionable per se. Jefferson v. Bates, 152 Miss. 128, 118 So. 717, 1928 Miss. LEXIS 225 (Miss. 1928).

Law imputes intention to damage the other party by speaking of words that are slanderous per se. Jefferson v. Bates, 152 Miss. 128, 118 So. 717, 1928 Miss. LEXIS 225 (Miss. 1928).

Language clearly imputing embezzlement, actionable per se; damage implied from spoken words slanderous per se. Doherty v. L. B. Price Mercantile Co., 132 Miss. 39, 95 So. 790, 1923 Miss. LEXIS 20 (Miss. 1923).

But statement in letter not injuring reputation, exposing to public hatred, degrading or imputing that person is unworthy of credit not libelous per se. Heralds of Liberty v. Rankin, 130 Miss. 698, 94 So. 849, 1922 Miss. LEXIS 242 (Miss. 1923).

Words falsely charging one with commission of crime are actionable per se only where such charge if true would subject him to punishment for a crime involving moral turpitude, or one infamous in character, or one which if not necessarily infamous would bring disgrace upon him. Woodville v. Pizatti, 119 Miss. 85, 80 So. 491, 1918 Miss. LEXIS 14 (Miss. 1918).

Slanderous per se to say that member of legislature received money for voting an appropriation. Nabors v. Mathis, 115 Miss. 564, 76 So. 549, 1917 Miss. LEXIS 234 (Miss. 1917).

Where insurance company issued circular letter to its agents, not referring to plaintiff by name, but referring to him as a hard drinker, a habitual carrier of firearms, reputed to have killed two men, and stating that he had lost a foot when insured and had recently shot off the other for which he was making claim, such language did not constitute libel per se, in view of plaintiff's substantial admission of such facts, and the statement as to his claim for a lost foot was consistent with accidental shooting. Holliday v. Maryland Casualty Co., 115 Miss. 56, 75 So. 764, 1917 Miss. LEXIS 184 (Miss. 1917).

Accusing one of being thief, actionable per se. Valley Dry Goods Co. v. Buford, 114 Miss. 414, 75 So. 252, 1917 Miss. LEXIS 49 (Miss. 1917).

An instance where a statement concerning plaintiff's use of money advanced under contract to deliver staves, was not libelous per se. Lucas E. Moore Stave Co. v. Wells, 111 Miss. 796, 72 So. 228, 1916 Miss. LEXIS 397 (Miss. 1916).

Letter stating that another was in fact dishonest, without brains, undiplomatic, and not optimistic, and comparing his actions with those of a hog which muddies the stream was defamatory and libelous per se. Hines v. Shumaker, 97 Miss. 669, 52 So. 705, 1910 Miss. LEXIS 269 (Miss. 1910).

A clearance paper given a discharged employee, reciting: "Cause for leaving service, unsatisfactory service, conduct good," is not libelous per se. Illinois C. R. Co. v. Ely, 83 Miss. 519, 35 So. 873, 1903 Miss. LEXIS 73 (Miss. 1904).

To charge the defendant with having poisoned the plaintiff is actionable per se. Furr v. Speed, 74 Miss. 423, 21 So. 562, 1896 Miss. LEXIS 181 (Miss. 1896).

Both intention to injure and to damage are implied by law from the speaking of words that are slanderous per se. Furr v. Speed, 74 Miss. 423, 21 So. 562, 1896 Miss. LEXIS 181 (Miss. 1896).

7. Privileged communication.

An absolutely privileged communication is one made in the interest of the public service or the due administration of justice, and in practical effect is limited to legislative, judicial or military proceedings. Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693, 1955 Miss. LEXIS 639 (Miss. 1955).

An officer of the law has no absolute privilege for any and all comments which he makes. Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693, 1955 Miss. LEXIS 639 (Miss. 1955).

Statement by assisting manager of store that plaintiff and two others trifled with store's money with ill intent was not privileged under State Unemployment Compensation Act providing that communications in connection with requirements and administration of act shall be privileged as alleged accusations were not made in connection with requirements or administration of that act. Montgomery Ward & Co. v. Harland, 205 Miss. 380, 38 So. 2d 771, 1949 Miss. LEXIS 436 (Miss. 1949).

Matter published in a judicial proceeding is absolutely privileged. Gunter v. Reeves, 198 Miss. 31, 21 So. 2d 468, 1945 Miss. LEXIS 166 (Miss. 1945).

Allegations made in affidavit for search warrant, in absence of showing taking allegation out of general rule, is absolutely privileged as matter published in a judicial proceeding. Gunter v. Reeves, 198 Miss. 31, 21 So. 2d 468, 1945 Miss. LEXIS 166 (Miss. 1945).

Absolutely privileged communication is one made in interest of public service or administration of justice and is practically limited to legislative and judicial proceedings and other actions of state. Grantham v. Wilkes, 135 Miss. 777, 100 So. 673, 1924 Miss. LEXIS 81 (Miss. 1924).

Defendant's statement that plaintiff admitted theft not privileged because made to brother of other alleged thief. Valley Dry Goods Co. v. Buford, 114 Miss. 414, 75 So. 252, 1917 Miss. LEXIS 49 (Miss. 1917).

Letter from defendant corporation sent under seal and for plaintiff's inspection alone, relating to business transaction between them and urging payment for machinery, was privileged and not actionable libel. Cartwright-Caps Co. v. Fischel & Kaufman, 113 Miss. 359, 74 So. 278, 1917 Miss. LEXIS 109 (Miss. 1917).

Statement of defendant to fraternal organization attempting to settle difference between himself and plaintiff, that plaintiff had been guilty of perjury, not made in rebuttal of charges against defendant, is not privileged. Pate v. Trollinger, 113 Miss. 255, 74 So. 131, 1916 Miss. LEXIS 35 (Miss. 1916).

The scope of the defamatory matter, in order to be excusable on the ground of privileged communication, must not exceed exigency of privileged occasion. Hines v. Shumaker, 97 Miss. 669, 52 So. 705, 1910 Miss. LEXIS 269 (Miss. 1910).

Statements casually made to officers, not for the public good, which were also made to other persons, are not privileged communications. Bigner v. Hodges, 82 Miss. 215, 33 So. 980, 1903 Miss. LEXIS 130 (Miss. 1903).

Where occasion privileged, plaintiff must establish malice. Alabama & V. R. Co. v. Brooks, 69 Miss. 168, 13 So. 847, 1891 Miss. LEXIS 172 (Miss. 1891).

8. Qualified privilege.

In a suit to recover for the alleged libel of the plaintiff in a credit report, where there was nothing before the court to dispute the defendant's contention that this report was made in good faith in the ordinary and everyday course of its business in answer to a request from a client for a credit report on the plaintiff, and nothing in the report suggested malice or anything more than the reporting of what was found from informants to be the facts about which a questionnaire related, the report enjoyed a qualified privilege and it was immaterial whether its contents were libelous per se or libelous per quod. Wilson v. Retail Credit Co., 438 F.2d 1043, 1971 U.S. App. LEXIS 11984 (5th Cir. Miss. 1971).

A credit report furnished in good faith, and without malice, by a reporting agency to one entitled to receive the same is entitled to qualified privilege, even though it contains erroneous information. Wilson v. Retail Credit Co., 325 F. Supp. 460, 1971 U.S. Dist. LEXIS 14248 (S.D. Miss. 1971), aff'd, 457 F.2d 1406, 1972 U.S. App. LEXIS 10066 (5th Cir. Miss. 1972).

Where government employees gave allegedly defamatory oral and written statements to an Air Force officer in the course of his investigation of the manager of the Exchange Services Store at an air base, they were afforded the protection of the doctrine of governmental immunity. Houtenville v. Dunahoo, 286 F. Supp. 5, 1968 U.S. Dist. LEXIS 9083 (N.D. Miss. 1968).

Statements made by a university dean when recommending against a professor's tenure were protected by a qualified governmental immunity where there was no publication outside the circle of persons having an intimate and direct interest in the tenure proceedings and there was no showing that the dean acted with malice. Staheli v. Smith, 548 So. 2d 1299, 1989 Miss. LEXIS 410 (Miss. 1989), limited, Raddin v. Manchester Educ. Found., 175 So. 3d 1243, 2015 Miss. LEXIS 507 (Miss. 2015).

Evidence in a slander suit by a highway patrolman against a person whom he had arrested for public drunkenness, and who had thereafter telephoned law enforcement agencies, including the patrolman's superiors, repeatedly calling the patrolman a "heathen son of a bitch" and charging that the patrolman had taken $2,100 out of such person's pocket, supported a finding that, if the occasion when the statements were made was conditionally privileged as a communication with the proper law enforcement officials to inquire of property lost or stolen, such conditional privilege was abused in that such statements charging the patrolman with being a thief were false and made out of ill will and spite and in bad faith. Ralston Purina Co. v. Colton, 262 So. 2d 414, 1972 Miss. LEXIS 1313 (Miss. 1972).

In a libel action, the evidence was insufficient to establish malice on the part of the defendant newspaper publisher in publishing a photograph of articles taken from the automobile of a person arrested on a charge of bank robbery, which articles included explosives and weapons along with a campaign poster of the plaintiff who had run for public office and been actively engaged in politics in Mississippi, and was admittedly known throughout the state. Perkins v. Mississippi Publishers Corp., 241 So. 2d 139, 1970 Miss. LEXIS 1320 (Miss. 1970).

A plaintiff who had been prominently engaged in state politics for a good many years and had been a candidate and had conducted political campaigns for several public offices over a twenty-year period, was, at the time of the publication of an allegedly libelous photograph, a "public figure" notwithstanding the fact that his latest political campaign ended several weeks before publication of the libel. Perkins v. Mississippi Publishers Corp., 241 So. 2d 139, 1970 Miss. LEXIS 1320 (Miss. 1970).

Where the declaration showed that plaintiff occupied a prominent quasi-public position and that the editorial in question was a criticism of the assertions of plaintiff in regard to matters of public interest, and it was not alleged that there was any falsity in the statements of fact on which the writer therein based his criticisms, only that the editorial contained false and libelous words concerning plaintiff, the state of the pleadings on its face showed that the occasion was conditionally privileged, and the editorial was not actionable since the privilege had not been abused. Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So. 2d 171, 1957 Miss. LEXIS 401 (Miss. 1957).

A letter from a general agent of an insurance company advising the local agent that in view of the credit report on a named insured it would be necessary to cancel the insurance policy issued upon insured's business was not libelous, and, even if it was, it would have been qualifiedly privileged. Miley v. Foster, 229 Miss. 106, 90 So. 2d 172, 1956 Miss. LEXIS 591 (Miss. 1956).

In a libel action by a sheriff against a newspaper on the ground that the article stated that the sheriff had shot a person without justification whereas a deputy had fired the shot, the article was not libelous because the sheriff and deputy were acting in concert and had committed an illegal assault on a person just before the shooting so that the article was substantially correct. Smith v. Byrd, 225 Miss. 331, 83 So. 2d 172, 1955 Miss. LEXIS 588 (Miss. 1955).

The law guards jealously the right to the enjoyment of a good reputation, but public policy, good morals, the interests of society, and sound business demand that an employer, or his representative, be permitted to discuss freely with an employee, or his chosen representative, charges made against the employee affecting the latter's employment and on such occasion there is a qualified privilege and statements made within the scope of the privilege, in good faith and without malice, are not actionable. Killebrew v. Jackson City Lines, Inc., 225 Miss. 84, 82 So. 2d 648, 1955 Miss. LEXIS 562 (Miss. 1955).

One is privileged to publish the actual facts as to the commission of a crime and the facts as to the arrest and charges made against a person suspected of the crime provided the statement does not go further than a mere report of the news by making charges, directly or by inference, insinuation, or assumption that the person arrested is guilty of the crime and if the account does not go beyond a mere narration of the transaction recounted and makes injurious reflections on the private or business character of a party to the transaction it is actionable if untrue. Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693, 1955 Miss. LEXIS 639 (Miss. 1955).

It is a fundamental requisite that one claiming the benefit of qualified privilege must believe in good faith that the defamatory matter is true. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

The existence of the privilege does not license the speaker to introduce irrelevant defamatory matter beyond the exigencies of the occasion. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

While the fact that alleged slanderous words may have been uttered in the presence and hearing of other persons who were accidentally present and to whom the remarks were not addressed will not overthrow the qualifiedly privileged nature of the communication, the fact that slanderous charges are made in the presence and hearing of others not interested in the investigation, is not an immaterial circumstance where the privilege is exceeded and the one claiming the benefit of the privilege is acting in bad faith, without probable cause, and from anger and displayed malice, in wilful and wanton disregard of the rights of the person to whom the slanderous charges are addressed. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In action by sales clerk against store and its assistant manager to recover damages for slanderous remarks, the entire context of what the assistant manager said to the plaintiff and two other sales clerks must be considered in determining whether the defendants acted in wilful and wanton disregard of the rights of the plaintiff. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In slander action by sales clerk against store and its assistant manager, the fact that a friendly relation had previously existed between the parties who were interested in the investigation with regard to misplacement of store's money is a circumstance to disprove malice, but such fact is not controlling. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In suit by sales clerk against store and its assistant manager to recover damages for slander, privilege in the conduct of an investigation to determine who was responsible for negligent or careless misplacement of store's money was exceeded by accusation of hiding store's money with ill intent and warranted jury finding that the accusation in its slanderous aspects was not made in good faith and on probable cause for suspecting anyone of having trifled with the store's money with ill intentions. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

Qualifiedly privileged communication is one made in good faith to person having interest in subject matter or about which he has a duty to a person having a corresponding interest or duty. Grantham v. Wilkes, 135 Miss. 777, 100 So. 673, 1924 Miss. LEXIS 81 (Miss. 1924).

Under § 124 of the Const. an applicant for pardon does not have to sign his petition, and a person signing such petition is exercising a qualfied privilege. Grantham v. Wilkes, 135 Miss. 777, 100 So. 673, 1924 Miss. LEXIS 81 (Miss. 1924).

A circular letter by an insurance company to its agents concerning reputation of insured and matters pertaining to the risk, not libelous per se, constituted a qualified privileged communication. Holliday v. Maryland Casualty Co., 115 Miss. 56, 75 So. 764, 1917 Miss. LEXIS 184 (Miss. 1917).

Examination by Masonic Lodge Committee investigating charges against member is an occasion of qualified privilege. Jones v. Edwards, 57 Miss. 28, 1879 Miss. LEXIS 6 (Miss. 1879); Fritz v. Williams, 16 So. 359 (Miss. 1894).

9. Damages.

Punitive damages are not recoverable in an action for libel or slander per quad where no actual damages are shown. Barton v. Barnett, 226 F. Supp. 375, 1964 U.S. Dist. LEXIS 6419 (N.D. Miss. 1964).

In a suit based upon actionable word statute where defendant called plaintiff a crook, an instruction advising the jury that they were not authorized to award damages for injury to plaintiff's reputation in the community, was proper since plaintiff sought only exemplary damages. Wells v. Branscome, 222 Miss. 1, 74 So. 2d 743, 1954 Miss. LEXIS 609 (Miss. 1954).

In slander action by sales clerk against store and assistant manager, testimony showing personal reactions of plaintiff to accusations, loss incident to discharge, and humiliation incident to her own republication of charges, could influence jury only in arriving at amount of damages, and if introduction is erroneously permitted, remittitur reducing judgment from $15,000 to $7,500 will cure any harm done by testimony in regard to measure of damages. Montgomery Ward & Co. v. Harland, 205 Miss. 380, 38 So. 2d 771, 1949 Miss. LEXIS 436 (Miss. 1949).

While instruction in suit by sales clerk against store and assistant manager to recover damages for slanderous remarks, that the jury could not award her any damages whatever on account of her discharge was proper in view of the fact that she was not employed for a fixed term, plaintiff was entitled to show that she was in fact damaged in her reputation by what had transpired, as represented by evidence that she was unable to obtain or retain employment thereafter by reason thereof. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In action on note, defendant held not entitled to recoup amount of damages arising from use of actionable words by plaintiff because of defendant's failure to pay note, since plea of recoupment was an independent tort. Calhoun v. McNair, 175 Miss. 44, 166 So. 330, 1936 Miss. LEXIS 9 (Miss. 1936).

$500 damages to man under 21 years of age, denounced as thief and liar, held not excessive. Landrum v. Ellington, 152 Miss. 569, 120 So. 444, 1929 Miss. LEXIS 223 (Miss. 1929).

Jury, within reasonable bounds, sole judge of damage sustained. Landrum v. Ellington, 152 Miss. 569, 120 So. 444, 1929 Miss. LEXIS 223 (Miss. 1929).

Where words were actionable per se plaintiff was entitled to exemplary damages and it was unnecessary to show special damages. Jefferson v. Bates, 152 Miss. 128, 118 So. 717, 1928 Miss. LEXIS 225 (Miss. 1928).

Plaintiff in malicious libel, entitled to punitive damages as the jury might assess, without showing actual damages. Hubbard v. Rutledge, 52 Miss. 581, 1876 Miss. LEXIS 259 (Miss. 1876).

10. —Mitigation.

In an action for slander against an insurance company after plaintiff had recovered on policy, evidence that recovery had been contested on the ground of fraudulent representations, admissible in mitigation of damages. National Life & Acci. Ins. Co. v. De Vance, 110 Miss. 196, 70 So. 83, 1915 Miss. LEXIS 23 (Miss. 1915).

Apology admissible in mitigation of damages but not as bar. Dixie Fire Ins. Co. v. Betty, 101 Miss. 880, 58 So. 705, 1912 Miss. LEXIS 21 (Miss. 1912).

The truth of the slanderous words spoken constitutes no defense, and can only go to the jury in mitigation of damages. McLean v. Warring, 13 So. 236 (Miss. 1893).

Sudden heat of passion is circumstance mitigating damages. Powers v. Presgroves, 38 Miss. 227, 1859 Miss. LEXIS 110 (Miss. 1859).

The truth or falsity of words is an important consideration for a jury in estimating the damages. Crawford v. Mellton, 20 Miss. 328, 1849 Miss. LEXIS 39 (Miss. 1849); Jefferson v. Bates, 152 Miss. 128, 118 So. 717, 1928 Miss. LEXIS 225 (Miss. 1928).

11. Judicial proceedings.

Statement by attorney for plaintiff in argument to jury that plaintiff had read to jury testimony given on former trial by absent witness in response to plaintiff's questions but that defendant did not read testimony of witness given in response to questions asked on behalf of defendant, to which objection was overruled, was not reversible error. Montgomery Ward & Co. v. Harland, 205 Miss. 380, 38 So. 2d 771, 1949 Miss. LEXIS 436 (Miss. 1949).

Whether alleged libelous words are calculated to lead to breach of peace is question for jury. Hodges v. Cunningham, 160 Miss. 576, 135 So. 215, 1931 Miss. LEXIS 226 (Miss. 1931).

Jury passes on both amount of damages and on whether or not words were actionable. Davis v. Woods, 95 Miss. 432, 48 So. 961, 1909 Miss. LEXIS 249 (Miss. 1909).

When, in action for slander, the slanderous words alleged are not in foreign or technical language, and not ambiguous nor uttered in fable, question or enigma or the like, but are such plain, ordinary words as are in common use, an instruction to the jury that unless the words used were understood by the hearers to have been uttered in a malicious or slanderous sense they must find for the defendant, is erroneous. In such case, it is the judgment of the jury, and not the opinion of the hearers of the words, that must determine whether they were slanderous or not. Jarnigan v. Fleming, 43 Miss. 710, 1870 Miss. LEXIS 77 (Miss. 1870).

12. —Pleadings.

Where plaintiff's declaration seeking damages for libel is based primarily on common law rights and the Mississippi actionable words statute, the fact that it also alleges as an element of damages that he was deprived of his rights under the United States Constitution is not sufficient to confer jurisdiction upon the federal courts and a motion to remand was sustained. Walker v. Savell, 243 F. Supp. 478, 1965 U.S. Dist. LEXIS 7387 (N.D. Miss. 1965).

Sufficient in slander to allege words or synonymous words constituting same. Valley Dry Goods Co. v. Buford, 114 Miss. 414, 75 So. 252, 1917 Miss. LEXIS 49 (Miss. 1917).

Declaration setting out words used and alleging that from their usual construction and common acceptance they are considered insulting and calculated to lead to violence and breach of peace, and were spoken contrary to statute, held good on demurrer. Davis v. Woods, 95 Miss. 432, 48 So. 961, 1909 Miss. LEXIS 249 (Miss. 1909).

A bill of particulars in an action for slander which gives the actionable words, the time, place, and the names of the persons to whom they were spoken, is sufficient. McLean v. Warring, 13 So. 236 (Miss. 1893).

A declaration which avers that defendant spoke the works "contrary to the statute, with a view to insult the plaintiff, and to lead him to commit violence and breach of the peace," brings the case within the statute. Scott v. Peebles, 10 Miss. 546, 1844 Miss. LEXIS 177 (Miss. 1844).

A declaration in an action under the statute is insufficient if it does not show that the action is based on the statute and is within its purview. Scott v. Peebles, 10 Miss. 546, 1844 Miss. LEXIS 177 (Miss. 1844); Warren v. Norman, 1 Miss. 387, 1831 Miss. LEXIS 1 (Miss. 1831); Davis v. Farrington, 1 Miss. 304, 1827 Miss. LEXIS 20 (Miss. 1827).

13. —Evidence.

Youth court records of a juvenile's adjudication of delinquency arising from a shoplifting incident were admissible into evidence in the juvenile's slander suit against a store employee arising from the same incident, since the truth is a total defense to a slander suit; the juvenile's action of initiating the slander suit "lifted the veil of confidentiality" of the youth court proceedings, thereby exposing him to the "harsh realities of litigation." Daniels by Glass v. Wal-Mart Stores, 634 So. 2d 88, 1993 Miss. LEXIS 564 (Miss. 1993), limited, Sample v. State, 643 So. 2d 524, 1994 Miss. LEXIS 466 (Miss. 1994), limited, Mask v. Elrod (In re Estate of Mask), 703 So. 2d 852, 1997 Miss. LEXIS 752 (Miss. 1997).

Where it was contended that a letter from a general agent of an insurance company advising the local agent that in view of a credit report it would be necessary to cancel insurance policies covering plaintiff's business was libelous, it was not error to admit in evidence a credit report which formed the basis of the letter, since, if for no other reason, the report was admissible on the question of good faith and freedom from malice on the part of the writer of the letter. Miley v. Foster, 229 Miss. 106, 90 So. 2d 172, 1956 Miss. LEXIS 591 (Miss. 1956).

In a suit based upon the actionable words statute, to recover for statements made by the defendant that the plaintiff was a crook, testimony relative to the plaintiff's general reputation for honesty and fair dealing was admissible in mitigation of damages. Wells v.

Branscome, 222 Miss. 1, 74 So. 2d 743, 1954 Miss. LEXIS 609 (Miss. 1954).

In slander action by sales clerk against store and assistant manager, testimony by clerk that customers stopped, looked and listened, is sufficient proof that customers heard remarks complained of. Montgomery Ward & Co. v. Harland, 205 Miss. 380, 38 So. 2d 771, 1949 Miss. LEXIS 436 (Miss. 1949).

In slander suit by sales clerk against store and its assistant manager resulting from accusations by assistant manager that plaintiff and two others trifled with store's money with ill intent, defendants are entitled to prove, on question of good faith, the information on which assistant manager acted in making accusations. Montgomery Ward & Co. v. Harland, 205 Miss. 380, 38 So. 2d 771, 1949 Miss. LEXIS 436 (Miss. 1949).

In an action against an employer and its assistant store manager for slander in charging plaintiff and two other employees with trifling with the employer's money with ill intentions, the trial court erred in excluding testimony that the assistant store manager was acting in the premises in the light of information that the hidden check had been given to one of the three plaintiffs and not to one of the two remaining employees, since such testimony was pertinent to the issue of malice. Montgomery Ward & Co. v. Higgins, 201 Miss. 467, 29 So. 2d 267, 1947 Miss. LEXIS 407 (Miss. 1947).

While the plaintiff is limited in his right of recovery to the charge made in the declaration and which is admitted to have been proved in so far as testimony on behalf of plaintiff is concerned, it is competent for plaintiff to prove such additional facts and circumstances as will throw light on the question as to whether third persons present would reasonably understand that the speaker intended to reflect upon plaintiff. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In slander action by sales clerk against store and its assistant manager, evidence that investigation with regard to misplacement of store's money was considered by assistant manager as involving an act of carelessness warranted jury in believing that his statements accusing plaintiff and two other sales clerks with trifling with store's money with ill intentions were made in wilful and wanton disregard of their rights, and in excess of any right that he had in investigating an act of mere carelessness. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In slander suit by sales clerk against store and its assistant manager, wherein assistant manager, investigating misplacement of store's money, accused plaintiff and others of trifling with the store's money with ill intentions, there being no evidence that any of them were responsible for such misplacements, evidence warranted jury in imposing both actual and punitive damages. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In assessing punitive damages in slander suit by sales clerk against store and its assistant manager for accusations exceeding defendant's privilege in investigating misplacement of store's money, jury could properly take into consideration evidence that defendant's store had current assets worth more than $261,000,000 and that its earned surplus was nearly $110,000,000. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In an action for slander against an insurance company after plaintiff had recovered on policy, evidence that recovery had been contested on the ground of fraudulent representations, admissible in mitigation of damages. National Life & Acci. Ins. Co. v. De Vance, 110 Miss. 196, 70 So. 83, 1915 Miss. LEXIS 23 (Miss. 1915).

Where the communication is upon a privileged occasion and is a privileged communication, the burden is upon the plaintiff to show actual malice in order to recover. But if the privilege of the communication is not conceded, and does not appear from the plaintiff's testimony, the burden is then upon the defendant, who relies upon the privilege, to establish it. Hines v. Shumaker, 97 Miss. 669, 52 So. 705, 1910 Miss. LEXIS 269 (Miss. 1910).

An allegation in a declaration for slander that defendant "had butchered and sold his patrons a steer affected with a loathsome disease, and which at the time had a running sore or cancer on its leg," is supported by testimony that "He had butchered and sold a steer which was unfit for use because it had a running sore on its leg." Bigner v. Hodges, 82 Miss. 215, 33 So. 980, 1903 Miss. LEXIS 130 (Miss. 1903).

The exact words alleged to have been spoken, or synonymous words, must be proved. It is not sufficient to prove words conveying a similar idea. Jones v. Edwards, 57 Miss. 28, 1879 Miss. LEXIS 6 (Miss. 1879).

In libel suit, where defense was honest motive, held defendant might be questioned as to effect of plaintiff's business in competition with his own. Hubbard v. Rutledge, 57 Miss. 7, 1879 Miss. LEXIS 2 (Miss. 1879).

Where manifest that word was used in its ordinary and popular meaning, court should so decide and exclude evidence of technical meaning. Rodgers v. Kline, 56 Miss. 808, 1879 Miss. LEXIS 219 (Miss. 1879).

First Amendment restrictions mandate that the plaintiff in a defamation action bear the burden of proving falsity. Burk v. Illinois C. G. R. Co., 529 So. 2d 515, 1988 La. App. LEXIS 1569 (La.App. 1 Cir.), cert. denied, 532 So. 2d 179, 1988 La. LEXIS 2528 (La. 1988).

14. —Jury questions.

When evidence on the question as to whether the defendant made the defamatory statements ascribed to him was in conflict, a question for the jury was clearly presented. Miley v. Foster, 229 Miss. 106, 90 So. 2d 172, 1956 Miss. LEXIS 591 (Miss. 1956).

Under the actionable words statute the jury are the sole judges of damages sustained, but the discretion vested in the jury must be reasonably exercised. Wells v. Branscome, 222 Miss. 1, 74 So. 2d 743, 1954 Miss. LEXIS 609 (Miss. 1954).

Where alleged slanderous language is unambiguous, it is to be construed in its ordinary sense, and without reference to how those to whom it was published understood it or what was intended by the publisher, the jury being the judges as to whether the words would reasonably be understood in a defamatory meaning. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

Where the evidence showed that defendant store's assistant manager in a loud and angry voice and in the presence of store customers accused the plaintiff and two other sales clerks of hiding store money with ill intent and stated that they were all fired without a recommendation, question whether the plaintiff was individually slandered was for the jury to decide. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

In suit by sales clerk against store and its assistant manager to recover damages for slanderous remarks, the jury was entitled to consider defendants' attitude in failing to tell one who is considering employing plaintiff that in so far as was known the plaintiff was all right and had a good record, as a circumstance to show whether they had acted wilfully and wantonly in discharging her for the reasons set forth in the slanderous utterances complained of, in view of the fact that there was no evidence to show that plaintiff was guilty of the accusations made with regard to trifling with or hiding the store's money with ill intent. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

15. —Instructions.

In an action brought under the common-law slander, instructions which failed to state that the words spoken were "calculated to lead to a breach of peace," were not erroneous as the words calculated to lead to a breach of the peace is required under the actionable word statute but not under common-law slander suit. Travis v. Hunt, 224 Miss. 193, 79 So. 2d 734, 1955 Miss. LEXIS 476 (Miss. 1955).

In a suit based upon actionable words statute to recover damages for plaintiff from defendant for calling the plaintiff a crook, peremptory instruction for the buyer on liability was proper. Wells v. Branscome, 222 Miss. 1, 74 So. 2d 743, 1954 Miss. LEXIS 609 (Miss. 1954).

An instruction to the jury that if they believe from the evidence that such damages as the plaintiff has suffered, were caused by his own actions and conduct or from any other source and not by the publication made by defendant, they must find for defendant, was proper. Sheffield v. Journal Pub. Co., 211 Miss. 294, 51 So. 2d 479, 1951 Miss. LEXIS 355 (Miss. 1951).

While instruction in suit by sales clerk against store and assistant manager to recover damages for slanderous remarks, that the jury could not award her any damages whatever on account of her discharge was proper in view of the fact that she was not employed for a fixed term, plaintiff was entitled to show that she was in fact damaged in her reputation by what had transpired, as represented by evidence that she was unable to obtain or retain employment thereafter by reason thereof. Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So. 2d 572, 1946 Miss. LEXIS 268 (Miss. 1946).

An instruction in a suit for slander which erroneously uses the word "uttered" instead of the word "published" is not reversible error. Cartwright-Caps Co. v. Fischel & Kaufman, 113 Miss. 359, 74 So. 278, 1917 Miss. LEXIS 109 (Miss. 1917).

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Libel and slander: words reflecting upon one in his character as employee as actionable per se. 6 A.L.R.2d 1008.

Admissibility on question of damages in action for libel or slander of testimony as to the impression or effect of the matter upon the minds of individuals. 12 A.L.R.2d 1005.

Civil liability for insulting or abusive language not amounting to defamation. 15 A.L.R.2d 108.

Libel and slander: statements regarding labor relations or disputes. 19 A.L.R.2d 694.

Libel and slander: defamation of one relative to another by person not related to either, as subject of qualified privilege. 25 A.L.R.2d 1388.

Liability for permitting walls or other portions of place of public resort to be occupied with matter defamatory of plaintiff. 28 A.L.R.2d 1454.

Libel and slander: report of mercantile agency as privileged. 30 A.L.R.2d 776.

Libel and slander: statements and briefs as privileged. 32 A.L.R.2d 423.

Imputation of perjury or false swearing as actionable per se. 38 A.L.R.2d 161.

Liability for statement or publication representing plaintiff as cruel to or killer of animals. 39 A.L.R.2d 1388.

Libel and slander: statements respecting race, color, or nationality as actionable. 46 A.L.R.2d 1287.

Libel and slander: statement or publication that plaintiff has been indicted or is under indictment. 52 A.L.R.2d 1178.

Libel and slander: criticism of literary or artistic works. 64 A.L.R.2d 245.

Libel and slander: privilege in connection with proceedings to disbar or otherwise discipline attorney. 77 A.L.R.2d 493.

Defamatory nature of statements reflecting on plaintiff's religious beliefs, standing, or activities. 87 A.L.R.2d 453.

Libel and slander: publication by accidental communication, or communication only to plaintiff. 92 A.L.R.2d 219.

Comment Note. – Constitutional aspects of libel or slander of public officials. 95 A.L.R.2d 1450.

Libel: Imputing credit unworthiness to nontrader. 99 A.L.R.2d 700.

Libel and slander: sufficiency of identification of plaintiff by matter complained of as defamatory. 100 A.L.R.2d 227.

Venue of civil libel action against newspaper or periodical. 15 A.L.R.3d 1249.

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice. 20 A.L.R.3d 988.

Libel by will. 21 A.L.R.3d 754.

Defamation: Actionability of accusation or imputation of tax evasion. 32 A.L.R.3d 1427.

Relevancy of matter contained in pleading as affecting privilege within law of libel. 38 A.L.R.3d 272.

Libel and slander: actionability of statements imputing inefficiency or lack or qualification to public school teacher. 40 A.L.R.3d 490.

Libel and slander: qualified privilege of reply to defamatory publication. 41 A.L.R.3d 1083.

What constitutes "publication" of libel in order to start running of period of limitations. 42 A.L.R.3d 807.

Libel and slander: privilege of reporting judicial proceedings as extending to proceeding held in secret or as to which record is sealed by court. 43 A.L.R.3d 634.

Right of governmental entity to maintain action for defamation. 45 A.L.R.3d 1315.

Libel and slander: actionability of defamatory statements as to business conduct, relating to a single transaction or occurrence. 51 A.L.R.3d 1300.

Libel and slander: privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement. 60 A.L.R.3d 1041.

Libel and slander: privileged nature of communication to other employees or employees' union of reason for plaintiff's discharge. 60 A.L.R.3d 1080.

Libel and slander: Dictation to defendant's secretary, typist, or stenographer as publication. 62 A.L.R.3d 1207.

Disparagement of the quality of intangible property. 74 A.L.R.3d 298.

Libel and slander: Who is "public figure" in the light of Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997.75 A.L.R.3d 616.

Libel and slander: Privileged nature of statements or utterances by member of school board in course of official proceedings. 85 A.L.R.3d 1137.

Libel and slander: Privileged nature of communications between insurer and insured. 85 A.L.R.3d 1161.

Libel by newspaper headlines. 95 A.L.R.3d 660.

Defamation: publication of "letter to editor" in newspaper as actionable. 99 A.L.R.3d 573.

Allowance of punitive damages in action for slander of title or disparagement of property. 7 A.L.R.4th 1219.

Liability of commercial printer for defamatory statement contained in matter printed for another. 16 A.L.R.4th 1372.

Refusal of defendant in "public figure" libel case to identify claimed sources as raising presumption against existence of source. 19 A.L.R.4th 919.

Libel and slander: attorneys' statements, to parties other than alleged defamed party or its agents, in course of extrajudicial investigation or preparation relating to pending or anticipated civil litigation as privileged. 23 A.L.R.4th 932.

State constitutional protection of allegedly defamatory statements regarding private individual. 33 A.L.R.4th 212.

Libel and slander: privileged nature of statements or utterances by members of governing body of public institution of higher learning in course of official proceedings. 33 A.L.R.4th 632.

Criticism or disparagement of physician's or dentist's character, competence, or conduct as defamation. 38 A.L.R.4th 836.

Criticism or disparagement of dentist's character, competence, or conduct as defamation. 120 A.L.R.5th 483.

Defamation of psychiatrist, psychologist, or counselor. 38 A.L.R.4th 874.

Defamation: application of New York Times and related standards to nonmedia defendants. 38 A.L.R.4th 1114.

Defamation: privilege accorded state or local governmental administrative records relating to private individual member of public. 40 A.L.R.4th 318.

What constitutes "single publication" within meaning of single publication rule affecting action for libel and slander, violation of privacy, or similar torts. 41 A.L.R.4th 541.

Defamation: nature and extent of privilege accorded public statements, relating to subject of legislative business or concern, made by member of state or local legislature or council outside of formal proceedings. 41 A.L.R.4th 1116.

Actionable nature of advertising impugning quality or worth of merchandise or products. 42 A.L.R.4th 318.

Criticism or disparagement of attorney's character, competence, or conduct as defamation. 46 A.L.R.4th 326.

Libel or slander: defamation by gestures or acts. 46 A.L.R.4th 403.

Defamation: publication by intracorporate communication of employee's evaluation. 47 A.L.R.4th 674.

Defamation: privilege attaching to news report of criminal activities based on information supplied by public safety officers-modern status. 47 A.L.R.4th 718.

Excessiveness or inadequacy of compensatory damages for defamation. 49 A.L.R.4th 1158.

Defamation: who is "libel-proof." 50 A.L.R.4th 1257.

Libel and slander: defamation by cartoon. 52 A.L.R.4th 424.

Libel and slander: defamation by photograph. 52 A.L.R.4th 488.

Defamation of class or group as actionable by individual member. 52 A.L.R.4th 618.

Libel and slander: defamation by question. 53 A.L.R.4th 450.

Libel and slander: sufficiency of identification of allegedly defamed party. 54 A.L.R.4th 746.

Defamation of professional athlete or sports figure. 54 A.L.R.4th 869.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation – post-New York Times cases. 57 A.L.R.4th 404.

Libel or slander: defamation by statement made in jest. 57 A.L.R.4th 520.

Imputation of allegedly objectionable political or social benefits or principles as defamation. 62 A.L.R.4th 314.

Publication of allegedly defamatory matter by plaintiff ("self-publication") as sufficient to support defamation action. 62 A.L.R.4th 616.

Defamation: designation as scab. 65 A.L.R.4th 1000.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state. 83 A.L.R.4th 1006.

Who is "public figure" for purposes of defamation action. 19 A.L.R.5th 1.

Who is "public official" for purposes of defamation action. 44 A.L.R.5th 193.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Defamation: Publication of letter to editor in newspaper as actionable. 54 A.L.R.5th 443.

Liability for statement or publication charging plaintiff with killing of, cruelty to, or inhumane treatment of animals. 69 A.L.R.5th 645.

Libel and slander: statements regarding labor relations or disputes. 94 A.L.R.5th 149.

Immunity of police or other law enforcement officer from liability in defamation action. 100 A.L.R.5th 341.

Defamation of manufacturer, regarding product, other than through statement charging breach or nonperformance of contract. 104 A.L.R.5th 523.

Defamation of building contractor or subcontractor other than through statement charging breach or nonperformance of contract. 106 A.L.R.5th 475.

Defamation of member of clergy. 108 A.L.R.5th 495.

Defamation of church member by church or church official. 109 A.L.R.5th 541.

Criticism or disparagement of physician's character, competence, or conduct as defamation. 16 A.L.R.6th 1.

Liability of Newspaper for Libel and Slander - 21st Century Cases. 22 A.L.R. 6th 553.

Defamation of Psychiatrist, Psychologist, or Counselor. 67 A.L.R.6th 437.

Validity, construction, and application of federal criminal statute (18 USCS § 1464) punishing utterance of obscene, indecent, or profane language by means of radio communication. 17 A.L.R. Fed. 900.

Am. Jur.

50 Am. Jur. 2d, Libel and Slander §§ 1 et seq.

12A Am. Jur. Pl & Pr Forms (Rev), Fright, Shock, and Mental Disturbance, Form 45 (complaint, petition, or declaration – for damages resulting from intentional infliction of emotional distress-counts for slander and defamation-by employee).

16A Am. Jur. Pl & Pr Forms (Rev), Libel and Slander, Forms 21 et seq. (complaints, petitions, or declaration – libel.

16A Am. Jur. Pl & Pr Forms (Rev), Libel and Slander, Form 70.1 (Allegation – Innuendo – False charge – Plaintiff's character).

19 Am. Jur. Trials, Defamation, §§ 1 et seq.

1 Am. Jur. Proof of Facts 2d, Identification of Individual Allegedly Defamed, §§ 13 et seq. (proof of identification of unnamed person where referred to in defamatory statement as an individual); §§ 21 et seq. (proof of identification of unnamed person where referred to in defamatory statement as a member of a group or class).

40 Am. Jur. Proof of Facts 2d 649, Sufficiency of Retraction of Defamatory Statement.

5 Am. Jur. Proof of Facts 3d, Defamation by Employer, §§ 1 et seq.

6 Am. Jur. Proof of Facts 3d, Invasion of Privacy by False Light Publicity, §§ 1 et seq.

CJS.

53 C.J.S., Libel and Slander

Injurious Falsehood §§ 1-15, 22, 23, 31–34, 38–41, 43, 77, 83.

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§ 95-1-3. Liability of radio and television stations or networks.

(1) The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by any person other than the owner, licensee or operator, or some agent or employee thereof.

(2) In no event, however, shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations, be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by or on behalf of any candidate for public office, unless such statement is made by an agent or employee of the station in the course of his employment.

HISTORY:

Codes, 1942, § 1059.5; Laws, 1954, ch. 250, §§ 1, 2.

JUDICIAL DECISIONS

1. In general.

A person is not a "public figure" who does not occupy a role of special prominence in the affairs of society or who has not been thrust to the forefront of particular public controversies in order to influence the resolution of the issues involved; and the New York Times rule does not automatically extend to all reports of judicial proceedings regardless of whether the party plaintiff in such proceedings is a public figure who might be assumed to have voluntarily exposed him – or herself to increased risk of injury from defamatory falsehood; there is no substantial reason why one involved in litigation should forfeit that degree of protection afforded by the law of defamation simply by virtue of being drawn into a courtroom. Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154, 1976 U.S. LEXIS 26 (U.S. 1976).

RESEARCH REFERENCES

ALR.

Defamation by radio or television. 50 A.L.R.3d 1311.

Defamation: privilege attaching to news report of criminal activities based on information supplied by public safety officers-modern status. 47 A.L.R.4th 718.

Defamation: who is "libel-proof." 50 A.L.R.4th 1257.

Libel and slander: defamation by cartoon. 52 A.L.R.4th 424.

Defamation of class or group as actionable by individual member. 52 A.L.R.4th 618.

Libel and slander: defamation by question. 53 A.L.R.4th 450.

Libel and slander: sufficiency of identification of allegedly defamed party. 54 A.L.R.4th 746.

Defamation of professional athlete or sports figure. 54 A.L.R.4th 869.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation – post-New York Times cases. 57 A.L.R.4th 404.

Libel or slander: defamation by statement made in jest. 57 A.L.R.4th 520.

Who is "public figure" for purposes of defamation action. 19 A.L.R.5th 1.

Liability of Internet Service Provider For Internet or E-mail Defamation. 84 A.L.R.5th 169.

Am. Jur.

50 Am. Jur. 2d, Libel and Slander § 353.

19 Am. Jur. Trials, Defamation, §§ 1 et seq.

6 Am. Jur. Proof of Facts 3d, Invasion of Privacy by False Light Publicity, §§ 1 et seq.

CJS.

53 C.J.S., Libel and Slander
Injurious Falsehood §§ 173-180.

§ 95-1-5. Newspapers and radio or television stations to have opportunity to make corrections prior to suit.

(1) Before any civil action is brought for publication, in a newspaper domiciled and published in this state or authorized to do business in Mississippi so as to be subject to the jurisdiction of the courts of this state, of a libel, or against any radio or television station domiciled in this state, the plaintiff shall, at least ten (10) days before instituting any such action, serve notice in writing on the defendant at its regular place of business, specifying the article, broadcast or telecast, and the statements therein, which he alleges to be false and defamatory.

(2) If it appears upon the trial that said article was published, broadcast or telecast in good faith, that its falsity was due to an honest mistake of the facts, and there were reasonable grounds for believing that the statements in said article, broadcast or telecast were true, and that within ten (10) days after the service of said notice a full and fair correction, apology and retraction was published in the same edition or corresponding issues of the newspaper in which said article appeared, and in as conspicuous place and type as was said original article, or was broadcast or telecast under like conditions correcting an honest mistake, and if the jury shall so find, the plaintiff in such case shall recover only actual damages. The burden of proof of the foregoing facts shall be affirmative defenses of the defendant and pled as such.

(3) This section shall not apply to any publication concerning a candidate for public office made within ten (10) days of any primary, general or special election in which such candidate's candidacy for or election to public office is to be determined, and this section shall not apply to any editorial or to any regularly published column in which matters of opinions are expressed.

HISTORY:

Codes, 1942, § 1059.7; Laws, 1962, ch. 318, §§ 1-4.

JUDICIAL DECISIONS

1. In general.

Newspaper's refusal to print a retraction of an article publishing a sheriff's department report concerning a contractor's arrest for home repair fraud did not amount to gross negligence, as Miss. Code Ann. § 95-1-5(2) did not impose upon the newspaper a duty to retract. Hegwood v. Cmty. First Holdings, Inc., 546 F. Supp. 2d 363, 2008 U.S. Dist. LEXIS 37901 (S.D. Miss. 2008).

Failure of plaintiff to serve demand for retraction upon newspaper and wire service before filing civil action for libel requires dismissal of libel action; dismissal is without prejudice, where newspaper and wire service had suffered no substantial prejudice from failure to receive demand for retraction, in that filing of claim placed newspaper and wire service on notice of nature and identity of plaintiff's claims. Pannell v. Associated Press, 690 F. Supp. 546, 1988 U.S. Dist. LEXIS 8512 (N.D. Miss. 1988).

Miss Code Anno § 95-1-5(1) applies to Associated Press Wire Service and other forms of news reporting services such as news magazine and cable or satellite news transmissions. Pannell v. Associated Press, 690 F. Supp. 546, 1988 U.S. Dist. LEXIS 8512 (N.D. Miss. 1988).

Retraction demand is absolute prerequisite to cause of action for libel. Pannell v. Associated Press, 690 F. Supp. 546, 1988 U.S. Dist. LEXIS 8512 (N.D. Miss. 1988).

RESEARCH REFERENCES

ALR.

Libel and slander: defamation by cartoon. 52 A.L.R.4th 424.

Libel and slander: defamation by photograph. 52 A.L.R.4th 488.

Defamation of class or group as actionable by individual member. 52 A.L.R.4th 618.

Libel and slander: defamation by question. 53 A.L.R.4th 450.

Libel and slander: sufficiency of identification of allegedly defamed party. 54 A.L.R.4th 746.

Defamation of professional athlete or sports figure. 54 A.L.R.4th 869.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation – post-New York Times cases. 57 A.L.R.4th 404.

Libel or slander: defamation by statement made in jest. 57 A.L.R.4th 520.

Who is "public figure" for purposes of defamation action. 19 A.L.R.5th 1.

Access of public to broadcast facilities under First Amendment. 66 A.L.R. Fed. 628.

Am. Jur.

50 Am. Jur. 2d, Libel and Slander §§ 349, 351, 387-390, 393.

6 Am. Jur. Proof of Facts 3d, Invasion of Privacy by False Light Publicity, §§ 1 et seq.

CJS.

53 C.J.S., Libel and Slander
Injurious Falsehood §§ 157-160.

Law Reviews.

Comment, Ferguson v. Watkins: The Vortex Within Mississippi Defamation Law. 55 Miss. L. J. 619, September, 1985.

CHAPTER 3.

NUISANCES

Sec.

95-3-1. Definitions of terms "person," "place" and "nuisance".
95-3-3. Persons guilty.
95-3-5. Action to abate and enjoin; who may maintain.
95-3-7. Jurisdiction; procedure; temporary restraining order.
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§ 95-3-1. Definitions of terms "person," "place" and "nuisance"

For the purpose of this chapter the terms place, person and nuisance are defined as follows:

a. "Place" shall include any building, erection, or structure or any separate part or portion thereof or the ground itself.

b. "Person" shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee.

c. "Nuisance" shall mean any place as above defined in or upon which lewdness, assignation or prostitution is conducted, permitted, continued or exists or any other place as above defined in or upon which a controlled substance as defined in Section 41-29-105, Mississippi Code of 1972, is unlawfully used, possessed, sold or delivered and the personal property and contents used in conducting or maintaining any such place for any such purpose. One single act of unlawful cohabitation, lewdness or possession, use, sale or delivery of a controlled substance about such property shall not come within the terms hereof.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2790a; 1930, § 2868; 1942, § 1060; Laws, 1918, ch. 193; Laws, 1973, ch. 317, § 1, eff from and after passage (approved March 14, 1973).

Cross References —

Powers of municipal governing authorities to prevent, remove, and abate nuisances, see § 21-19-1.

Places resorted to by narcotic drug addicts as public nuisance, see § 41-29-309.

Carrying concealed pistol or revolver in place of nuisance, see § 45-9-101.

Forest fires as public nuisance, see § 49-19-25.

Bar of tort action against governmental bodies for airport development activities, see § 61-3-83.

Building, clubs or boats containing gambling devices as nuisances, see § 95-3-25.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.

1. In general.

Sections 95-3-1 et seq., including § 95-3-13, were meant to supplement rather than to replace the common-law rules of evidence of public nuisance. Proby v. State, 498 So. 2d 792, 1986 Miss. LEXIS 2841 (Miss. 1986).

Where defendant operated a combination cafe and dance hall which was declared to be a public nuisance, there was no adequate remedy at law for relief of this nuisance and it was within the inherent powers of the chancery court to enjoin the operation of the cafe in the manner constituting the nuisance. Green v. State, 212 Miss. 846, 56 So. 2d 12, 1952 Miss. LEXIS 317 (Miss. 1952).

This statute [Code 1942, § 1060] has no application to nuisances involving gambling and the sale of intoxicating liquors, and does not authorize a decree including a prohibition against the removal of any of the personal property from the premises; a decree in such respect is void and cannot sustain a conviction of contempt for violation thereof. Redding v. State, 184 Miss. 371, 185 So. 560, 1939 Miss. LEXIS 23 (Miss. 1939).

2. Constitutionality.

The Mississippi statute forbidding nuisances, Miss. Code Ann. §§ 95-3-1 et seq., is not unconstitutionally vague; adequate notice was clearly provided by the terms of the statute, which were clearly understandable words that left no room for misinterpretation. Collins v. City of Hazlehurst, 151 F. Supp. 2d 749, 2001 U.S. Dist. LEXIS 10765 (S.D. Miss. 2001).

RESEARCH REFERENCES

ALR.

Coalyard as a nuisance. 8 A.L.R.2d 419.

Damages for diminution of value of use of the property as recoverable for a permanent nuisance affecting real property. 10 A.L.R.2d 669.

Animal rendering or bone-boiling plant or business as nuisance. 17 A.L.R.2d 1269.

Stockyard as nuisance. 18 A.L.R.2d 1033.

Use of phonograph, loud-speaker, or other mechanical or electrical device for broadcasting music, advertising, or sales talk from business premises, as nuisance. 23 A.L.R.2d 1289.

Tourist or trailer camp, motor court or motel, as nuisance. 24 A.L.R.2d 571.

Private school as nuisance. 27 A.L.R.2d 1249.

Liability of landlord for injury or death of third person on street or highway by nuisance created by tenant for month to month, year to year, or the like. 39 A.L.R.2d 973.

Quarries, gravel pits, and the like as nuisances. 47 A.L.R.2d 490.

Cemetery or burial ground as nuisance. 50 A.L.R.2d 1324.

Public dump as nuisance. 52 A.L.R.2d 1134.

Dairy, creamery, or milk distributing plant, as nuisance. 92 A.L.R.2d 974.

Drive-in theater or other outdoor dramatic or musical entertainment as nuisance. 93 A.L.R.2d 1171.

Keeping pigs as nuisance. 2 A.L.R.3d 931.

Keeping poultry as nuisance. 2 A.L.R.3d 965.

Motorbus or truck terminal as nuisance. 2 A.L.R.3d 1372.

Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoinable nuisance. 21 A.L.R.3d 1058.

Operation of incinerator as nuisance. 41 A.L.R.3d 1009.

Laundry or drycleaning establishment as nuisance. 41 A.L.R.3d 1236.

Automobile racetrack or drag strip as nuisance. 41 A.L.R.3d 1273.

Gasoline or other fuel storage tanks as nuisance. 50 A.L.R.3d 209.

Zoo as nuisance. 58 A.L.R.3d 1126.

Pornoshops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

Interference with radio or television reception as nuisance. 58 A.L.R.3d 1142.

Animals as attractive nuisance. 64 A.L.R.3d 1069.

Existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment. 79 A.L.R.3d 320.

Massage parlor as nuisance. 80 A.L.R.3d 1020.

Operation of cement plant as nuisance. 82 A.L.R.3d 1004.

Keeping bees as nuisance. 88 A.L.R.3d 992.

Carwash as nuisance. 4 A.L.R.4th 1308.

Windmill as nuisance. 36 A.L.R.4th 1159.

Computer as nuisance. 45 A.L.R.4th 1212.

Telephone calls as nuisance. 53 A.L.R.4th 1153.

Tower or Antenna as Constituting Nuisance. 88 A.L.R.5th 641.

Keeping of domestic animal as constituting public or private nuisance. 90 A.L.R.5th 619.

Sewage treatment plant as constituting nuisance. 92 A.L.R.5th 517.

Nudity as constituting nuisance. 92 A.L.R.5th 593.

Hog breeding, confining, or processing facility as constituting nuisance. 93 A.L.R.5th 621.

Remedies for sewage treatment plant alleged or deemed to be nuisance. 101 A.L.R.5th 287.

Vibrations not accompanied by blasting or explosion as constituting nuisance. 103 A.L.R.5th 157.

Am. Jur.

24 Am. Jur. 2d, Disorderly Houses §§ 1 et seq.

18A Am. Jur. Pl & Pr Forms (Rev), Nuisances, Forms 163, 164 (complaint or declaration for abatement of house of prostitution).

37 Am. Jur. Proof of Facts 2d 141, Outdoor Advertising Sign or Billboard As Nuisance.

CJS.

27 C.J.S., Disorderly Houses §§ 1 et seq.

Law Reviews.

1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March, 1979.

Rychlak, Common-Law remedies for environmental wrongs: The role of private nuisance. 59 Miss. L. J. 657, Winter, 1989.

Practice References.

Blackman and Thomas, A Practical Guide to Disputes Between Adjoining Landowners (Matthew Bender).

Damages in Tort Actions (Matthew Bender).

Douthwaite, Ronald W. Eades, Jury Instructions for Personal Injury and Tort Cases (Michie).

Munger, What's It Worth? A Guide to Current Personal Injury Awards and Settlements, 2003 Edition (Michie).

§ 95-3-3. Persons guilty.

Any person who shall use, occupy, establish or conduct a nuisance as herein defined, or aid or abet therein, and the owner, agent or lessee of any interest in such nuisance, together with the person employed in or in control of any such nuisance by any such owner, agent or lessee, shall be guilty of maintaining a nuisance and shall be enjoined as hereinafter provided.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2790b; 1930, § 2869; 1942, § 1061; Laws, 1918, ch. 193.

RESEARCH REFERENCES

ALR.

Liability of landlord for injury or death of third person on street or highway by nuisance created by tenant for month to month, year to year, or the like. 39 A.L.R.2d 973.

Liability for damage to land or its occupants from dust, gases, odors, vibration, or the like, occasioned by defendant's continuous vehicular use of adjoining or nearby public highway. 25 A.L.R.4th 1192.

Am. Jur.

24 Am. Jur. 2d, Disorderly Houses §§ 30 et seq.

37 Am. Jur. Proof of Facts 2d 141, Outdoor Advertising Sign or Billboard As Nuisance.

43 Am. Jur. Proof of Facts 2d 303, Commercial Activity as Actionable Private Nuisance.

CJS.

27 C.J.S., Disorderly Houses §§ 3-5.

§ 95-3-5. Action to abate and enjoin; who may maintain.

Whenever a nuisance exists, the attorney-general of the state, the district attorney of the district, the county attorney, or any person who is a citizen of the county, may bring an action in equity in the name of the State of Mississippi, upon the relation of such attorney general, district attorney, or county attorney, or person to abate such nuisance and to perpetually enjoin the person or persons maintaining the same from further maintenance thereof.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2790c; 1930, § 2870; 1942, § 1062; Laws, 1918, ch. 193.

Cross References —

Suits by attorney general, see §§ 7-5-37 et seq.

Duties of county attorneys generally, see § 19-23-11.

Duty of district attorney to appear and prosecute, see § 25-31-11.

Investigation of nuisance questions by state board of health, see § 41-3-15.

Abatement of matters or things declared by state health board to be nuisances, see § 41-23-13.

Abatement of gambling establishments constituting nuisance, see § 95-3-25.

JUDICIAL DECISIONS

1. In general.

Complainant owner of land adjoining alley through which he has access to his property has special interest in alley and suffers such peculiar injury by obstruction of alley by another land owner adjoining alley as to entitle him to relief, where alley is not, and never has been, open for public use and no one is presently interested in or affected by making alley accessible to complainant. Perry v. Jones, 43 So. 2d 565 (Miss. 1949).

Temporary injunction in suit to abate nuisance-maintaining building where lewdness and prostitution was practiced-can only enjoin particular nuisance complained of in bill. Dickerson v. State, 159 Miss. 83, 132 So. 88, 1931 Miss. LEXIS 38 (Miss. 1931).

Decree on hearing for temporary injunction restraining defendant from maintaining nuisance-maintaining building where lewdness and prostitution was practiced-anywhere within court district held improper. Dickerson v. State, 159 Miss. 83, 132 So. 88, 1931 Miss. LEXIS 38 (Miss. 1931).

RESEARCH REFERENCES

ALR.

What constitutes special injury that entitles private party to maintain action based on public nuisance-modern cases. 71 A.L.R.4th 13.

Remedies for sewage treatment plant alleged or deemed to be nuisance. 101 A.L.R.5th 287.

Am. Jur.

58 Am. Jur. 2d, Nuisances §§ 207, 292, 293, 318.

18A Am. Jur. Pl & Pr Forms (Rev), Nuisances, Form 108 (complaint, petition, or declaration – For equitable relief from nuisance and for damages – contamination of ground surface from storage and disposal of toxic substances by lessee); Form 164 (complaint or declaration by state for abatement of house of prostitution).

43 Am. Jur. Proof of Facts 2d 303, Commercial Activity as Actionable Private Nuisance.

5 Am. Jur. Proof of Facts 3d, Special Injury Sufficient to Give Standing to Maintain Private Action Based on Public Nuisance, §§ 1 et seq.

CJS.

66 C.J.S., Nuisances §§ 149, 150 et seq.

§ 95-3-7. Jurisdiction; procedure; temporary restraining order.

Such action shall be brought in the chancery court of the county in which the property is located, by a verified bill of complaint, stating the facts constituting the nuisance, the names of the parties, the object of the action, a substantial description of the place constituting the alleged nuisance, and a general description of the personal property used in connection therewith. The bill of complaint may contain an application for a temporary injunction, and where such application has been made, the chancery court, the chancellor in vacation, any judge of the circuit court, or a judge of the supreme court, may in his discretion, on good cause shown, on motion of the complainant, issue an ex parte restraining order restraining the defendants and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court granting or refusing such temporary injunction, and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of said order with any person in charge of said place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance. When such restraining order is so posted, mutilation or removal thereof, while the same remains in force, shall be a contempt of court, provided such posted order contains thereon a notice to that effect.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2790d; 1930, § 2871; 1942, § 1063; Laws, 1918, ch. 193.

Cross References —

Injunctions generally, see §§ 11-13-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where an action brought in the chancery court for an injunction to abate a nuisance, and for damages already accrued, failed on the injunction issue, the chancery court erred in not deciding the issue of damages. Shaw v. Owen, 229 Miss. 126, 90 So. 2d 179, 1956 Miss. LEXIS 593 (Miss. 1956).

Temporary injunction in suit to abate nuisance-maintaining building where lewdness and prostitution was practiced-can only enjoin particular nuisance complained of in bill. Dickerson v. State, 159 Miss. 83, 132 So. 88, 1931 Miss. LEXIS 38 (Miss. 1931).

Decree on hearing for temporary injunction restraining defendant from maintaining nuisance-maintaining building where lewdness and prostitution was practiced-anywhere within court district held improper. Dickerson v. State, 159 Miss. 83, 132 So. 88, 1931 Miss. LEXIS 38 (Miss. 1931).

RESEARCH REFERENCES

ALR.

Venue of suit to enjoin nuisance. 7 A.L.R.2d 481.

Joinder, in injunction action to restrain or abate nuisance, of persons contributing thereto through separate and independent acts. 45 A.L.R.2d 1284.

§ 95-3-9. Procedure; temporary injunction; bond.

When the bill contains an application for a temporary injunction a hearing thereon shall be granted within ten (10) days after the filing of the bill; but a copy of the complaint together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendants at least five (5) days before such hearing. If the hearing be then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. Each defendant so notified may file a verified answer on or before the date fixed in said notice for said hearing, but the court or judge may allow additional time for so answering, provided such extension of time shall not prevent the issuing of said temporary writ as prayed for. No bond shall be required for the issuance of any restraining order or temporary injunction mentioned in this chapter.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2790d; 1930, § 2872; 1942, § 1064; Laws, 1918, ch. 193.

Cross References —

Injunctions generally, see §§ 11-13-1 et seq.

JUDICIAL DECISIONS

1. In general.

Temporary injunction in suit to abate nuisance-maintaining building where lewdness and prostitution was practiced-can only enjoin particular nuisance complained of in bill. Dickerson v. State, 159 Miss. 83, 132 So. 88, 1931 Miss. LEXIS 38 (Miss. 1931).

Decree on hearing for temporary injunction restraining defendant from maintaining nuisance-maintaining building where lewdness and prostitution was practiced-anywhere within court district held improper. Dickerson v. State, 159 Miss. 83, 132 So. 88, 1931 Miss. LEXIS 38 (Miss. 1931).

§ 95-3-11. Temporary injunction; further orders.

If, upon the hearing, the allegations be sustained to the satisfaction of the court, the court shall issue a temporary injunction restraining the defendants and any other person or persons from continuing the nuisance. When the temporary injunction has been granted, it shall be binding on the defendants throughout the chancery district. If at the time of granting a temporary injunction it shall further appear that the person owning, in control, or in charge of the nuisance so enjoined, has received five (5) days' notice of the hearing, then unless such person shall show to the satisfaction of the court or judge that the nuisance complained of has been abated, or that such person proceeded forthwith to enforce his rights under the provisions of this chapter, the court or judge shall forthwith also issue an order closing the place for any purpose until decision shall be rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided, if already issued, or if not issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located thereat or therein as hereinbefore provided, and such restraining order shall be served and the inventory of such property shall be made and filed as hereinbefore provided. However, if the owner or owners of any real or personal property so closed or restrained, or to be closed or restrained, appear at any time between the filing of the bill of complaint and the hearing on the application for a permanent injunction, and pay all costs incurred and file a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the clerk, conditioned that such owner or owners will immediately abate the nuisance and prevent same from being established or kept until the decision of the court shall have been rendered on the application for a permanent injunction, then and in that case, the court, or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance, and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property or both to the respective owners thereof, and cancel or refrain from issuing at the time of the hearing on the application for the temporary injunction, as the case may be, any order or orders closing such real property or restraining the removal or interference with such personal property.

HISTORY:
Codes, Hemingway's 1921 Supp, § 2790d; 1930, § 2873; 1942, § 1065; Laws, 1918, ch. 193.

JUDICIAL DECISIONS

1. In general.

Temporary injunction in suit to abate nuisance-maintaining building where lewdness and prostitution was practiced-can only enjoin particular nuisance complained of in bill. Dickerson v. State, 159 Miss. 83, 132 So. 88, 1931 Miss. LEXIS 38 (Miss. 1931).

Decree on hearing for temporary injunction restraining defendant from maintaining nuisance-maintaining building where lewdness and prostitution was practiced-anywhere within court district held improper. Dickerson v. State, 159 Miss. 83, 132 So. 88, 1931 Miss. LEXIS 38 (Miss. 1931).

§ 95-3-13. Trial; evidence; costs; permanent injunction.

The action when brought shall be triable at the next term of court, provided process shall have been served for twenty or more days, otherwise at the following term, and said cause shall have precedence over all other cases except election contests, or injunctions. In such action evidence of the general reputation of the place, or an admission, or finding, of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place shall be admissible for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge of and acquiescence and participation therein on the part of the person or persons charged with maintaining said nuisance as herein defined. If the complaint is filed by a person who is citizen of the county, it shall not be dismissed except upon a sworn statement by the complainant and his or its attorney, setting forth the reasons why the actions should be dismissed and the dismissal approved by the district attorney or county attorney in writing or in open court. If the court be of the opinion that the action ought not to be dismissed, he may direct the district attorney or county attorney to prosecute said action to final decree, and if the action is continued more than one term of court any person who is a citizen of the county, or the attorney general, or the district attorney, or the county attorney, may be substituted for the complainant and prosecute said action to final decree. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance be established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendants and other person or persons from further maintaining the nuisance at the place complained of, and the defendants from maintaining such nuisance elsewhere within the chancery district, and may tax said defendants with all costs of the proceedings.

HISTORY:
Codes, Hemingway's 1921 Supp, § 2790e; 1930, § 2874; 1942, § 1066; Laws, 1918, ch. 193.

JUDICIAL DECISIONS

1. In general.

Since § 95-3-13 is directed against houses of prostitution, a specific type of nuisance, its provisions were inapplicable to city's petition to enjoin the operation of a lounge which was predicated on the common law of nuisance. Proby v. State, 498 So. 2d 792, 1986 Miss. LEXIS 2841 (Miss. 1986).

Sections 95-3-1 et seq., including § 95-3-13, were meant to supplement rather than to replace the common-law rules of evidence of public nuisance. Proby v. State, 498 So. 2d 792, 1986 Miss. LEXIS 2841 (Miss. 1986).

RESEARCH REFERENCES

ALR.

Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance. 40 A.L.R.3d 601.

"Coming to nuisance" as a defense or estoppel. 42 A.L.R.3d 344.

What constitutes special injury that entitles private party to maintain action based on public nuisance-modern cases. 71 A.L.R.4th 13.

Am. Jur.

24 Am. Jur. 2d, Disorderly Houses §§ 11 et seq.

CJS.

27 C.J.S., Disorderly Houses §§ 7 et seq.

§ 95-3-15. Order of abatement.

If the existence of the nuisance be admitted, or established in an action as provided in this chapter, an order of abatement shall be entered as a part of judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in Section 95-3-11, and shall direct the sale in the manner provided for the sale of chattels under execution of such personal property as belong to the defendants notified or appearing. Such order shall also require the renewal for one (1) year of any bond furnished by the owner of the real property as provided in Section 95-3-11, or, if not so furnished, shall continue for one (1) year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was issued, shall include an order directing the effectual closing of the place against its use for any purpose, and so keeping it closed for a period of one (1) year, unless sooner released; provided, however, that the owner of any place so closed and not released under bond as hereinbefore provided in Section 95-3-11, may at this time appear and obtain such release in the manner and upon fulfilling the requirements as hereinbefore provided. The release of the property under any of the provisions of this chapter shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. Owners of unsold personal property and contents so seized must appear and claim same within ten (10) days after such order of abatement is made and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action shall be presumed to have had knowledge of the general reputation of the place. If such innocence be so established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as hereinbefore provided. If any person shall break and enter or use a place so directed to be closed, he shall be punished as for contempt as provided hereinafter. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees he would for levying upon the selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

HISTORY:
Codes, Hemingway's 1921 Supp, § 2790f; 1930, § 2875; 1942, § 1067; Laws, 1918, ch. 193.

JUDICIAL DECISIONS

1. In general.
This section [Code 1942, § 1067] is not applicable to the abatement of nuisances growing out of the sale of intoxicating liquors provided for in Code 1942, § 2646. Pigford v. State, 184 Miss. 194, 183 So. 259, 1938 Miss. LEXIS 303 (Miss. 1939).

This section [Code 1942, § 1067] is not in pari materia with Code 1942, §§ 2646, 2647, vesting the chancery court with power to abate nuisances relating to intoxicating liquors. Pigford v. State, 184 Miss. 194, 183 So. 259, 1938 Miss. LEXIS 303 (Miss. 1939).

RESEARCH REFERENCES

Am. Jur.
24 Am. Jur. 2d, Disorderly Houses §§ 45, 46.

CJS.
66 C.J.S., Nuisances §§ 209-215.

§ 95-3-17. Unknown defendants; process; publication.

The provisions of existing laws regarding the service of process shall apply to service in proceedings under this chapter. The person in whose name the real estate affected by the action stands on the books of the tax collector for purposes of taxation shall be presumed to be the owner thereof, and in case of unknown persons having or claiming any ownership, right, title or interest in property affected by the action, such may be made parties to the action by designating them in the summons and complaint as "all other persons unknown claiming any ownership, right, title or interest in the property affected by the action," and service thereon may be had by publishing in the manner prescribed by law. Any person having or claiming such ownership, right, title or interest, and any owner or agent in behalf of himself and such owner, may make, serve, and file his answer therein twenty (20) days after such service and have trial of his rights in the premises by the court, and if said cause had already proceeded to trial or to findings and judgment, the court shall by order fix the time and place of such further trial and shall modify, add to, or confirm such findings and decrees as the case may require. Other parties to said action shall not be affected thereby.

HISTORY:
Codes, Hemingway's 1921 Supp, § 2790i; 1930, § 2876; 1942, § 1068; Laws, 1918, ch. 193.

Cross References —
Process, notice and publication generally, see §§ 13-3-1 et seq.

§ 95-3-19. Contempt; punishment.

In case of the violation of any injunction or closing order granted under provisions of this chapter, or of a restraining order or the commission of any other contempt of court in proceedings under this chapter, the court, or the chancellor in vacation, may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court a complaint upon oath setting out and alleging facts constituting such violation, upon which the court or chancellor shall cause a warrant to issue, under which the defendant shall be arrested. The trial thereof may be had upon affidavits or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this chapter shall be punished by a fine of not less than Two Hundred Dollars ($200.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment in the county jail not less than three (3) nor more than six (6) months or by both such fine and imprisonment.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2790h; 1930, § 2877; 1942, § 1069; Laws, 1918, ch. 193.

Cross References —

Power of supreme court, chancery courts, circuit courts and county courts to punish for contempt generally, see § 9-1-17.

Power of chancery court of chancellor to punish for contempt, see §§ 9-5-85, 9-5-87.

JUDICIAL DECISIONS

1. In general.

In a proceeding involving gambling and the sale of intoxicating liquors, the inclusion in the decree enjoining the nuisance of a prohibition against the removal of any of the personal property from the premises was absolutely void, and a conviction of contempt for removing personal property could not be sustained, since this chapter does not apply to cases involving gambling and liquor nuisances where prostitution is not involved. Redding v. State, 184 Miss. 371, 185 So. 560, 1939 Miss. LEXIS 23 (Miss. 1939).

§ 95-3-21. County attorney; duty; procedure.

In case the existence of such nuisance is established in a criminal proceeding, under existing laws, it shall be the duty of the county attorney or district attorney to proceed promptly under this chapter to enforce the provisions and penalties thereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. All moneys collected under this chapter shall be paid into the county treasury. The proceeds of the sale of the personal property, as provided in Section 95-3-15, shall be applied in payment of the costs of the action and abatement, including the complainant's costs, or so much of such proceeds as may be necessary, except as otherwise provided by law.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2790g; 1930, § 2878; 1942, § 1070; Laws, 1918, ch. 193.

Cross References —

Duties of county attorneys generally, see § 19-23-11.

Duty of district attorney to appear and prosecute, see § 25-31-11.

Abatement of nuisances declared by state board of health, see § 41-23-13.

Duty of county attorney or district attorney to bring action to abate nuisance, see § 95-3-5.

§ 95-3-23. Lease annulled for unlawful use.

If a tenant or occupant of a building or tenement under a lawful title uses such place as a nuisance as herein defined, such use shall annul and make void the lease or other title under which he holds and, without any act of the owner, shall cause the right of possession to revert and vest in the owner, and the owner may without process of law make immediate entry upon the premises.

HISTORY:

Codes, Hemingway's 1921 Supp, § 2790k; 1930, § 2879; 1942, § 1071; Laws, 1918, ch. 193.

Cross References —

Liability of tenant holding over after notice to quit demised premises, see § 89-7-25.

Proceedings to remove tenant or les see holding over, see §§ 89-7-27 et seq.

RESEARCH REFERENCES

ALR.

Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce. 86 A.L.R.3d 1116.

§ 95-3-25. Clubs, boats, etc., operating gaming devices; applicability of provisions of this section.

Any building, club, vessel, boat, place or room, wherein is kept or exhibited any game or gaming table, commonly called A.B.C. or E.O. roulette, or rowley-powley, or rouquetnoir, roredo, keno, monte, or any faro-bank, dice, or other game, gaming table, or bank of the same or like kind, or any other kind or description of gambling device under any other name whatever, and any such place where information is furnished for the purpose of making and settling bets or wagers on any horse race, prize fight, or on the outcome of any like event, or where bets or wagers are arranged for, made or settled, shall be deemed to be a common nuisance and may be abated by writ of injunction, issued out of a court of equity upon a bill filed in the name of the state by the Attorney General, or any district or county attorney, whose duty requires him to prosecute criminal cases on behalf of the state in the county where the nuisance is maintained, or by any citizen or citizens of such county, such bill to be filed in the county in which the nuisance exists. And all rules of evidence and of practice and procedure that pertain to courts of equity generally in this state may be invoked and applied in any injunction procedure hereunder. The provisions of this section shall not apply to any form of gaming or gambling that is legal under the laws of the State of Mississippi or to a licensed gaming establishment and shall not apply to any licensed gaming establishment having on its premises any gambling device, machine or equipment that is owned, possessed, controlled, installed, procured, repaired or transported in accordance with subsection (4) of Section 97-33-7.

Upon the abatement of any such nuisance, any person found to be the owner, operator or exhibitor of any gambling device described in the first paragraph of this section may be required by the court to enter into a good and sufficient bond in such amount as may be deemed proper by the court, to be conditioned that the obligor therein will not violate any of the laws of Mississippi pertaining to gaming or gambling for a period of not to exceed two (2) years from the date thereof. The failure to make such bond shall be a contempt of court and for such contempt the person or party shall be confined in the county jail until such bond is made, but not longer than two (2) years. Said bond shall be approved by the clerk of the court where the proceedings were had and shall be filed as a part of the record of such case.

HISTORY:

Codes, 1942, § 1073; Laws, 1938, ch. 341; Laws, 1989, ch. 480, § 9; Laws, 1990, ch. 449, § 4; Laws, 1990, ch. 573, § 8; Laws, 2005, 5th Ex Sess, ch. 16, § 2, eff from and after passage (approved Oct. 17, 2005).

Cross References —

Suits by attorney general, see §§ 7-5-37 et seq.

Duties of county attorneys generally, see § 19-23-11.

Elected or appointed official not to derive any pecuniary benefit as result of duties under this section, and penalties therefor, see § 25-4-119.

Duty of district attorney to appear and prosecute, see § 25-31-11.

Licensing and regulation of cruise vessels, see § 27-109-1 et seq.

Enforceability of gambling and future contracts generally, see §§ 87-1-1 et seq.

Definition of nuisance in connection with disorderly houses, see § 95-3-1.

Gambling offenses generally, see §§ 97-33-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Maintenance of action.
3. Injunctions.
4. Extent of decree.

1. In general.

That the defendant may not be required to incriminate himself does not render demurrable a petition to enjoin as a public nuisance what is also a crime. State v. Myers, 244 Miss. 778, 146 So. 2d 334, 1962 Miss. LEXIS 506 (Miss. 1962).

A defendant should seek the court's ruling on whether, in view of the privilege against self-incrimination, he should be required to answer parts of the bill. State v. Myers, 244 Miss. 778, 146 So. 2d 334, 1962 Miss. LEXIS 506 (Miss. 1962).

The statutes which give the state a power to enjoin operation of gaming devices and also give the state power to abate by injunction the sale of liquor are not invalid and unconstitutional because they constitute an attempt to confer upon the chancery court criminal jurisdiction. Brooks v. State, 219 Miss. 262, 68 So. 2d 461, 1953 Miss. LEXIS 387 (Miss. 1953).

Statutes which give the state power to enjoin the operation of gaming devices and which also give the state power to abate by injunction the sale of liquor, are not unconstitutional because they deny due process of law in that the defendants are denied the right of trial by jury. Brooks v. State, 219 Miss. 262, 68 So. 2d 461, 1953 Miss. LEXIS 387 (Miss. 1953).

Slot machines kept and used for gambling purposes are included in this statute [Code 1942, § 1073] by virtue of clause, "or any other kind or description of gambling device under any other name whatever," and "ejusdem generis" rule cannot avail to exclude such gambling devices, as doctrine of "ejusdem generis" is rule of construction to be applied as an aid in ascertaining legislative intent and cannot control where plain purpose of legislature would thereby be hindered or defeated; nor does doctrine apply where specific words of statute signify subjects greatly different from one another; nor where specific words embrace all objects of their class, so that general words must bear different meaning from specific words or be meaningless; nor where there are no specific terms followed by general terms; the general expression is not to be considered as limited only to last of enumeration, but applies to all. Morgan v. State, 208 Miss. 185, 44 So. 2d 45, 1950 Miss. LEXIS 239 (Miss. 1950).

This statute [Code 1942, § 1073] is penal and must be construed strictly. State ex rel. Whall v. Saenger Theatres Corp., 190 Miss. 391, 200 So. 442, 1941 Miss. LEXIS 58 (Miss. 1941).

2. Maintenance of action.

While in the absence of statutory authority a citizen, as such, has no standing to champion the rights of the public in abating a public nuisance, the legislature may authorize such action. State ex rel. Whall v. Saenger Theatres Corp., 190 Miss. 391, 200 So. 442, 1941 Miss. LEXIS 58 (Miss. 1941).

A proceeding to abate a nuisance under this section [Code 1942, § 1073] is maintainable by a private citizen without first requesting the public officials named therein to do so. State ex rel. Whall v. Saenger Theatres Corp., 190 Miss. 391, 200 So. 442, 1941 Miss. LEXIS 58 (Miss. 1941).

Applying the rule of construction that where a statute enumerates and specifies subjects or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, or under a general clause, those not of like kind or classification as those enumerated, "bank night" scheme in theatres was not within the purview of this section. State ex rel. Whall v. Saenger Theatres Corp., 190 Miss. 391, 200 So. 442, 1941 Miss. LEXIS 58 (Miss. 1941).

Action to abate "bank night" scheme in theaters and to recover for theater admission money spent by the complainant and others who had assigned their claims to the complainant, was properly dismissed where the scheme in question was not within the purview of a statute making any building, club, vessel, etc., wherein is kept or exhibited any game or gaming table, etc., a common nuisance. State ex rel. Whall v. Saenger Theatres Corp., 190 Miss. 391, 200 So. 442, 1941 Miss. LEXIS 58 (Miss. 1941).

This section [Code 1942, § 1073] expressly authorizes the institution of a proceeding for the abatement of nuisances by private citizens. Caravella v. State, 185 Miss. 1, 186 So. 653, 1939 Miss. LEXIS 118 (Miss. 1939).

A decree abating the nuisances of selling intoxicating liquor and carrying on gambling on certain premises, and providing for the condemnation and sale of personal property used in connection with the operation of such nuisances, was not erroneous because the court decided the case on final hearing on proof submitted on the hearing for a temporary injunction alone where there was no request on the part of the appellants that they might present any additional evidence, nor demand for a further hearing with the showing that other and additional evidence was desired to be offered. Caravella v. State, 185 Miss. 1, 186 So. 653, 1939 Miss. LEXIS 118 (Miss. 1939).

This section [Code 1942, § 1073], together with Code 1930, § 2007, as amended by Laws, 1938, Chapter 349 (Code 1942, § 2646), and Code 1930, § 1979 (Code 1942, § 2618), warrants a proceeding to abate nuisances of selling intoxicating liquors and carrying on gambling on certain described premises and a decree perpetually enjoining the defendant from operating such nuisances on the premises and providing for the condemnation and sale of all personal property used in connection therewith, where the lawful use of the real estate involved is not restrained. Caravella v. State, 185 Miss. 1, 186 So. 653, 1939 Miss. LEXIS 118 (Miss. 1939).

3. Injunctions.

That a public nuisance may also be a violation of the criminal law does not reduce the authority of the chancery court to enjoin it. State v. Myers, 244 Miss. 778, 146 So. 2d 334, 1962 Miss. LEXIS 506 (Miss. 1962).

Since the statute [Code 1942, § 1073] did not give to the chancery court power to enjoin a defendant from violating the liquor and gambling laws anywhere in the state, other than on the premises found to be a common nuisance, an injunction which undertook to prohibit the defendant from having intoxicating liquors and gambling devices in his possession at places, other than the place ordered to be abated as a nuisance, was invalid, so that a defendant, charged with violating the invalid portion of the injunction, was improperly found to be in contempt of court. Horne v. State, 232 Miss. 252, 98 So. 2d 653, 1957 Miss. LEXIS 465 (Miss. 1957).

The possession of slot machines was in violation of an injunction against violation of gambling laws, regardless of whether machines were operated. Stevens v. State, 225 Miss. 48, 82 So. 2d 645, 1955 Miss. LEXIS 557 (Miss. 1955).

A temporary injunction may issue where it appears that intoxicating liquors and slot machines were stored and exhibited at a motor court and cafe in violation of statute. McBride v. State, 221 Miss. 508, 73 So. 2d 154, 1954 Miss. LEXIS 557 (Miss. 1954).

Where defendant operated a combination cafe and dance hall which was declared to be a public nuisance, there was no adequate remedy at law for relief of this nuisance and it was within the inherent power of the chancery court to enjoin the operation of the cafe in the manner constituting the nuisance. Green v. State, 212 Miss. 846, 56 So. 2d 12, 1952 Miss. LEXIS 317 (Miss. 1952).

In an action to abate a gambling place nuisance a temporary injunction is not void because it does not describe the premises. Alexander v. State, 210 Miss. 517, 49 So. 2d 387, 1950 Miss. LEXIS 353 (Miss. 1950).

Purpose of Code 1942, § 2646, which provides that where intoxicating liquors are kept, that place is a common nuisance which may be abated by an injunction, can only be accomplished by an injunction against the person or persons, who may be ascertained and adjudged to be responsible for that nuisance but the injunction does not issue to suppress a business as such. Vermillion v. State, 210 Miss. 255, 49 So. 2d 401, 1950 Miss. LEXIS 345 (Miss. 1950).

It is not enough under Code 1942, § 2646, that the nuisance therein defined be found and adjudged to exist, the identity of the person or persons responsible for the nuisance must also be ascertained and adjudicated and to the end, as the statute provides, that the nuisance so found to exist may be abated by a writ of injunction against the party or parties responsible therefor. Vermillion v. State, 210 Miss. 255, 49 So. 2d 401, 1950 Miss. LEXIS 345 (Miss. 1950).

In a suit to abate a gambling place as a nuisance, the chancery court had power to issue temporary injunction inasmuch as Code 1942, § 1073 specifically provides that all rules of evidence and of practice and procedure that pertain to courts of equity generally in this state may be invoked and applied in any injunction procedure thereunder and this evidences a legislative intent to grant the court the full use of its injunctive powers. Alexander v. State, 210 Miss. 517, 49 So. 2d 387, 1950 Miss. LEXIS 353 (Miss. 1950).

4. Extent of decree.

In a padlock proceeding where it appeared that the defendants could have conducted an illegal liquor business in the building as well as outside the building, the chancellor was not justified in padlocking the building and depriving defendant of the use thereof for legitimate purposes. Whittington v. State, 222 Miss. 94, 75 So. 2d 272, 1954 Miss. LEXIS 625 (Miss. 1954).

While the court can, under this section [Code 1942, § 1073], abate and enjoin the prosecution of the business adjudged to be a common nuisance, such as selling of liquor and gambling, and require offenders to execute a bond to comply with the decree, the court is without power to order the padlocking of the buildings, where defendants have executed the compliance bond. Foreman v. State, 209 Miss. 331, 46 So. 2d 794, 1950 Miss. LEXIS 394 (Miss. 1950).

This section [Code 1942, § 1073] does not authorize the inclusion in a decree, enjoining nuisance of a prohibition against the removal of any of the personal property from the premises, and, the decree being void in that respect will not sustain a conviction of contempt for violation thereof. Redding v. State, 184 Miss. 371, 185 So. 560, 1939 Miss. LEXIS 23 (Miss. 1939).

RESEARCH REFERENCES

ALR.

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling. 82 A.L.R.4th 356.

Am. Jur.

38 Am. Jur. 2d, Gambling §§ 129 et seq.

12A Am. Jur. Pl & Pr Forms (Rev), Gambling, Form 1 (complaint or declaration to abate gambling house as nuisance).

CJS.

38 C.J.S., Gaming §§ 106 et seq.

Law Reviews.

Rychlak, Common-Law remedies for environmental wrongs: The role of private nuisance. 59 Miss. L. J. 657, Winter, 1989.

§ 95-3-27. Existing laws and prosecutions not affected.

This chapter shall be construed as supplementary to and in aid of existing statutes in this state relating to the same subject-matter, and not as a repeal of the same.

HISTORY:

Codes, Hemingway's 1921 Supp. § 2790l; 1930, § 2880; 1942, § 1072; Laws, 1918, ch. 193.

§ 95-3-29. Immunity of certain agricultural operations from nuisance actions.

(1) In any nuisance action, public or private, against an agricultural operation, including forestry activity, proof that the agricultural operation, including forestry activity, has existed for one (1) year or more is an absolute defense to the nuisance action, if the operation is in compliance with all applicable state and federal permits.

(2) The following words and phrases as used in this section shall have the meanings given them in this section:

(a) "Agricultural operation" includes, without limitation, any facility or production site for the production and processing of crops, or products thereof, livestock, or products thereof, farm-raised fish and fish products, livestock products, honeybees, honey and other products of the beehive, wood, timber or forest products, fowl or plants for breeding or sales and poultry or poultry products for commercial or industrial purposes. "Agricultural operation' also includes the use of farm machinery, equipment, devices, chemicals, products for agricultural use, materials and structures designed for agricultural use and used in accordance with best agricultural management practices and are in compliance with any applicable state and federal permits.

(b) "Forestry activity" means any activity associated with the reforesting, growing, managing, protecting and harvesting of timber, wood and forest products including nongame species.

(c) "Traditional farm practices" means those accepted customs and standards established and followed by similar agricultural operations under similar circumstances.

(3) The provisions of this section shall not be construed to affect any provision of the "Mississippi Air and Water Pollution Control Law."

(4) This section shall not affect actions commenced prior to July 1, 1980.

HISTORY:

Laws, 1980, ch. 374; Laws, 1981, ch. 357, § 1; Laws, 1994, ch. 647, § 2; Laws, 2004, ch. 591, § 1; Laws, 2009, ch. 333, § 1, eff from and after passage (approved Mar. 16, 2009).

Editor's Notes —

Section 49-17-7 provides that the words "Mississippi Air and Water Pollution Control Commission" wherever they may appear in the laws of the State of Mississippi shall be construed to mean the Mississippi Commission on Natural Resources. Section 49-2-6, however, provides wherever the term "Mississippi Commission on Natural Resources" appears in any law the same shall mean the Mississippi Commission on Environmental Quality.

Cross References —

Exemption of land used for agricultural purposes from zoning regulations, see § 17-1-3.

Exemption of farm buildings from building codes, see § 19-5-9.

Animal and poultry by-products disposal or rendering plants, see §§ 41-51-1 et seq.

Mississippi Air and Water Pollution Control Law, see §§ 49-17-1 et seq.

JUDICIAL DECISIONS

1. In general.

The 2003 version of the Mississippi Right to Farm statute, Miss. Code Ann. § 95-3-29(1), does not contain the condition that the operation is in compliance with all applicable state and federal permits. Hill v. Koppers, Inc., 2010 U.S. Dist. LEXIS 5036 (N.D. Miss. Jan. 20, 2010).

Plaintiff's nuisance claim was barred by Mississippi's Right to Farm statute, Miss. Code Ann. § 95-3-29(1), because a wood processing plant–which had been in operation for approximately 100 years–was included within the statute's definition of an agricultural operation. Hill v. Koppers, Inc., 2010 U.S. Dist. LEXIS 5036 (N.D. Miss. Jan. 20, 2010).

Although the Mississippi Air and Water Pollution Control Law made it unlawful for a person to cause pollution of the air or waters under Miss. Code Ann. § 49-17-29 and allowed private party participation under Miss. Code Ann. § 49-17-35 to initiate a request with the state department of environmental quality, the law provided neither a private right of action or a private remedy for persons adversely affected by air or water pollution; the claims against hog farm operators were also barred by the Right to Farm Law of Miss. Code Ann. § 95-3-29(1) in that the farms had been operating more than a year without a substantial change in operation. Norman v. Prestage Farms, Inc., 2007 U.S. Dist. LEXIS 24456 (N.D. Miss. Mar. 30, 2007).

United States Bankruptcy Court for the Northern District of Mississippi held in abeyance its final decision on defendants Prestage Farms', motion for summary judgment pending briefing by the parties because it was unclear whether, under the Mississippi Air and Water Pollution Control Law, codified in Miss. Code Ann. § 49-17-1, et seq., plaintiffs could maintain a private cause of action of nuisance; if they could, the action was not time barred under Miss. Code Ann. § 95-3-29. Moore v. Prestage Farms, Inc. (In re Moore), 306 B.R. 849, 2004 Bankr. LEXIS 282 (Bankr. N.D. Miss. 2004).

A nuisance action against a paper mill brought by plaintiffs who lived approximately 100 miles downriver from the mill, arising from injury allegedly caused by the mill's discharge of toxic chemicals into the river, was not time-barred by § 95-3-29; given the purpose of the statute-to prevent homes or businesses from building in the vicinity of an established agricultural operation and then attempting to have the agricultural operation penalized as a nuisance because of odors, sounds and sights traditionally associated with such a business-it would not be allowed to defeat an action for nuisance on property located 100 miles away from the agricultural operation. Leaf River Forest Prods. v. Ferguson, 662 So. 2d 648, 1995 Miss. LEXIS 557 (Miss. 1995).

OPINIONS OF THE ATTORNEY GENERAL

Section 17-1-3 prohibits requiring the issuing of building permits and payment of building permit fees for farm buildings or other farm structures. Section 17-2-7 prohibits the enforcement of building codes, including the International Building Codes, on farm structures. However, such exemptions do not include farm residences. 2006 Miss. Op. Att'y Gen. 436.

RESEARCH REFERENCES

ALR.

Animal rendering or bone-boiling plant or business as nuisance. 17 A.L.R.2d 1269.

Stockyard as nuisance. 18 A.L.R.2d 1033.

Dairy, creamery, or milk distributing plant, as nuisance. 92 A.L.R.2d 974.

Keeping pigs as nuisance. 2 A.L.R.3d 931.

Keeping poultry as nuisance. 2 A.L.R.3d 965.

Keeping horses as nuisance. 27 A.L.R.3d 627.

"Coming to nuisance" as a defense or estoppel. 42 A.L.R.3d 344.

Animals as attractive nuisance. 64 A.L.R.3d 1069.

Keeping bees as nuisance. 88 A.L.R.3d 992.

Keeping of domestic animal as constituting public or private nuisance. 90 A.L.R.5th 619.

Hog breeding, confining, or processing facility as constituting nuisance. 93 A.L.R.5th 621.

CHAPTER 5.

TRESPASS

Sec.

95-5-1 through 95-5-9. Repealed.
95-5-10. Cutting trees without consent of owner.
95-5-11. Loosening or taking boats and water craft.
95-5-13. Taking cottonseed sacks.
95-5-15. Boxing pine trees.
95-5-17. Repealed.
95-5-19. Poultry or livestock-killing dog; how dealt with.
95-5-21. Poultry and livestock killed by dog; owner liable.
95-5-23. To fences, bars, gates, bridges, buildings.
95-5-25. By firing woods.
95-5-27. On lands held by the state.
95-5-29. Limitation of actions; effect of recovery; claiming less than statutory penalty.
95-5-31. Duty of possessor of real property to trespasser.

§§ 95-5-1 through 95-5-9. Repealed.

Repealed by Laws, 1989, ch. 558, § 2, eff from and after July 1, 1989.

§ 95-5-1. [Codes, Hutchinson's 1848, ch. 12, art. 6(9); 1857, ch. 18, art. 2; 1871, § 2474; 1880, § 962; 1892, § 4411; 1906, § 4976; Hemingway's 1917, § 3245; 1930, § 3410; 1942, § 1074; Laws, 1950, ch. 312, § 1; Laws, 1981, ch. 395, § 1]

§ 95-5-3. [Codes, Hutchinson's 1848, ch. 12, art. 6(7); 1857, ch. 18, art. 1; 1871, § 2473; 1880, § 961; 1892, § 4412; 1906, § 4977; Hemingway's 1917, § 3246; 1930, § 3411; 1942, § 1075; Laws, 1924, ch. 167; Laws, 1950, ch. 312, § 2; Laws, 1981, ch. 395, § 2]

§ 95-5-5. [Codes, 1857, ch. 18, art. 3; 1871, § 2475; 1880, § 963; 1892, § 4413; 1906, § 4978; Hemingway's 1917, § 3247; 1930, § 3412; 1942, § 1076]

§ 95-5-7. [Codes, 1857, ch. 18, art. 4; 1871, § 2476; 1880, § 964; 1892, § 4414; 1906, § 4979; Hemingway's 1917, § 3248; 1930, § 3413; 1942, § 1077]

§ 95-5-9. [Codes, 1857, ch. 18, art. 5; 1871, § 2477; 1880, § 965; 1892, § 4415; 1906, § 4980; Hemingway's 1917, § 3249; 1930, § 3414; 1942, § 1078]

Editor's Notes —

Former § 95-5-1 was entitled: By cutting trees; live oaks.

Former § 95-5-3 was entitled: By cutting trees; cypress and other trees.

Former § 95-5-5 was entitled: By cutting trees; ornamental trees.

Former § 95-5-7 was entitled: By cutting shrubs, bushes and plants.

Former § 95-5-9 was entitled: By cutting fruit trees.

RESEARCH REFERENCES

Practice References.

Blackman and Thomas, A Practical Guide to Disputes Between Adjoining Landowners (Matthew Bender).

Damages in Tort Actions (Matthew Bender).

Douthwaite, Ronald W. Eades, Jury Instructions for Personal Injury and Tort Cases (Michie).

Munger, What's It Worth? A Guide to Current Personal Injury Awards and Settlements, 2003 Edition (Michie).

§ 95-5-10. Cutting trees without consent of owner.

(1) If any person shall cut down, deaden, destroy or take away any tree without the consent of the owner of such tree, such person shall pay to the owner of such tree a sum equal to double the fair market value of the tree cut down, deadened, destroyed or taken away, together with the reasonable cost of reforestation, which cost shall not exceed Two Hundred Fifty Dollars ($250.00) per acre. The liability for the damages established in this subsection shall be absolute and unconditional and the fact that a person cut down, deadened, destroyed or took away any tree in good faith or by honest mistake shall not be an exception or defense to liability. To establish a right of the owner prima facie to recover under the provisions of this subsection, the owner shall only be required to show that such timber belonged to such owner, and that such timber was cut down, deadened, destroyed or taken away by the defendant, his agents or employees, without the consent of such owner. The remedy provided for in this section shall be the exclusive remedy for the cutting down, deadening, destroying or taking away of trees and shall be in lieu of any other compensatory, punitive or exemplary damages for the cutting down, deadening, destroying or taking away of trees but shall not limit actions or awards for other damages caused by a person.

(2) If the cutting down, deadening, destruction or taking away of a tree without the consent of the owner of such tree be done willfully, or in reckless disregard for the rights of the owner of such tree, then in addition to the damages provided for in subsection (1) of this section, the person cutting down, deadening, destroying or taking away such tree shall pay to the owner as a penalty Fifty-five Dollars ($55.00) for every tree so cut down, deadened, destroyed or taken away if such tree is seven (7) inches or more in diameter at a height of eighteen (18) inches above ground level, or Ten Dollars ($10.00) for every such tree so cut down, deadened, destroyed or taken away if such tree is less than seven (7) inches in diameter at a height of eighteen (18) inches above ground level, as established by a preponderance of the evidence. To establish the right of the owner prima facie, to recover under the provisions of this subsection, it shall be required of the owner to show that the defendant or his agents or employees, acting under the command or consent of their principal, willfully and knowingly, in conscious disregard for the rights of the owner, cut down, deadened, destroyed or took away such trees.

(3) All reasonable expert witness fees and attorney's fees shall be assessed as court costs in the discretion of the court.

HISTORY:

Laws, 1989, ch. 558, § 1, eff from and after July 1, 1989, and applicable to causes of action accruing on or after July 1, 1989.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2. Statute of limitations.
3. Attorneys' fees.
4. Life tenants and remaindermen.
5. Co-ownership of property.
6. Damages.
7. Willfully or in conscious disregard.
8. Burden of proof.
9. Evidence.

II. UNDER FORMER LAW.

11. In general.
12. Construction and application, generally.
13. Effect of verbal permission to cut trees.
14. Possession of and title to land.
15. —Joint ownership.
16. —Tax title holder.
17. Good faith cutting of trees.
18. Wilfulness or negligence.
19. Mistake.
20. Trees between street and sidewalk.
21. Liability for agent's acts.
22. Recovery of statutory penalties and actual and punitive damages.
23. Damages.

I. UNDER CURRENT LAW.

1. In general.

Penalty under Miss. Code Ann. § 95-5-10 does not fit claims that fall under the definition of waste; therefore, in an action where two owners granted timber deeds for property without the consent of the other co-tenants, dismissal of an action for waste was improper because the statutory penalty in Miss. Code Ann. § 95-5-10 was not the exclusive remedy for the wrongful cutting of timber. Tolbert v. Southgate Timber Co., 943 So. 2d 90, 2006 Miss. App. LEXIS 868 (Miss. Ct. App. 2006).

As a "good faith" defense no longer existed in cases of timber trespass, the chancery court erred in finding that a logging company was not jointly and severally liable with the individuals for the timber trespass on the landowner's property. Moorehead v. Hudson, 888 So. 2d 459, 2004 Miss. App. LEXIS 748 (Miss. Ct. App. 2004).

The person injured was the owner of the property from which the trees were cut. Flowers v. McCraw, 792 So. 2d 339, 2001 Miss. App. LEXIS 325 (Miss. Ct. App. 2001).

The statute is highly penal and is to be applied only in the clearest of cases. McCorkle v. Loumiss Timber Co., 760 So. 2d 845, 2000 Miss. App. LEXIS 258 (Miss. Ct. App. 2000).

2. Statute of limitations.

Supreme Court of Mississippi overruled McCain v. Memphis Hardwood Flooring Co., 725 So. 2d 788 (Miss. 1998), to the extent that the remedies provided in Miss. Code Ann. § 95-5-10(1) are subject to the limitations period set out in Miss. Code Ann. § 15-1-33. Stockstill v. Gammill, 943 So. 2d 35, 2006 Miss. LEXIS 624 (Miss. 2006).

Denial of expert witness fees and attorney fees under Miss. Code Ann. § 95-5-10(3) was not manifestly wrong or clearly erroneous despite an award of compensatory damages for the cutting down of trees because the cutting was done mistakenly. Stockstill v. Gammill, 943 So. 2d 35, 2006 Miss. LEXIS 624 (Miss. 2006).

Subsection 2 is subject to the statute of limitations provided in § 95-5-29 because the subsection involves specific penalties; § 95-5-10(1) is not subject to § 95-5-29, but is subject to § 15-1-33 because it is a penalty controlled by a one year statute of limitation. McCain v. Memphis Hardwood Flooring Co., 725 So. 2d 788, 1998 Miss. LEXIS 272 (Miss. 1998), overruled in part, Stockstill v. Gammill, 943 So. 2d 35, 2006 Miss. LEXIS 624 (Miss. 2006).

3. Attorneys' fees.

Chancery court properly awarded plaintiffs attorney's and expert fees pursuant to Miss. Code Ann. § 95-5-50(3) (Rev. 2013) where the heir admitted that he had removed trees from land that was determined by a survey to be owned by plaintiffs, and the heir had not rebutted the admitted evidence of the estimates for the damages, expert fees, and attorney's fees. Dobbs v. Crawford, 177 So. 3d 448, 2015 Miss. App. LEXIS 168 (Miss. Ct. App.), cert. denied, — So. 3d —, 2015 Miss. LEXIS 630 (Miss. 2015), cert. denied, 178 So. 3d 729, 2015 Miss. LEXIS 554 (Miss. 2015).

In a trespass case brought against three timber cutters in which a chancery court ruled in their favor that an old wire fence was the proper boundary line, and the cutters appealed the chancery court's denial of their claim for attorney's fees and costs under Miss. Code Ann. § 95-5-10(3), that statute was inapplicable because it created a cause of action for an individual whose trees were wrongly cut by another person. It was not the intent of the Legislature to permit fees to be recovered as costs by a successful defendant in a timber-cutting case. Camp v. Stokes, 41 So. 3d 697, 2009 Miss. App. LEXIS 700 (Miss. Ct. App. 2009), rev'd, 41 So. 3d 685, 2010 Miss. LEXIS 384 (Miss. 2010).

In a case involving the destruction of trees, a trial court erred in basing an award of attorney fees on the amount recovered from a lumber company because the trial court should have examined the fees requested under Miss. R. Prof. Conduct 1.5 for reasonableness. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

In a landowner's action against a lumber company for trespass and wrongful cutting of timber, the trial judge offered no reason why the fees of the landowner's attorneys were not reasonable, except that they did not prevail on all their claims; rather, the trial court awarded fees in proportion to the damages awarded. Such an arbitrary method of calculation was an abuse of discretion, and the appellate court reversed and remanded the matter. Smith v. Parkerson Lumber, Inc., 2004 Miss. App. LEXIS 326 (Miss. Ct. App. Apr. 20, 2004), op. withdrawn, sub. op., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

A contingency fee arrangement does not restrict a court's discretion in awarding attorneys' fees to an award not greater than the percentage of recovery defined by the agreement. McCain v. Memphis Hardwood Flooring Co., 725 So. 2d 788, 1998 Miss. LEXIS 272 (Miss. 1998), overruled in part, Stockstill v. Gammill, 943 So. 2d 35, 2006 Miss. LEXIS 624 (Miss. 2006).

4. Life tenants and remaindermen.

A life tenant (and those acting under authority of the life tenant) may not be compelled to respond to the remainderman for the statutory penalties set out in the statute; a remainderman's sole remedy in such a situation is a common law action for waste. Twin States Land & Timber Co. v. Chapman, 750 So. 2d 567, 1999 Miss. App. LEXIS 676 (Miss. Ct. App. 1999).

5. Co-ownership of property.

Where one of multiple co-owners consents to the harvesting of timber from a parcel of property, such consent bars his or her recovery under this section and also defeats recovery by the other co-owners; however, this does not mean that the other tenants are without remedy under the common law doctrine of waste for their share of the value of the timber cut. Fly Timber Co. v. Waldo, 758 So. 2d 1067, 2000 Miss. App. LEXIS 163 (Miss. Ct. App. 2000).

6. Damages.

Amount of $ 250 is the cost of reforestation, not the maximum fair market value of the tree under the statute. Murrell v. Brown, 202 So. 3d 287, 2016 Miss. App. LEXIS 563 (Miss. Ct. App. 2016).

Trial court properly instructed the jury that it could award statutory penalties based on a preponderance of the evidence because a property owner sought and received damages under the tree-cutting statute and not punitive damages for trespass as the tortfeasor contended, the tortfeasor offered nothing but bare assertions to the contrary, and under a prior iteration of the tree-cutting statute, the Supreme Court of Mississippi held that statutory penalties need only be proven by a preponderance of the evidence Taylor v. Galloway, 189 So. 3d 1288, 2016 Miss. App. LEXIS 263 (Miss. Ct. App. 2016).

Judgment denying appellants' motion for reconsideration or, in the alternative, for a new trial after the circuit court ordered appellee to pay damages in the amount of $ 92,901.60 to appellants was affirmed because there was no error in the circuit court's use of appellee's valuation for the determination of damages; there was nothing in the record which contradicted that appellee's values were based on what the market would pay for the standing timber at issue. Reeves v. Peterson, 41 So. 3d 720, 2010 Miss. App. LEXIS 181 (Miss. Ct. App. 2010).

Although the landowner contended that he should have been awarded statutory damages under Miss. Code Ann. § 95-5-10(2) because although the landowner and his two witnesses testified about trees that were illegally cut, and the landowner claimed that their testimonies were neither impeached nor rebutted by any other witness or evidence, it was well settled that decisions as to the weight and credibility of a witness's statement are the proper province of the jury. The jury did award the landowner $ 3,200 in damages, and based on the record, the appellate court did not find that this award was unreasonably or outrageously low; accordingly, the trial judge did not err by entering judgment on the jury's verdict. Pittman v. Dykes Timber Co., 18 So. 3d 923, 2009 Miss. App. LEXIS 673 (Miss. Ct. App. 2009).

Trial court did not err in refusing to grant a judgment notwithstanding the verdict in a case involving the destruction of trees because it was within the province of the jury to believe the testimony of witnesses regarding who was responsible for the cutting; the evidence showed that a person not associated with a lumber company actually cut down some of the owner's trees. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

In a case involving the destruction of trees, a trial court did not err in denying an owner's motion for additur because the jury's verdict was not unreasonable; the jury awarded the owner slightly more than double the costs of the trees cut, plus the cost of reforestation. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

In a case involving the destruction of trees, a trial court did not err in denying a motion for a new trial based on a failure to allow expert testimony because such testimony was not admissible to determine whether punitive damages were appropriate. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

In a case involving the destruction of trees, an owner was not permitted to recover for trespass, loss of enjoyment of use, and diminution in value because there was no evidence that the owner suffered any damages that were unrelated to the destruction of the trees, such as damage to roads, fences, other improvements, or to the soil. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

In a property owner's trespass suit against a construction company, the trial court properly denied the property owner's instruction on the statutory destruction of trees as the property owner failed to meet his burden of showing how many trees were cut. Teasley v. Buford, 876 So. 2d 1070, 2004 Miss. App. LEXIS 617 (Miss. Ct. App. 2004).

Where the property owner produced photographs clearly showing actual damage to the land from wrongful cutting, and testified to having examined all the stumps left on the property and measured 44 trees over 7 inches in diameter, and 172 trees under 7 inches that had been cut, the chancellor erred in finding that the trees were so small that they had no market value; Miss. Code Ann. § 95-5-10(1) and (2) allowed, in part, for the cost of reforestation in such cases, and also for damages of $ 55 per tree for small diameter trees; consequently the chancellor's decision was reversed, and the matter was remanded for further proceedings on the issue of damages, including possible punitive damages, and attorney's fees or expert fees. Muirhead v. Vaughn, 878 So. 2d 1028, 2004 Miss. App. LEXIS 406 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 953 (Miss. 2004).

Miss. Code Ann. § 95-5-10(1) does not require that the owner produce evidence of market value or reforestation costs. Muirhead v. Vaughn, 2004 Miss. App. LEXIS 1 (Miss. Ct. App. Jan. 6, 2004), op. withdrawn, sub. op., 878 So. 2d 1028, 2004 Miss. App. LEXIS 406 (Miss. Ct. App. 2004).

Although the landowners' attorney was remiss in the presentation of evidence concerning damages, once the trial court was presented with clear evidence that the landowners owned the property and that the trees had been cut without their consent, the trial court was obliged to award damages in some form pursuant to Miss. Code Ann. § 95-5-10(1); on remand, the trial court was to award damages to the landowners and consider whether punitive damages and attorney or expert fees under § 95-5-10(2), (3) were warranted. Muirhead v. Vaughn, 2004 Miss. App. LEXIS 1 (Miss. Ct. App. Jan. 6, 2004), op. withdrawn, sub. op., 878 So. 2d 1028, 2004 Miss. App. LEXIS 406 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant of attempted sexual battery of a female minor where the victim testified that defendant asked her to get into a car with him and to lie down in the back of the car, and asked her if "he was going to get him some sex," and when they arrived at a hotel room, defendant announced to other men there that the victim was there to have sex with them. Quarles v. State, 863 So. 2d 987, 2004 Miss. App. LEXIS 2 (Miss. Ct. App. 2004).

Where the neighbor cited Miss. Code Ann. § 95-5-10 as authority for the argument that any person who took a tree without the consent of the owner was liable in the amount double the fair market value of the tree, the neighbor was not entitled to such damages from the owner; the neighbor was not the owner of the parcel at issue, because the neighbor's adverse possession claim under Miss. Code Ann. § 15-1-13 failed. Scrivener v. Johnson, 861 So. 2d 1057, 2003 Miss. App. LEXIS 1196 (Miss. Ct. App. 2003).

The fair market value of timber was properly determined to be what it would sell for while standing in the woods, i.e., the amount received from the mill, the amount paid to the loggers, plus the amount paid to the owners. Cox v. F-S Prestress, Inc., 1999 Miss. App. LEXIS 719 (Miss. Ct. App. July 20, 1999).

7. Willfully or in conscious disregard.

Where plaintiffs successfully sued defendant for violating Miss. Code Ann. § 95-5-10 by cutting down their trees, the trial court erred in granted them a directed verdict on statutory damages under § 95-5-10(2), because defendant submitted evidence that he did not act willfully or in reckless disregard for their rights in doing so with testimony that he believed in good faith that he owned the property. Taylor v. Galloway, 105 So. 3d 1160, 2012 Miss. App. LEXIS 825 (Miss. Ct. App. 2012).

As a "good faith" defense no longer existed in cases of timber trespass, the chancery court erred in finding that a logging company was not jointly and severally liable with the individuals for the timber trespass on the landowner's property, and the chancery court should consider the issue of punitive damages under Miss.

Code Ann. § 95-5-10(2) on remand if the removing or deadening of trees was done willfully or in reckless disregard for the rights of the landowner. Moorehead v. Hudson, 888 So. 2d 459, 2004 Miss. App. LEXIS 748 (Miss. Ct. App. 2004).

In a landowner's action against a lumber company for trespass and wrongful cutting of timber, the trial court erred in denying the landowner's attempts to elicit testimony from the landowner's expert and from the lumber company's expert through cross-examination on whether it was reckless to cut timber before determining boundary lines, because that testimony was a crucial part of the evidence needed by the jury to determine whether the landowner should receive the statutory penalty under Miss. Code Ann. § 95-5-10(2), and the testimony was admissible. Thus, reversal and a remand for new trial on the issue of penalties was necessary. Smith v. Parkerson Lumber, Inc., 2004 Miss. App. LEXIS 326 (Miss. Ct. App. Apr. 20, 2004), op. withdrawn, sub. op., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

Wood cutters and the neighbor acted in reckless disregard, under Miss. Code Ann. § 95-5-10, in cutting the landowners' timber, because there was no barrier between the properties, and as a result, the neighbor should have provided a legal description of the property, and the wood cutter should have asked for a survey. Miller v. Pannell, 815 So. 2d 1117, 2002 Miss. LEXIS 33 (Miss. 2002).

8. Burden of proof.

Appellant property owners failed to prove that the appellee property owners had committed trespass by cutting timber on appellants' property because appellants failed to prove that appellees had cut timber off their property. It was undisputed that appellees had cut timber, but appellants failed to prove the location of where the timber was cut and that the timber had belonged to appellants. Pulliam v. Bowen, 54 So. 3d 331, 2011 Miss. App. LEXIS 88 (Miss. Ct. App. 2011).

9. Evidence.

Where appellant was sued under Miss. Code Ann. § 95-5-10 for cutting trees on appellees' land, his testimony that his father told him he would one day own the land was not hearsay to the extent that it was offered to prove that appellant had a good-faith reason to believe that he owned the property and thus was not liable for statutory damages under § 95-5-10(2). However, he waived this argument by failing to present it to the trial court. Taylor v. Galloway, 105 So. 3d 1160, 2012 Miss. App. LEXIS 825 (Miss. Ct. App. 2012).

Where appellant was sued under Miss. Code Ann. § 95-5-10 for cutting trees on appellees' land, his testimony that his father told him he would one day own the land was inadmissible hearsay.to the extent it was offered to prove the truth of the matter asserted–i.e., appellant's ownership of the land. Taylor v. Galloway, 105 So. 3d 1160, 2012 Miss. App. LEXIS 825 (Miss. Ct. App. 2012).

II. UNDER FORMER LAW.

11. In general.

Damages recovered under this section [Code 1942, § 1075] held excessive. Vicksburg Hardwood Co. v. Redditt, 241 Miss. 330, 130 So. 2d 848, 1961 Miss. LEXIS 351 (Miss. 1961).

Where the plaintiff had testified that no merchantable timber had been cut or removed by the defendant, and the plaintiff's own estimate as to the damage that had been done to his merchantable timber on account of the alleged trespasses was $250, an award of $500 actual damages was not so improper as to require granting plaintiff a new trial on the question of damages alone. Strawbridge v. Day, 232 Miss. 42, 98 So. 2d 122, 1957 Miss. LEXIS 442 (Miss. 1957).

In a suit to recover actual value of trees cut on plaintiffs' land without their consent and statutory penalty for cutting such trees, the accuracy of survey made by county surveyor, starting at an old recognized corner but not at a recognized corner established by the original government survey, was a question for a jury. Kelley v. Welborn, 217 Miss. 16, 63 So. 2d 413, 1953 Miss. LEXIS 407 (Miss. 1953).

In a suit to recover the actual value of trees cut on plaintiffs' land without their consent, and statutory penalty for cutting such trees, the burden is upon the plaintiffs to show how many trees of each variety were cut before they can recover the statutory penalty. Kelley v. Welborn, 217 Miss. 16, 63 So. 2d 413, 1953 Miss. LEXIS 407 (Miss. 1953).

Instruction authorizing recovery of statutory penalty of $15.00 per tree for cutting hardwood trees without owner's consent, without limiting recovery of such penalty to those hardwood trees enumerated in the statute was erroneous. Kelley v. Welborn, 217 Miss. 16, 63 So. 2d 413, 1953 Miss. LEXIS 407 (Miss. 1953).

In an action by landowner for wrongful cutting of his standing timber, where the owner testified that the timber was worth $1000 and also testified that he received some of the timber which he sold for $175, he was not entitled to preemptory instruction directing the jury to return a verdict for actual value of timber in the sum of $1000. Hudson v. Landers, 215 Miss. 447, 61 So. 2d 312, 1952 Miss. LEXIS 584 (Miss. 1952).

Conflicting evidence as to location of area referred to in timber deed reserving "all trees around the old home site in between present fences which lie in the shape of a V," warranted jury in finding that the reserved area contended for by the plaintiffs was the correct one, in action to recover actual damages and statutory penalties for cutting such trees under this section. Floyd v. Williams, 198 Miss. 350, 22 So. 2d 365, 1945 Miss. LEXIS 205 (Miss. 1945).

Trial court did not abuse its discretion in not permitting jury to view the premises where ornamental trees reserved in timber deed had been cut and removed from the land, in action to recover actual damages and statutory penalties therefor, where diagrams, photographs, and testimony were sufficient to enable the jury to understand the respective contentions of the parties, notwithstanding that the photographs could not accurately disclose the number of trees cut and even though the plaintiffs joined with the defendant in the request for a view. Floyd v. Williams, 198 Miss. 350, 22 So. 2d 365, 1945 Miss. LEXIS 205 (Miss. 1945).

The allowance of a statutory penalty for trees cut on the land in question was improper, where at the time of the cutting the land was not designated as a homestead, and the notice not to cut trees upon the homestead contained no description of such homestead, nor was the homestead described in the affidavits prosecuting those who cut the trees. Robert G. Bruce Co. v. Spears, 187 Miss. 405, 187 So. 756, 1939 Miss. LEXIS 75 (Miss. 1939).

In a suit under this section [Code 1942, § 1075] for a statutory penalty plaintiff must show that the defendant cut the trees and the number of trees so cut. Rowan v. Beattie, 130 Miss. 449, 94 So. 232, 1922 Miss. LEXIS 218 (Miss. 1922).

Prior to the enactment of ch. 167 laws 1924 (Code 1942, § 1075), the owner could recover either the statutory penalty or the value of the trees cut, but not both. Roell v. Shields, 124 Miss. 226, 86 So. 763, 1920 Miss. LEXIS 503 (Miss. 1921).

The board of levee commissioners cannot be sued by a landowner to subject the fund procured by them by special taxation to the payment of the penalty provided for cutting trees on the land of another without his consent. Lowe v. Board of Levee Comm'rs, 19 So. 346 (Miss. 1896).

A telegraph company having the right of way over its line along a public road must be governed by its actual width. It cannot assume that there is a uniformly legal width of thirty feet and that it can cut trees anywhere within fifteen feet of the center. Clay v. Postal Tel. Co., 70 Miss. 406, 11 So. 658, 1892 Miss. LEXIS 66 (Miss. 1892).

If the plaintiff appeal to the circuit court from a justice of the peace, he may amend by adding to his demand more trees than sued for before the justice. McCleary v. Anthony, 54 Miss. 708, 1877 Miss. LEXIS 86 (Miss. 1877).

12. Construction and application, generally.

In an action based on § 95-5-3 [repealed], a jury instruction stating that a person is required to take whatever precautions and safeguards as are reasonably necessary to assure himself or herself that he or she has the lawful authority to cut timber before he or she engages in the deliberate act of cutting or destroying a tree, properly stated the standard of care that is necessary for that person to claim the benefits of a good faith defense when it is alleged that he or she cut timber without authority on the property of another. Berry v. Player, 542 So. 2d 895, 1989 Miss. LEXIS 188 (Miss. 1989).

A landowner suing to recover statutory penalty for destruction of trees must show lack of good faith, gross negligence or willful misconduct on the part of the defendant in inflicting damages, but he is not further burdened to show with greater precision the amount of the damages than would be the case in an ordinary damage suit. Nichols v. Stacks, 485 So. 2d 1034, 1986 Miss. LEXIS 2413 (Miss. 1986).

A statute such as Code 1942, § 1075, creating a cause of action not known to the common law and fixing the time (Code 1942, § 1087) within which an action must be commenced thereunder is not a statute of limitation, but the right given thereby is a conditional one and the commencement of the action within the time fixed is a condition precedent to any liability under the statute. Evans v. Broadhead, 233 So. 2d 771, 1970 Miss. LEXIS 1667 (Miss. 1970).

Code 1942, § 744 allowing one to bring an action within one year after a previous action has been defeated for reasons other than upon the merits did not apply to that portion of the plaintiff's suit which was founded on a cause of action created by Code 1942, § 1075, and therefore that portion of the suit which was founded on Code 1942, § 1075 and brought more than three years after the alleged destruction of trees, although within one year after defeat of the action for a reason other than upon its merits, was barred by the one-year period of limitations contained in Code 1942, § 1087. Evans v. Broadhead, 233 So. 2d 771, 1970 Miss. LEXIS 1667 (Miss. 1970).

Where the plaintiff sought damages under Code 1942, § 1075, but additionally sought damages by reason of an alleged trespass consisting of items other than the specific penalties given by Code 1942, § 1075, the one-year limitation stated in Code 1942, § 1087 was not applicable to those additional items. Evans v. Broadhead, 233 So. 2d 771, 1970 Miss. LEXIS 1667 (Miss. 1970).

The cutting of trees necessary to a survey which a utility is authorized by statute to make for the purpose of locating a transmission line does not subject it to the penalty prescribed by this section [Code 1942, § 1075]. Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546, 1962 Miss. LEXIS 536 (Miss. 1962).

The statutory remedy for trespass is not exclusive insofar as punitive damages are concerned. Day v. Hamilton, 237 Miss. 472, 115 So. 2d 300, 1959 Miss. LEXIS 493 (Miss. 1959).

This highly penal provision must be strictly construed. Lochridge v. Hannon, 236 Miss. 687, 112 So. 2d 234, 1959 Miss. LEXIS 363 (Miss. 1959).

The legislature never intended to base a recovery of the statutory penalty on a mere nonfeasance or omission to discharge a duty owing to another and this section [Code 1942, § 1075] indicates that it was intended to apply only to the wrongful cutting of the trees, or to some affirmative act on the part of the wrongdoer in cutting or destroying trees. Ginther v. Long, 227 Miss. 885, 87 So. 2d 286, 1956 Miss. LEXIS 768 (Miss. 1956).

Where the proof showed that the trustees of the graveyard took possession of the property by virtue of a deed, which was executed and delivered but which had become lost, and they have exercised dominion and control over it ever since, and the defendant with full notice of the claim went ahead and cut timber, the jury was fully warranted in imposing the statutory penalty provided for in this section [Code 1942, § 1075]. C. L. Gray Lumber Co. v. Pickard, 220 Miss. 419, 71 So. 2d 211, 1954 Miss. LEXIS 456 (Miss. 1954).

It does not follow, from the fact that under this section [Code 1942, § 1075] both actual and punitive damages may be recovered against a trespasser, that this rule applies under the statute providing for the recovery of double rent for a tenant's holding over (Code 1942, § 947). Tepper Bros. v. Buttross, 178 Miss. 659, 174 So. 556, 1937 Miss. LEXIS 261 (Miss. 1937).

This section [Code 1942, § 1075] must be strictly construed in so far as statutory penalty for cutting trees is concerned. Murphy v. Seward, 145 Miss. 713, 110 So. 790, 1926 Miss. LEXIS 38 (Miss. 1926).

Chapter 167 Laws 1924 (Code 1942, § 1075) cannot be made to apply to a transaction taking place before its enactment. Fleming v. Dunigan Cooperage Co., 144 Miss. 769, 109 So. 851, 1926 Miss. LEXIS 363 (Miss. 1926).

This section [Code 1942, § 1075] affixes to a tree an arbitrary value without regard to its intrinsic value and is intended to partake both of the punishment for the trespass and of a remuneration for the tortious act. Ladnier v. Ingram Day Lumber Co., 123 Miss. 238, 85 So. 196, 1920 Miss. LEXIS 24 (Miss. 1920).

In order to recover the statutory penalties the plaintiff must show: (a) that the trees were cut on his land; (b) that they were cut without his consent; (c) that they were cut within twelve months before the suit was begun; (d) that they were cut by defendant or his agents or employees, acting within the scope of their employment or by the command or consent of their principal; (e) that the cutting was done wilfully or recklessly without proper precaution to prevent a trespass. Therrell v. Ellis, 83 Miss. 494, 35 So. 826, 1903 Miss. LEXIS 70 (Miss. 1904).

Carrying away a tree already cut or fallen is as much within the statute as cutting trees. Keystone Lumber & Improv. Co. v. McGrath, 21 So. 301 (Miss. 1897).

13. Effect of verbal permission to cut trees.

Where it was shown that the defendant was acting in good faith and under an oral agreement with the owner when he cut the storm-damaged timber, the defendant was not liable for the statutory penalty. Armstrong v. Trawick, 221 Miss. 367, 73 So. 2d 167, 1954 Miss. LEXIS 546 (Miss. 1954).

Act which would otherwise be trespass on real property may be justified on ground of license to use or enter such property, if at time of such act license is still unrevoked. Sansing v. Thomas, 205 Miss. 618, 38 So. 2d 706, 1949 Miss. LEXIS 451 (Miss. 1949).

Act of landowner in pointing out old fence line and authorizing defendant to cut trees up to that line constitutes license to cut trees up to that line and excuses and exempts defendant from all liability for actual damages and statutory penalty for all acts done within scope of license and for all trees cut before reaching fence line, even though fence line is not true property line as shown by later survey. Sansing v. Thomas, 205 Miss. 618, 38 So. 2d 706, 1949 Miss. LEXIS 451 (Miss. 1949).

In action of trespass for cutting and removing trees, instruction is reversibly erroneous which excludes from jury consideration of license, if any, granted by owner of land to defendant, and which deprives defendant of consideration by jury of this defense to all claims for actual value or statutory penalty for cutting trees. Sansing v. Thomas, 205 Miss. 618, 38 So. 2d 706, 1949 Miss. LEXIS 451 (Miss. 1949).

Although title to standing timber can be conveyed only by writing, yet a party is not subject to the penalty imposed in this section [Code 1942, § 1075] if he cuts timber by verbal permission. Fleming v. Dunigan Cooperage Co., 144 Miss. 769, 109 So. 851, 1926 Miss. LEXIS 363 (Miss. 1926).

An unwritten verbal license is a good defense to an action of trespass. Hicks v. Mississippi Lumber Co., 95 Miss. 353, 48 So. 624, 1909 Miss. LEXIS 233 (Miss. 1909).

14. Possession of and title to land.

A timber company acquired no right of possession by a timber deed executed by remaindermen while the life tenant still lived, and therefore could not maintain a suit for the actual value of the timber cut or to recover the statutory penalty. Jackson v. State, 314 So. 2d 346, 1975 Miss. LEXIS 1680 (Miss. 1975).

In an action involving a controversy over the title to land and the right to recover the actual value and the statutory penalty for the alleged wrongful cutting of timber thereon, since complainants' evidence, together with all the reasonable inferences to be deduced therefrom, tended to establish their title by adverse possession, the court erred in sustaining the defendant's motion to dismiss. Coaker v. Churchwell, 229 Miss. 369, 90 So. 2d 849, 1956 Miss. LEXIS 616 (Miss. 1956).

Where both parties to a suit for the recovery of the value of trees alleged to have been unlawfully cut and removed from land claimed to be the property of the plaintiff, and for statutory damages, undertook to establish title to the land by adverse possession, an issue of fact was raised, which was properly left with the jury. E. L. Bruce Co. v. Edwards, 192 Miss. 1, 3 So. 2d 846, 1941 Miss. LEXIS 2 (Miss. 1941).

A plaintiff must either prove title or the possession of the land from which the trees were cut in a suit for the cutting of trees. Houston Bros. v. Lenhart, 136 Miss. 841, 101 So. 289, 1924 Miss. LEXIS 114 (Miss. 1924).

A certificate issued to one in possession of public land claiming it as a homestead, under § 2290 U. S. Revised Statutes (43 USCS § 162, 9 AFCA title 43 § 162), constitutes title sufficient to support an action for cutting and removing timber from the land. Hiwannee Lumber Co. v. McPhearson, 95 Miss. 589, 49 So. 741, 1909 Miss. LEXIS 291 (Miss. 1909).

Possession of land with color of title by person claiming to be the owner is sufficient to sustain an action for the statutory penalty for cutting trees thereon. Carpenter v. Savage, 93 Miss. 233, 46 So. 537, 1908 Miss. LEXIS 92 (Miss. 1908).

After the defendant had sold the land to plaintiff, but before he had surrendered actual possession, he cut trees therefrom and is held liable to plaintiff for the statutory penalty under this section [Code 1942, § 1075]. Smith v. Forbes, 89 Miss. 141, 42 So. 382, 1906 Miss. LEXIS 44 (Miss. 1906).

To maintain trespass or debt for the statutory penalty in the commission of trespass in the cutting of trees, the plaintiff must have possession or title, and a plaintiff could not maintain such an action, where she showed no title in herself, because she showed none in the state, under which she derivatively claimed, and the lands were wild or vacant lands, unoccupied and uncleared. Darrill v. Dodds, 78 Miss. 912, 30 So. 4, 1901 Miss. LEXIS 151 (Miss. 1901).

Plaintiff in trespass for cutting trees is not entitled to recover where he shows neither a record, paper title nor a concurrence of possession and claim of ownership. Gathings v. Miller, 76 Miss. 651, 24 So. 964, 1898 Miss. LEXIS 120 (Miss. 1898).

That the defendant was in the adverse possession of the land under claim and color of title, when he cut the trees, is of itself no defense to the demand for the statutory penalty. Miller v. Wesson, 58 Miss. 831, 1881 Miss. LEXIS 49 (Miss. 1881).

Proof of the record title is sufficient without proof of possession, for the recovery of the statutory penalty, but in the absence of proof of the record title, both possession and claim of ownership must be shown. McCleary v. Anthony, 54 Miss. 708, 1877 Miss. LEXIS 86 (Miss. 1877).

Possession of land under claim and color of title by the plaintiff is sufficient title to enable him to recover the statutory penalty for cutting trees thereon, but possession alone is not. Dejarnett v. Haynes, 23 Miss. 600, 1852 Miss. LEXIS 270 (Miss. 1852); Ware v. Collins, 35 Miss. 223, 1858 Miss. LEXIS 32 (Miss. 1858); MHOON v. Greenfield, 52 Miss. 434, 1876 Miss. LEXIS 238 (Miss. 1876); McCleary v. Anthony, 54 Miss. 708, 1877 Miss. LEXIS 86 (Miss. 1877).

15. —Joint ownership.

In an action for trespass under this section [Code 1942, § 1075] plaintiff must prove that the cutting was without the consent of all the joint owners, as the consent of one would bar all. Bollinger-Franklin Lumber Co. v. Tullos, 124 Miss. 855, 87 So. 486, 1921 Miss. LEXIS 191 (Miss. 1921).

To recover the statutory penalty there must be proof of nonconsent of all owners. Bollinger-Franklin Lumber Co. v. Tullos, 124 Miss. 855, 87 So. 486, 1921 Miss. LEXIS 191 (Miss. 1921).

The right of tenants in common of land to sue for the statutory penalty is joint and whatever bars one will bar all. Haley v. Taylor, 77 Miss. 867, 28 So. 752, 1900 Miss. LEXIS 58 (Miss. 1900).

The right of tenants in common to sue for trespass to land is joint and the quantum of damages which one may recover is the quantum to which each of the others will be limited. Haley v. Taylor, 77 Miss. 867, 28 So. 752, 1900 Miss. LEXIS 58 (Miss. 1900).

16. —Tax title holder.

Claimant to land under a void tax title had no interest in the land or the timber thereon, and therefore was not entitled to statutory penalties for the cutting of certain trees. Thompson v. Reed, 199 Miss. 129, 23 So. 2d 888, 1945 Miss. LEXIS 276 (Miss. 1945).

Under this section [Code 1942, § 1075] the holder of the tax title is not authorized to recover the statutory penalty before the period of redemption has expired and the owner intends to redeem it before the expiration of the time. Murphy v. Seward, 145 Miss. 713, 110 So. 790, 1926 Miss. LEXIS 38 (Miss. 1926).

The tax title holder who enters on land without the delinquent owner's consent before expiration of redemption period is a trespasser. But a delinquent owner who cuts timber on land sold for taxes with a bona fide intention to redeem the land is not subject to the penalty. Murphy v. Seward, 145 Miss. 713, 110 So. 790, 1926 Miss. LEXIS 38 (Miss. 1926).

17. Good faith cutting of trees.

Where defendant acted in good faith in cutting and removing timber from lands under a claim which defendant felt it had the legal right to assert, plaintiffs are not entitled to recover the statutory penalty for which provision is made in § 1075, Code of 1942. Wineman v. Shannon Bros. Lumber Co., 368 F. Supp. 652, 1973 U.S. Dist. LEXIS 11839 (N.D. Miss. 1973).

In an action based on § 95-5-3 [repealed], a jury instruction which provided no definition of good faith but merely stated that good faith, however it was defined, would be defined in an objective, as opposed to a subjective, manner, was proper. Berry v. Player, 542 So. 2d 895, 1989 Miss. LEXIS 188 (Miss. 1989).

To establish a good faith defense, a party must show that, before cutting or destroying trees, he took reasonable precautions and safeguards to assure himself that he had lawful authority to do so. Grisham v. Hinton, 490 So. 2d 1201, 1986 Miss. LEXIS 2480 (Miss. 1986).

Aged defendant's sincere belief, predicated on many years of familiarity with the land, that 2 surveyors hired by her had mistakenly fixed the boundaries of the tract, would not establish a good faith defense to an action for cutting trees thereon. Grisham v. Hinton, 490 So. 2d 1201, 1986 Miss. LEXIS 2480 (Miss. 1986).

In an action under this section [Code 1942, § 1075], the burden is on defendant to establish good faith. L & A Contracting Co. v. Hube, 241 Miss. 710, 133 So. 2d 394, 1961 Miss. LEXIS 388 (Miss. 1961).

One from whom it is sought to recover the statutory penalty for unlawfully cutting timber is entitled to go to the jury on the issue of good faith where he claimed to have been clearing land for a highway then being constructed and that he had told his men to cut only as directed by the highway contractor, although he admitted on cross-examination that he did not know to whom the property belonged and had made no effort to find out, and had not gone to the courthouse to inquire about the title. Dearman v. Partridge, 239 Miss. 611, 124 So. 2d 680, 1960 Miss. LEXIS 330 (Miss. 1960).

"Good faith," as used in this section [Code 1942, § 1075] denotes honesty of purpose, freedom from intention to defraud or deprive others of rights or property to which in equity and good conscience they are entitled. Strawbridge v. Day, 232 Miss. 42, 98 So. 2d 122, 1957 Miss. LEXIS 442 (Miss. 1957).

While the plaintiff, in order to recover the statutory penalty for wrongful cutting of timber, is only required to show that the timber belonged to him, and that the timber was cut by the defendant, his agents or employees, without plaintiff's consent, the defendant may establish good faith as an affirmative defense to plaintiff's claim for the statutory penalty, and in making such defense the defendant is not required to prove freedom of negligence, but only that the trespass was not wilful, or did not result from wantonness or recklessness. Strawbridge v. Day, 232 Miss. 42, 98 So. 2d 122, 1957 Miss. LEXIS 442 (Miss. 1957).

Where the defendant's testimony as to his own good faith in cutting timber was not contradicted, and the plaintiff admitted that no merchantable timber had been cut, the court properly refused to peremptorily instruct for the plaintiff on the question of statutory penalty even though the plaintiff had testified that after he had warned defendant's workmen not to cross his line and deaden any timber on his land, some trees on his land had been poisoned, but made no showing of the kind or how many trees, if any, had been poisoned after the warning. Strawbridge v. Day, 232 Miss. 42, 98 So. 2d 122, 1957 Miss. LEXIS 442 (Miss. 1957).

In an action for actual value and statutory penalty for wrongful cutting of timber, the owner of timber makes out a prima facie case out of his right to recover the penalty when he shows that he owns the timber and that the defendant or his representative cut it without his consent and if the defendant pleads good faith as an affirmative defense, he may then offer evidence to that effect. Reynolds v. McGehee, 220 Miss. 750, 71 So. 2d 780, 1954 Miss. LEXIS 491 (Miss. 1954).

In order to have recovery of the statutory penalty for cutting trees without owner's consent, a good faith is an affirmative defense which must be pleaded and established by defendant. Kelley v. Welborn, 217 Miss. 16, 63 So. 2d 413, 1953 Miss. LEXIS 407 (Miss. 1953).

Purchaser of timber acting in good faith is not required to make survey to be relieved of statutory penalty for cutting over line. Seward v. West, 168 Miss. 376, 150 So. 364, 1933 Miss. LEXIS 170 (Miss. 1933).

Evidence of a purchase by defendant of the timber from the occupant of the land and the latter's declaration at the time of his right to sell are admissible on the question of good faith in a suit by the owner for the statutory penalty. Haley v. Taylor, 77 Miss. 867, 28 So. 752, 1900 Miss. LEXIS 58 (Miss. 1900).

18. Wilfulness or negligence.

Evidence made out a case of willful, wanton and deliberate trespass upon plaintiff's property, so as to support a jury award of statutory and punitive damages pursuant to § 95-5-3, where the overwhelming evidence indicated that defendant's employees went upon plaintiff's land without permission and in violation of his express admonition for them not to run a seismographic line until he had given his permission, that the employees went upon the land several times in complete and willful disregard of those instructions, that they took lines, heavy equipment and material for running a line approximately one-half mile across the property, that two of the employees had been arrested and charged with trespass, that, subsequently, other employees again went upon the land without permission, and that they had cut and destroyed 201 trees, 75 percent of which were of commercial value. Seismic Petroleum Services, Inc. v. Ryan, 450 So. 2d 437, 1984 Miss. LEXIS 1726 (Miss. 1984).

Evidence that when the defendants obtained their timber deed, the grantees therein had pointed out to them an old fence line as the correct boundary line, and defendants had cut only to this line until the injunction was served upon them, and thereupon defendants notified their cutters and other employees not to cut any more timber in the area until the dispute over the boundary line was settled, failed to establish the wilful cutting of the trees by the defendants, and complainants were not entitled to the statutory penalty. Mabry v. Winding, 229 Miss. 88, 90 So. 2d 175, 1956 Miss. LEXIS 589 (Miss. 1956).

In an action by landowner for wrongful cutting of his standing timber, in absence of showing that wilful wrong was committed in cutting the timber or that there was connection therewith, such gross negligence or such real indifference, or such lack of good faith as to be tantamount to wilfulness, the statutory penalty should not be allowed. Hudson v. Landers, 215 Miss. 447, 61 So. 2d 312, 1952 Miss. LEXIS 584 (Miss. 1952).

Where the testimony shows that trespass to have been wilful, the statutory penalty may be allowed. Odom v. Luehr, 213 Miss. 782, 57 So. 2d 867, 1952 Miss. LEXIS 425 (Miss. 1952).

In an action for statutory penalty for wrongful cutting of timber and also to recover value of trees, evidence that the plaintiff notified the defendant in writing not to cut the timber and gave him a description by metes and bounds of land she claimed to own, the defendant disregarding the notice proceeding to cut the trees, was sufficient to warrant the jury in finding that the cutting was wilful, or defendant's negligence so gross, or his indifference to the true boundaries so real, as to be tantamount to wilfulness. Sansing v. Thomas, 211 Miss. 727, 52 So. 2d 478, 1951 Miss. LEXIS 400 (Miss. 1951).

In an action for damages for wrongful cutting of timber, the statutory penalty will be allowed only where the facts are well proved and where the testimony shows the trespass to have been wilful, or the negligence so gross or the indifference so real or the lack of good faith so evident, as to be tantamount to wilfulness. Pippin v. Sims, 211 Miss. 194, 51 So. 2d 272, 1951 Miss. LEXIS 348 (Miss. 1951).

Mere recklessness is not enough to justify imposition of statutory penalty, but rather there must be degree of recklessness so gross as to constitute wilfulness. Howse v. Russell, 210 Miss. 57, 48 So. 2d 628, 1950 Miss. LEXIS 320 (Miss. 1950), modified, 210 Miss. 57, 49 So. 2d 809, 1951 Miss. LEXIS 265 (Miss. 1951).

Defendant was not guilty of such reckless conduct as to justify imposition of statutory penalty where he cut trees on land between fence and true dividing line which had become plaintiff's by adverse possession after survey proposed by defendant and agreed to by plaintiff had disclosed true line, and where plaintiff had not disclosed he would not abide by such line. Howse v. Russell, 210 Miss. 57, 48 So. 2d 628, 1950 Miss. LEXIS 320 (Miss. 1950), modified, 210 Miss. 57, 49 So. 2d 809, 1951 Miss. LEXIS 265 (Miss. 1951).

Infliction of statutory penalty will only be allowed where facts are well proved and where testimony shows trespass to have been wilful, or shows negligence so gross, or indifference so real, or lack of good faith so evident, as to be tantamount to wilfulness. Howse v. Russell, 210 Miss. 57, 48 So. 2d 628, 1950 Miss. LEXIS 320 (Miss. 1950), modified, 210 Miss. 57, 49 So. 2d 809, 1951 Miss. LEXIS 265 (Miss. 1951).

Where grantor in timber deed reserving trees around home site was to mark the reserved trees, and did so mark 50 of them, but 41 of them were cut by defendant's employees over grantor's protest and according to defendant's instructions, finding was justified that the cutting was wilfully done without proper precaution to prevent trespass. Floyd v. Williams, 198 Miss. 350, 22 So. 2d 365, 1945 Miss. LEXIS 205 (Miss. 1945).

The statutory penalty for cutting timber on another's property will be allowed only where the facts are well proved, and where the testimony shows the trespass to have been wilful, or the negligence so gross, or the indifference so real, or the lack of good faith so evident, as to be tantamount to wilfulness. Hays v. Lyon, 192 Miss. 858, 7 So. 2d 523, 1942 Miss. LEXIS 57 (Miss. 1942).

Where one of two adjoining owners, having blazed a trail beyond the line fence, asserting ownership as far as the trail, proceeded through his employees to cut timber in the disputed area, and his agent, when the other owner called his attention to the line fence, which was being torn down in the work, replied that he didn't care a damn about the fence, and the next day when the other owner again appeared, with authority from his principal, told such owner to get back to the other side of the blazed trail, a determination that the trespasser was liable for the statutory penalty was justified. Hays v. Lyon, 192 Miss. 858, 7 So. 2d 523, 1942 Miss. LEXIS 57 (Miss. 1942).

Statutory damages for cutting trees on the land of another may be allowed only when the proof shows that the cutting was wilful, which implies both knowledge and intent, or a degree of recklessness so gross as to constitute wilfulness. Mere mistake or carelessness is not enough. E. L. Bruce Co. v. Edwards, 192 Miss. 1, 3 So. 2d 846, 1941 Miss. LEXIS 2 (Miss. 1941).

Where, in a suit for the recovery of the value of trees alleged to have been unlawfully cut and removed from land claimed to be the property of the plaintiff, and for statutory damages, the evidence was unsatisfactory as to establishment of title to the land itself, and there was sufficient justification for claim by either party, and the defendant, upon protest by the plaintiff, resumed cutting only after what it plausibly considered was a verification by survey of the calls of the deed, the plaintiff, upon the jury finding him to be the rightful owner, was entitled to recover the value of the trees, but not statutory damages. E. L. Bruce Co. v. Edwards, 192 Miss. 1, 3 So. 2d 846, 1941 Miss. LEXIS 2 (Miss. 1941).

Evidence did not show that purchaser of timber cutting over line did so wilfully or with such gross negligence or indifference or want of good faith as to be tantamount to wilfulness so as to be liable for statutory penalty. Seward v. West, 168 Miss. 376, 150 So. 364, 1933 Miss. LEXIS 170 (Miss. 1933).

Statutory penalty for cutting another's timber should be allowed only in case of culpable fault or omission; "culpable" being that which is deserving of moral blame. Seward v. West, 168 Miss. 376, 150 So. 364, 1933 Miss. LEXIS 170 (Miss. 1933).

Statutory penalty for cutting another's timber will be allowed only where facts are well proved and where testimony shows trespass to have been wilful or negligence so gross or indifference so real or lack of good faith so evident as to be tantamount to wilfulness. Seward v. West, 168 Miss. 376, 150 So. 364, 1933 Miss. LEXIS 170 (Miss. 1933).

Vendor of timber held not liable for statutory penalty for purchaser's wrongfully cutting over line, where vendor did not authorize such cutting and had no legal control over cutting. Seward v. West, 168 Miss. 376, 150 So. 364, 1933 Miss. LEXIS 170 (Miss. 1933).

An instruction may state that the burden of proof is on the plaintiff to show that defendant cut trees on plaintiff's land wilfully or with culpable negligence in failing to ascertain the boundaries thereof, and this does not contradict plaintiff's instruction that the burden of proof was on defendant to show he cut the trees by mistake while in the observance of reasonable care. Rector v. Shippey, Outzen & Co., 93 Miss. 254, 46 So. 408, 1908 Miss. LEXIS 80 (Miss. 1908).

Where a telephone company had maintained its line and cut out undergrowth along it for seven years before plaintiff acquired title to the property by descent, the telephone company's act in cutting away such small growth as interfered with the wires thereafter did not constitute a wilful or malicious cutting for which plaintiff could recover statutory penalties. Cumberland Tel. & Tel. Co. v. Martin, 93 Miss. 505, 46 So. 247, 1908 Miss. LEXIS 71 (Miss. 1908).

The defendant is not liable for statutory damages for wilful trespass in cutting trees when he does so relying on the unauthorized decision of a de facto tribunal. Lusby v. Kansas C., M. & B. R. Co., 73 Miss. 360, 19 So. 239, 1895 Miss. LEXIS 160 (Miss. 1895).

One negligently failing to acquaint himself with the boundary line of his own land who employs another, though an independent contractor, to cut trees near the line on land which he points out as his own, but which turns out to be beyond the line on the land of a third person, is a negligent co-trespasser and liable for the statutory penalty. Crisler v. Ott, 72 Miss. 166, 16 So. 416, 1894 Miss. LEXIS 90 (Miss. 1894).

A telegraph company is liable if its laborers clearing its right of way cut trees on adjoining land of another, although done contrary to the positive orders of the superintendent, if it resulted from the negligence of the latter in absenting himself and in trusting the work to ordinary laborers without supervision. Clay v. Postal Tel. Co., 70 Miss. 406, 11 So. 658, 1892 Miss. LEXIS 66 (Miss. 1892).

What is proper care to avoid the trespass depends upon the facts of each case. A person acting in good faith is not required to survey the land or resort to unusual or troublesome means to ascertain boundaries not plainly visible, but he cannot turn his employees loose in a forest with nothing to guide them save an indefinite command to cut trees only on his own land. Keirn v. Warfield, 60 Miss. 799, 1883 Miss. LEXIS 15 (Miss. 1883).

The statutory penalty is recoverable only in cases of wilful trespass or of neglect to take proper care and caution to avoid the trespass. Perkins v. Hackleman, 26 Miss. 41, 1853 Miss. LEXIS 38 (Miss. 1853); MHOON v. Greenfield, 52 Miss. 434, 1876 Miss. LEXIS 238 (Miss. 1876); McCleary v. Anthony, 54 Miss. 708, 1877 Miss. LEXIS 86 (Miss. 1877); Keirn v. Warfield, 60 Miss. 799, 1883 Miss. LEXIS 15 (Miss. 1883).

19. Mistake.

The statutory penalty is not recoverable from one who cut trees in the belief that they were included in a sale to him. Lochridge v. Hannon, 236 Miss. 687, 112 So. 2d 234, 1959 Miss. LEXIS 363 (Miss. 1959).

The statutory penalty and punitive damages were not allowable for cutting trees on complainant's land, where the evidence showed that both parties claimed title from a common grantor and that, while the land was entered and part of the trees were cut by defendants after they had been informed that the complainant claimed to own the land, this was done under the honest mistake and reasonable belief that the land belonged to one of the defendants. Anderson-Tully Co. v. Campbell, 193 Miss. 790, 10 So. 2d 445, 1942 Miss. LEXIS 146 (Miss. 1942).

Where defendant's employees in his absence ignorantly cut trees on plaintiff's land supposing they belonged to defendant, the defendant will not be liable for the statutory penalty. Smith v. Saucier, 40 So. 328 (Miss. 1906).

The defendant may defeat a recovery under the statute by showing that the trees were cut through accident, inadvertence, or mistake, and that reasonable care was taken to avoid the same. The burden of proving this is upon the defendant. Keirn v. Warfield, 60 Miss. 799, 1883 Miss. LEXIS 15 (Miss. 1883).

But if a party intending to trespass on public land through mistake cut down trees on the land of another, he is liable to the penalty imposed by the statute. Perkins v. Hackleman, 26 Miss. 41, 1853 Miss. LEXIS 38 (Miss. 1853).

20. Trees between street and sidewalk.

Where the removal of shade trees from a street is necessary to improve the highway, a municipality may remove such trees out of the street without being liable for damage, but it will be liable if their removal was unnecessary and arbitrary. Town of Durant v. Castleberry, 106 Miss. 699, 64 So. 657, 1914 Miss. LEXIS 9 (Miss. 1914).

A telephone company cutting trees between the street and the sidewalk and belonging to the adjacent lot owner is liable for damages under this section [Code 1942, § 1075]. A plaintiff who is in possession of land under color of title is entitled to recover the value of the timber cut by defendant without authority from the owner of the outstanding title and who made no claim to the land. Ingram-Day Lumber Co. v. Cuevas, 104 Miss. 32, 61 So. 4 (Miss. 1913).

A city is without authority to authorize a telephone company or other person to damage or destroy trees standing between the street and the sidewalk, which trees belong to adjacent property owners, but compensation will first have to be made to the owner. A city may remove trees thus situated if they destroy the free use of the street, by making compensation. Brahan v. Meridian Home Tel. Co., 97 Miss. 326, 52 So. 485, 1910 Miss. LEXIS 242 (Miss. 1910).

21. Liability for agent's acts.

Where defendant's employees in his absence ignorantly cut trees on plaintiff's land supposing they belonged to defendant, the defendant will not be liable for the statutory penalty. Smith v. Saucier, 40 So. 328 (Miss. 1906).

A telegraph company is liable if its laborers clearing its right of way cut trees on adjoining land of another, although done contrary to the positive orders of the superintendent, if it resulted from the negligence of the latter in absenting himself and in trusting the work to ordinary laborers without supervision. Clay v. Postal Tel. Co., 70 Miss. 406, 11 So. 658, 1892 Miss. LEXIS 66 (Miss. 1892).

A telegraph company so trespassing will be liable although the evidence shows that the trees cut were small, not exceeding six or eight inches in diameter, and it is error to allude to them in instructions as shrubs or undergrowth. Clay v. Postal Tel. Co., 70 Miss. 406, 11 So. 658, 1892 Miss. LEXIS 66 (Miss. 1892).

A person who is engaged in the construction of a building which is under the supervision of his agent and who instructs the agent to get the necessary timber from the principal's own land, which is well defined, is not liable for the statutory penalty for trees wilfully cut on land of another by mere laborers employed by the agent to get the timber, who were instructed by the agent to cut only on the principal's land. Fairchild v. New Orleans & N. E. R. Co., 60 Miss. 931, 1883 Miss. LEXIS 39 (Miss. 1883).

Where a plaintiff proves that he informed the defendant before the cutting of timber, of the location of the plaintiff's land, the defendant, in rebuttal of liability, may prove by the same witness that he at the same time instructed his choppers not to fell trees thereon. McCleary v. Anthony, 54 Miss. 708, 1877 Miss. LEXIS 86 (Miss. 1877).

22. Recovery of statutory penalties and actual and punitive damages.

On cross appeal from a decree of adverse possession, awarding title to land to parties in possession and assessing damages for fence and trees destroyed by the claimant, the chancellor's statutory penalty award of $525, or $25 for each of 35 destroyed trees, was reversed and rendered to increase that penalty to $1,925, pursuant to § 95-5-3 [repealed], as amended. Eason v. Hudson, 498 So. 2d 836, 1986 Miss. LEXIS 2872 (Miss. 1986).

Evidence supported punitive damages jury award in trespass action against oil company which, after minimal title check of property in the area, went on land, without owner's permission, to conduct seismic exploration, and damaged or destroyed several hundred trees, brought in heavy machinery, and made roads in a meandering or weaving fashion. Shell Oil Co. v. Murrah, 493 So. 2d 1274, 1986 Miss. LEXIS 2613 (Miss. 1986).

Defendants who established their good faith and who received no financial benefit from the cutting of the timber were not liable for statutory damages. Moore v. Boutwell, 315 So. 2d 921, 1975 Miss. LEXIS 1703 (Miss. 1975).

The statutory penalty provided for by Code 1972 § 95-5-3 will be allowed only where the facts are well proved and where the testimony shows the trespass to have been wilful, or the negligence so gross, or the indifference so real, or the lack of good faith so evident, as to be tantamount to wilfulness. Rutland v. Corley, 287 So. 2d 433, 1973 Miss. LEXIS 1333 (Miss. 1973).

The statutory penalties under § 1075, Code 1942, will be denied when the party cutting the trees on lands of another was acting in good faith and under the belief that the lands in question were its own. Wineman v. Shannon Bros. Lumber Co., 368 F. Supp. 652, 1973 U.S. Dist. LEXIS 11839 (N.D. Miss. 1973).

This section [Code 1942, § 1076] gives no right to recover actual damages for the destruction of ornamental trees, but provides only a penalty. Urban Renewal Agency v. Tackett, 255 So. 2d 904, 1971 Miss. LEXIS 1298 (Miss. 1971).

Compensatory damages may not be awarded in an action to recover the statutory penalty. Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546, 1962 Miss. LEXIS 536 (Miss. 1962).

Where plaintiff could have brought suit for a statutory penalty and for value of timber and for damages, as a single cause of action, but elected to sue first in county court only for the unpaid balance of actual value of timber which the defendant lumber company had withheld at the time of settlement of demand note, the county court judgment is res judicata as to any other cause of action for timber wrongfully cut and hauled away. Duett v. Pine Mfg. Co., 209 Miss. 830, 48 So. 2d 490, 1950 Miss. LEXIS 448 (Miss. 1950).

Where a lumber company advanced money to the plaintiff for the purchase of tract of timber and it was agreed that the plaintiff would cut the timber into logs and deliver the logs to the plant where the company was to manufacture the logs into lumber and pay the plaintiff and the plaintiff alleged that the company unlawfully cut timber and he brought action in county court to recover for the cost of cutting and removing logs, the plaintiff split his cause of action when he brought suit in circuit court for statutory penalty for wrongfully cutting logs, for value of logs and for other damages to his timber tract. Duett v. Pine Mfg. Co., 209 Miss. 830, 48 So. 2d 490, 1950 Miss. LEXIS 448 (Miss. 1950).

It was intention of legislature to authorize bringing of suit for both statutory penalty and actual damages, and that they together should constitute one cause of action which need not be placed in separate counts. Duett v. Pine Mfg. Co., 209 Miss. 830, 48 So. 2d 490, 1950 Miss. LEXIS 448 (Miss. 1950).

Under this section [Code 1942, § 1075] owner can recover both actual damages and statutory penalties in a proper case. Floyd v. Williams, 198 Miss. 350, 22 So. 2d 365, 1945 Miss. LEXIS 205 (Miss. 1945).

Owners were entitled to recover under this section [Code 1942, § 1075] both actual damages and statutory penalties for cutting ornamental trees reserved in a timber deed. Floyd v. Williams, 198 Miss. 350, 22 So. 2d 365, 1945 Miss. LEXIS 205 (Miss. 1945).

Error in overruling defendant's motion requiring plaintiffs to elect whether to seek recovery of actual damages or the statutory penalties for cutting ornamental trees on declaration predicated upon Code 1942, § 1076, was cured when plaintiffs amended their declaration so as to seek recovery of both actual damages and statutory penalties of $15 per tree as authorized by this section. Floyd v. Williams, 198 Miss. 350, 22 So. 2d 365, 1945 Miss. LEXIS 205 (Miss. 1945).

Statutory penalty and actual damages for cutting or deadening trees may be embraced in same count. A declaration alleging actual damages for cutting trees at $200.00 and statutory penalty claimed at $1800.00 in the same count is not subject to demurrer on the ground that the actual damages are less than the circuit court can take jurisdiction of. Fleming v. Dunigan Cooperage Co., 144 Miss. 769, 109 So. 851, 1926 Miss. LEXIS 363 (Miss. 1926).

The plaintiff may declare for the statutory penalty in one count and the actual value under another in an action for trespass under this section [Code 1942, § 1075], and should not be required to elect on which he will go to the jury, but is entitled to submit his case on both counts. Batson-McGehee Co. v. Smith, 134 Miss. 222, 98 So. 534, 1924 Miss. LEXIS 248 (Miss. 1924).

In order to recover the statutory penalties the plaintiff must show: (a) that the trees were cut on his land; (b) that they were cut without his consent; (c) that they were cut within twelve months before the suit was begun; (d) that they were cut by defendant or his agents or employees, acting within the scope of their employment or by the command or consent of their principal; (e) that the cutting was done wilfully or recklessly without proper precaution to prevent a trespass. Therrell v. Ellis, 83 Miss. 494, 35 So. 826, 1903 Miss. LEXIS 70 (Miss. 1904).

23. Damages.

The court properly calculated the fair market of timber by adding together the amount received from the mill, the amount paid to the loggers, and the amount paid to the defendants; the court rejected the contention that the price paid to the defendant was the fair market value contemplated by this section. Cox v. F-S Prestress, Inc., 1999 Miss. App. LEXIS 479 (Miss. Ct. App. July 20, 1999), rev'd, 797 So. 2d 839, 2001 Miss. LEXIS 4 (Miss. 2001).

RESEARCH REFERENCES

Am. Jur.

75 Am. Jur. 2d, Trespass §§ 1, 18, 24.

17 Am. Jur. Pl & Pr Forms (Rev), Logs and Timber, Forms 94 et seq. (injury to or conversion of timber).

Law Reviews.

Ogletree, A primer concerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall, 1989.

§ 95-5-11. Loosening or taking boats and water craft.

Every person who, without the consent of the owner or person in charge, shall loosen or take away any boat or water craft, shall pay to the owner thereof Twenty Dollars ($20.00), over and above the expenses for bringing back such boat or water craft.

HISTORY:

Codes, Hutchinson's 1848, ch. 12, art. 6(6); 1857, ch. 18, art. 6; 1871, § 2478; 1880, § 966; 1892, § 4416; 1906, § 4981; Hemingway's 1917, § 3250; 1930, § 3415; 1942, § 1079.

§ 95-5-13. Taking cottonseed sacks.

If a corporation or the agent or employee of a corporation shall deliver or cause to be delivered to any other corporation or its agent or employee for transportation, or shall receive for such purpose, or shall remove or secrete, without the consent of the owner or of his agent, any bag or sack commonly known as a cottonseed sack, so marked as to indicate its owner, it or he shall pay to the owner Twenty-five Cents (25¢) for each bag or sack so delivered or caused to be delivered, or received, or removed or secreted.

HISTORY:

Codes, 1892, § 4417; 1906, § 4982; Hemingway's 1917, § 3251; 1930, § 3416; 1942, § 1080.

§ 95-5-15. Boxing pine trees.

If any person shall box for turpentine, or shall cut or cause to be cut a box or boxes in a pine tree on land not his own, without consent of the owner of the land or tree, he shall pay to the owner thereof Five Dollars ($5.00) for each pine tree so boxed or cut.

HISTORY:
Codes, 1892, § 4418; 1906, § 4983; Hemingway's 1917, § 3252; 1930, § 3417; 1942, § 1081.

Cross References —
Punishment for malicious mischief, see § 97-17-67.

Criminal penalty for boxing pine trees, see § 97-17-79.

JUDICIAL DECISIONS

1. In general.
To incur the penalty under this section [Code 1942, § 1081] for boxing trees, the boxing must not only be done without the consent of the owner of the land or of the trees but also wilfully or recklessly. Ladnier v. Ingram Day Lumber Co., 135 Miss. 632, 100 So. 369, 1924 Miss. LEXIS 67 (Miss. 1924).

A continuing trespass may be enjoined. Ladnier v. Ingram Day Lumber Co., 135 Miss. 632, 100 So. 369, 1924 Miss. LEXIS 67 (Miss. 1924).

Tender of damages, which did not include cost to date, is insufficient although plaintiff did not recover more than the amount tendered. Louis Cohn & Bros. v. Lovell Lumber Co., 135 Miss. 716, 100 So. 188, 1924 Miss. LEXIS 57 (Miss. 1924).

The company owning the standing timber under warranty deed granting only a right to ingress and egress to cut down and remove same, could not enter the land, box the trees for turpentine, and burn off the brush. Rogers v. Lumber Mineral Co., 115 Miss. 339, 76 So. 145 (Miss. 1917).

The owner of trees from which has been extracted turpentine without his consent may recover amount of damage inflicted on the trees in the process of extraction or he may recover the products or their value or the amount of any actual damage unnecessarily inflicted on the trees. Hines v. Imperial Naval Store Co., 101 Miss. 802, 58 So. 650, 1911 Miss. LEXIS 176 (Miss. 1911).

A certificate from the register of the land office of the location of public lands vests sufficient title in the person to whom the certificate is granted to enable him to maintain an action thereon against the trespasser, and the certificate is admissible as evidence of title. Johnson v. Davis, 91 Miss. 708, 45 So. 979, 1907 Miss. LEXIS 207 (Miss. 1907).

Actual possession of the land and ownership of the trees entitles plaintiff to maintain an action of trespass. Harrison Naval Stores Co. v. Johnson, 91 Miss. 747, 45 So. 465, 1907 Miss. LEXIS 181 (Miss. 1907).

§ 95-5-17. Repealed.

Repealed by Laws, 1983, ch. 374, § 3, eff from and after July 1, 1983.

[Codes, 1880, §§ 815-817; 1892, § 4419; 1906, § 4984; Hemingway's 1917, § 3253; 1930, § 3418; 1942, § 1082]

Editor's Notes —
Former § 95-5-17 was entitled: By sheep-killing dogs and hogs.

§ 95-5-19. Poultry or livestock-killing dog; how dealt with.

The owner, or the immediate family, employee or agent of the owner, of any poultry or livestock, including cattle, horses, mules, jacks, jennets, sheep, goats and hogs, may kill any dog in the act of chasing or killing any such poultry or livestock, and any such person shall not be liable therefor to the owner of the dog.

HISTORY:
Codes, 1880, §§ 815-817; 1892, § 4420; 1906, § 4985; Hemingway's 1917, § 3254; 1930, § 3419; 1942, § 1083; Laws, 1983, ch. 374, § 1; Laws, 1985, ch. 377, eff from and after July 1, 1985.

RESEARCH REFERENCES

Am. Jur.
4 Am. Jur. 2d, Animals §§ 62 et seq.

CJS.
3B C.J.S., Animals §§ 328 et seq.

§ 95-5-21. Poultry and livestock killed by dog; owner liable.

If any dog shall kill or injure any poultry or any livestock, including cattle, horses, mules, jacks, jennets, sheep, goats and hogs, the owner of the dog shall pay to the owner of such poultry or livestock any loss suffered as a result of such injury and the value of the poultry or livestock killed and all costs of collection, including court costs and reasonable attorney's fees.

HISTORY:
Codes, 1942, § 1083.5; Laws, 1956, ch. 242; Laws, 1983, ch. 374, § 2, eff from and after July 1, 1983.

Cross References —
Restitution to owner for malicious injury or death of certain animals, see § 97-41-15.

JUDICIAL DECISIONS

1. Damages.
There was ample evidence to support the damage award due to dogs entering a property owner's land and killing the owner's cattle because the owner provided evidence of the cows' value; a manager of a stockyard also testified as to value of various cattle. Walker v. May, 166 So. 3d 613, 2015 Miss. App. LEXIS 349 (Miss. Ct. App. 2015).

RESEARCH REFERENCES

ALR.
Who "harbors" or "keeps" dog under animal liability statute. 64 A.L.R.4th 963.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

§ 95-5-23. To fences, bars, gates, bridges, buildings.

If any person shall put down any fence or bars, or open any gate, not his own, and leave the same down or open, without the permission of the owner, or shall in any manner injure or deface any bridge, building, or other structure not his own, he shall pay to the owner Twenty Dollars ($20.00) for every such offense, and shall be liable for all damages that may have resulted from such act.

HISTORY:
Codes, Hutchinson's 1847, ch. 12, art. 6(8); 1857, ch. 16, art. 19; 1871, § 1925; 1880, § 989; 1892, § 4422; 1906, § 4987; Hemingway's 1917, § 3256; 1930, § 3421; 1942, § 1085.

Cross References —
Criminal penalty for severing and converting fixtures, see § 97-17-47.

Punishment for malicious mischief, see § 97-17-67.

JUDICIAL DECISIONS

1. In general.

A contract between a railroad and a milling company, whereby the railroad company built a spur track on ground furnished by the milling company and connecting with its mill, was binding upon the assignee of the milling company, and such assignee could not recover the statutory penalty under this section [Code 1942, § 1085] for the destruction of a fence which the assignee had constructed across the spur track. Illinois C. R. Co. v. Sanders, 93 Miss. 107, 46 So. 241, 1908 Miss. LEXIS 66 (Miss. 1908).

There was a fatal variance between an allegation that the defendant tore down a house situated in block eight, and proof that the house was situated in block nine. Martin v. State, 89 Miss. 633, 42 So. 601, 1906 Miss. LEXIS 58 (Miss. 1906).

OPINIONS OF THE ATTORNEY GENERAL

If a surety meets its obligation by having a defendant in court at the appointed time, the surety should be discharged from any further obligation, such as insuring the defendant pays a fine. 1998 Miss. Op. Att'y Gen. 778.

RESEARCH REFERENCES

ALR.

Interest on damages for period before judgment for injury to, or detention, loss, or destruction of, property. 36 A.L.R.2d 337.

Propriety of awarding joint custody of children. 17 A.L.R.4th 1013.

Law Reviews.

Dowd, Defining the Doctrine of Equitable Distribution in Mississippi: A Rebuttable Presumption that Homemaking Services are as Valuable to the Acquisition of Marital Property as Breadwinning Services. 16 Miss. C. L. Rev. 479, Spring 1996.

§ 95-5-25. By firing woods.

If any person shall set on fire any lands of another, or shall wantonly, negligently, or carelessly allow any fire to get into the lands of another, he shall be liable to the person injured thereby, not only for the injury to or destruction of buildings, fences, and the like, but for the burning and injury of trees, timber, and grass, and damage to the range as well; and shall moreover be liable to a penalty of One Hundred and Fifty Dollars ($150.00) in favor of the owner.

HISTORY:

Codes, Hutchinson's 1848, ch. 13, art. 5(2); 1857, ch. 28, art. 1; 1871, § 2741; 1880, § 2816; 1892, § 4423; 1906, § 4988; Hemingway's 1917, § 3257; 1930, § 3422; 1942, § 1086.

Cross References —

Forest fires as nuisance, see § 49-19-25.

Mississippi Prescribed Burning Act not to limit civil or criminal liability provided for in this section, see § 49-19-307.

Criminal penalty for firing of woods, see § 97-17-13.

Charging the grand jury, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 7.01.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Acts of agents.
3. Proof.
4. Recovery of statutory penalty and damages.
5. Venue.

1. In general.

This section [Code 1942, § 1086] is applicable to negligence in failing to keep a fire from spreading to adjoining lands. Wofford v. Johnson, 250 Miss. 1, 164 So. 2d 458, 1964 Miss. LEXIS 445 (Miss. 1964).

A property owner setting fire on his own premises for a lawful purpose is not liable for damages caused by the spread of the fire to the property of another, unless he is negligent in starting or controlling the fire. Wofford v. Johnson, 250 Miss. 1, 164 So. 2d 458, 1964 Miss. LEXIS 445 (Miss. 1964).

The measure of diligence required of a property owner setting fire on his premises for a lawful purpose to prevent its spread is ordinary care. Wofford v. Johnson, 250 Miss. 1, 164 So. 2d 458, 1964 Miss. LEXIS 445 (Miss. 1964).

2. Acts of agents.

Where a servant charged with work which may be aided by fire, in furtherance of his duty, is guilty of negligence either in setting a fire or in controlling it thereafter, the master is liable for any damage which may result by reason of the spread of the fire to the property of another. Wofford v. Johnson, 250 Miss. 1, 164 So. 2d 458, 1964 Miss. LEXIS 445 (Miss. 1964).

Agents of a corporation who set out fire which burned plaintiff's property were personally liable for negligence. Gloster Lumber Co. v. Wilkinson, 118 Miss. 289, 79 So. 96, 1918 Miss. LEXIS 75 (Miss. 1918).

3. Proof.

A property owner damaged by the spread of fire lawfully set on the premises of another is not required to establish negligence in both the setting of the fire and the permitting of it to spread, but recovery may be had by showing that although the defendant acted properly in setting the fire, he failed to manage and tend it with reasonable prudence and ordinary care appropriate to the circumstances, and as a result thereof the fire spread to plaintiff's premises and caused damage. Wofford v. Johnson, 250 Miss. 1, 164 So. 2d 458, 1964 Miss. LEXIS 445 (Miss. 1964).

In action for damages to plaintiff's trees and fence caused by fire which spread to plaintiff's land, amount of verdict showed that jury assessed the statutory penalty, in view of the insufficiency of the evidence of actual damage. Gabbert v. Treadaway, 194 Miss. 435, 13 So. 2d 157, 1943 Miss. LEXIS 96 (Miss. 1943).

In an action for damages to plaintiff's land resulting from a fire alleged to have been started by the defendant's servant on adjoining land of the defendant and negligently permitted to spread to plaintiff's land, evidence that there was a more or less general custom for farmers in that section to burn ditches, fence rows, stalks, etc., in preparation for planting, was not relevant to the gravamen of the action and should have been excluded. Robinson v. Turfitt, 192 Miss. 160, 4 So. 2d 884, 1941 Miss. LEXIS 21 (Miss. 1941).

In tort action for damage by fire plaintiff must show with reasonable certainty that party charged is party actually responsible for wrong. McCain v. Wade, 181 Miss. 664, 180 So. 748, 1938 Miss. LEXIS 106 (Miss. 1938).

Record held not to show trial court committed error in sustaining motion to exclude plaintiff's evidence and refusing to submit case to jury. McCain v. Wade, 181 Miss. 664, 180 So. 748, 1938 Miss. LEXIS 106 (Miss. 1938).

4. Recovery of statutory penalty and damages.

In an action to recover damages to trees and to a fence, caused by fire spreading to plaintiff's land, instruction requiring the jury to add the penalty provided by this section [Code 1942, § 1086] if any actual damage by the fire was found to have resulted from defendant's negligence was correct in principle. Gabbert v. Treadaway, 194 Miss. 435, 13 So. 2d 157, 1943 Miss. LEXIS 96 (Miss. 1943).

Liability for the statutory penalty is not limited to cases where the defendant wilfully or wantonly allowed a fire to get onto the land of another, but expressly provides for the allowance of such penalty if the defendant "wantonly, negligently or carelessly" allowed a fire to get onto the land of others, and, since it would be necessary for the jury to first find that the defendant's act had been wantonly, negligently and carelessly done before it would be even entitled to award actual damages, the jury should not, having so found, have ignored an instruction to add to such damages the statutory penalty, and a motion to have the judgment include the statutory penalty as well as the actual damages should have been sustained by the court. Wilson v. Yazoo & M. V. R. Co., 192 Miss. 424, 6 So. 2d 313, 1942 Miss. LEXIS 34 (Miss. 1942).

A person damaged by fire negligently set out may sue in one action for both actual damages and statutory penalty. Gloster Lumber Co. v. Wilkinson, 118 Miss. 289, 79 So. 96, 1918 Miss. LEXIS 75 (Miss. 1918).

Under this section [Code 1942, § 1086] the owner can maintain an action for the penalty and damages while his land is held under lease to a third person, and he cannot be required to elect on which count he will stand, whether actual damage or statutory penalty, since he can recover on both. Gilchrist-Fordney Co. v. Parker, 109 Miss. 445, 69 So. 290, 1915 Miss. LEXIS 177 (Miss. 1915).

5. Venue.

Venue of action for setting fire to grass on defendants' land in two counties and burning bridge on road in J. county held in L. county where defendants resided. Jefferson Davis County v. Riley, 158 Miss. 473, 129 So. 324, 1930 Miss. LEXIS 14 (Miss. 1930).

RESEARCH REFERENCES

ALR.

Liability for spread of fire purposely and lawfully kindled. 24 A.L.R.2d 241.

Liability of one negligently causing fire for personal injuries sustained in attempt to control fire or to save life or property. 42 A.L.R.2d 494.

Liability of property owner for damages from spread of accidental fire originating on property. 17 A.L.R.5th 547.

Am. Jur.

35A Am. Jur. 2d, Fires §§ 7 et seq.

12 Am. Jur. Pl & Pr Forms (Rev), Fires, Forms 31, 32, 36, 37 (complaint or declaration for damages caused by failure to tend fire intentionally kindled); Form 38.1 (complaint, petition, or declaration – allegation – failure to tend fire intentionally kindled – specific acts of negligence); Form 42 (instruction to jury on liability for spread of fire lawfully kindled); Form 51, 52 (complaint or declaration for damages for loss caused by fire set in violation of statute); Form 54 (instruction to jury on liability for spread of fire kindled in violation of statute).

CJS.

36A C.J.S., Fires §§ 8 et seq.

Law Reviews.

Ogletree, A primer concerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall, 1989.

§ 95-5-27. On lands held by the state.

All the provisions of this chapter giving a penalty for cutting down, deadening, girdling, boxing, destroying, or taking away trees of any kind, herein mentioned, and regulating the remedy for enforcing the same, shall apply when the injury is committed on land belonging to the state, or which is held by the state in trust for any purpose.

HISTORY:

Codes, 1892, § 4421; 1906, § 4986; Hemingway's 1917, § 3255; 1930, § 3420; 1942, § 1084.

Cross References —

Prohibition against owner of land struck off to state for taxes cutting timber from land prior to redemption, see § 27-41-83.

Duty of land commissioner to protect public lands from trespass, see § 29-1-17.

Damages for trespass and cutting of timber on public lands, see § 29-1-19.

Penalty for cutting timber on state forfeited tax lands before purchase price is paid, see § 29-1-41.

Posting of leased sixteenth section or lieu land against trespassers, see § 29-3-54.

Disposition of funds collected because of trespass on sixteenth section or lieu lands located in more than one county or school district, see § 29-3-129.

Control and development of state forests, see § 55-3-11.

Bar of tort action against governmental bodies for airport development activities, see § 61-3-83.

Criminal penalty for cutting and rafting of timber from state lands, see § 97-7-65.

JUDICIAL DECISIONS

1. In general.

Liability of lessee of sixteenth section for cutting timber is that only which arises under general law of waste. J. T. Fargason & Son, Inc. v. Coahoma County, 156 Miss. 419, 124 So. 758, 1929 Miss. LEXIS 365 (Miss. 1929).

§ 95-5-29. Limitation of actions; effect of recovery; claiming less than statutory penalty.

An action for the remedies and penalties provided by Section 95-5-10 may be prosecuted in any court of competent jurisdiction within twenty-four (24) months from the time the injury was committed and not after. All other actions for any specific penalty given by this chapter may be prosecuted in any court of competent jurisdiction within twelve (12) months from the time the injury was committed, and not after; and a recovery of any penalty herein given shall not be a bar to any action for further damages, or to any criminal prosecution for any such offense as herein enumerated. A party, if he so elect, may, under any of the provisions of this chapter, claim less than the penalty given.

HISTORY:

Codes, Hutchinson's 1848, ch. 57, art. 6(4); 1857, ch. 18, art. 7; 1871, § 2479; 1880, § 968; 1892, § 4424; 1906, § 4989; Hemingway's 1917, § 3258; 1930, § 3423; 1942, § 1087; Laws, 1999, ch. 431, § 1, eff from and after passage (approved Mar. 19, 1999).

Cross References —

Disclaimer and tender of amends in actions for trespass on lands, see § 11-7-73.

Application of general limitations of actions provisions, see § 15-1-1.

General requirement that action to recover penalty be brought within one year, see § 15-1-33.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Trespass or destruction of trees.

1. In general.

A statute such as Code 1942, § 1075, creating a cause of action not known to the common law and fixing the time (Code 1942, § 1087) within which an action must be commenced thereunder is not a statute of limitation, but the right given thereby is a conditional one and the commencement of the action within the time fixed is a condition precedent to any liability under the statute. Evans v. Broadhead, 233 So. 2d 771, 1970 Miss. LEXIS 1667 (Miss. 1970).

Code 1942, § 744 allowing one to bring an action within one year after a previous action has been defeated for reasons other than upon the merits did not apply to that portion of the plaintiff's suit which was founded on a cause of action created by Code 1942, § 1075, and therefore that portion of the suit which was founded on Code 1942, § 1075 and brought more than three years after the alleged destruction of trees, although within one year after defeat of the action for a reason other than upon its merits, was barred by the one-year period of limitations contained in Code 1942, § 1087. Evans v. Broadhead, 233 So. 2d 771, 1970 Miss. LEXIS 1667 (Miss. 1970).

Where the plaintiff sought damages under Code 1942, § 1075, but additionally sought damages by reason of an alleged trespass consisting of items other than the specific penalties given by Code 1942, § 1075, the one-year limitation stated in Code 1942, § 1087 was not applicable to those additional items. Evans v. Broadhead, 233 So. 2d 771, 1970 Miss. LEXIS 1667 (Miss. 1970).

The statutory remedy for trespass is not exclusive insofar as punitive damages are concerned. Day v. Hamilton, 237 Miss. 472, 115 So. 2d 300, 1959 Miss. LEXIS 493 (Miss. 1959).

Evidence of a trespass committed after the filing of the declaration in an action for trespass on land is inadmissible. Gulf & C. R. Co. v. Hartley, 88 Miss. 674, 41 So. 382, 1906 Miss. LEXIS 188 (Miss. 1906).

In order to recover the statutory penalties the plaintiff must show: (a) that the trees were cut on his land; (b) that they were cut without his consent; (c) that they were cut within twelve months before the suit was begun; (d) that they were cut by defendant or his agents or employees, acting within the scope of their employment, or by the command or consent of their principal; (e) that the cutting was done wilfully or recklessly without proper precaution to prevent a trespass. Therrell v. Ellis, 83 Miss. 494, 35 So. 826, 1903 Miss. LEXIS 70 (Miss. 1904).

The statute runs against infants. Miller v. Wesson, 58 Miss. 831, 1881 Miss. LEXIS 49 (Miss. 1881).

The remedy, under the statute, is an action of debt, and a count for the value of trees cut may be joined with one for the statutory penalty. Miller v. Wesson, 58 Miss. 831, 1881 Miss. LEXIS 49 (Miss. 1881).

The plaintiff's ownership of the trees or land may be tried in the action for the statutory penalty. Miller v. Wesson, 58 Miss. 831, 1881 Miss. LEXIS 49 (Miss. 1881).

2. Trespass or destruction of trees.

Application of the discovery rule to the statute of limitations, Miss. Code Ann. § 95-5-29, was inappropriate where an owner of trees required no unique expertise to realize when his trees had been taken away without his permission, and because the cutting and taking away of trees was not a secretive or inherently undiscoverable act. Jackson v. Carter, 23 So. 3d 502, 2009 Miss. App. LEXIS 206 (Miss. Ct. App.), cert. denied, 22 So. 3d 1193, 2009 Miss. LEXIS 613 (Miss. 2009).

Subsection (2) § 95-5-10 is subject to the statute of limitations provided in § 95-5-29 because the subsection involves specific penalties; Subsection (1) § 95-5-10 is not subject to § 95-5-29, but is subject to § 15-1-33 because it is a penalty controlled by a one year statute of limitation. McCain v. Memphis Hardwood Flooring Co., 725 So. 2d 788, 1998 Miss. LEXIS 272 (Miss. 1998), overruled in part, Stockstill v. Gammill, 943 So. 2d 35, 2006 Miss. LEXIS 624 (Miss. 2006).

Supreme Court of Mississippi found that McCain v. Memphis Hardwood Flooring Co., 725 So. 2d 788 (Miss. 1998), should be overruled to the extent that Miss. Code Ann. § 95-5-29 would apply to a claim for the fair market value of the trees cut or the cost of reforestation; such damages would clearly be considered to be compensatory damages, while a claim for double the fair market value of the trees cut would indeed be penal in nature. Stockstill v. Gammill, 943 So. 2d 35, 2006 Miss. LEXIS 624 (Miss. 2006).

RESEARCH REFERENCES

ALR.

Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common-law trespass. 15 A.L.R.3d 1228.

§ 95-5-31. Duty of possessor of real property to trespasser.

(1) For the purposes of this section, the following words shall have the following meanings:

(a) "Possessor of real property" means any person with a fee, reversionary, or easement interest in real property, including an owner, lessee, or other lawful occupant.

(b) "Trespasser" means a person who enters upon the property of another without permission and without an invitation, express or implied, or other legal right.

(2) A possessor of real property owes no duty of care to a trespasser, except a duty to refrain from willfully or wantonly injuring such a person.

(3) Notwithstanding subsection (2) of this section, a possessor of real property may be subject to liability for injury to a trespasser if:

(a) The possessor discovers the trespasser in a position of peril on the property and fails to exercise reasonable care to prevent injury to that trespasser; or

(b) The trespasser is a child injured by an artificial condition on the possessor's property and all of the following apply:

(i) The place where the condition existed was one upon which the possessor knew or had reason to know that a child would be likely to trespass;

(ii) The condition is one of which the possessor knew or had reason to know and which the possessor realized or should have realized would involve an unreasonable risk of death or serious bodily harm to a child;

(iii) The injured child because of his or her youth did not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it;

(iv) The utility to the possessor of maintaining the condition and the burden of eliminating the danger was slight as compared with the risk to the child; and

(v) The possessor failed to exercise reasonable care to eliminate the danger or otherwise to protect the child.

(4) This section does not create or increase the liability of any possessor of real property and does not affect any immunities from or defenses to civil liability established by another section of the Mississippi Code of 1972 or available at common law to which a possessor of real property may be entitled.

HISTORY:

Laws, 2016, ch. 407, § 1, eff from and after July 1, 2016.

CHAPTER 7.

LIABILITY EXEMPTION FOR DONORS OF FOOD

Sec.

95-7-1. Definitions.
95-7-3. Donors of apparently wholesome food to charitable or nonprofit institutions not to be liable; exceptions.
95-7-5. Charitable or nonprofit organizations not liable as result of distribution of donated food.
95-7-7. Application of chapter.
95-7-9. Labeling of food.
95-7-11. Sale of donated food prohibited.
95-7-13. Regulations.

§ 95-7-1. Definitions.

For the purposes of this chapter, the following words shall have the following meanings:

(a) "Apparently wholesome food" shall mean food that is prepared or perishable or raw agricultural products which appear to be fit for human consumption at the time it is donated. Such food does not include canned goods that are leaking, swollen, dented on a seam, or no longer airtight.

(b) "Charitable or nonprofit organization" shall mean an incorporated or unincorporated organization that has been established and is operating for religious, charitable, or educational purposes and that does not distribute any of its income to its members, directors or officers.

(c) "Intentional misconduct" shall mean conduct that the person acting knows is harmful to the health or well-being of another person.

(d) "Donate" shall mean to give without requiring anything of monetary value from the donee.

(e) "Person" shall mean an individual, corporation, partnership, organization or association.

HISTORY:

Laws, 1983, ch. 534, § 1, eff from and after July 1, 1983.

Cross References —

Sale and inspection of food and drugs generally, see §§ 75-29-1 et seq.

§ 95-7-3. Donors of apparently wholesome food to charitable or nonprofit institutions not to be liable; exceptions.

Notwithstanding any other provisions of law, any person who makes a good faith donation to a charitable or nonprofit organization of apparently wholesome food, shall not be liable for damages in any civil action for any injury or death because of the condition of such food unless the injury or death is a direct result of the gross negligence, recklessness or intentional misconduct of the donor.

HISTORY:

Laws, 1983, ch. 534, § 2, eff from and after July 1, 1983.

RESEARCH REFERENCES

ALR.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion. 58 A.L.R.4th 7.

§ 95-7-5. Charitable or nonprofit organizations not liable as result of distribution of donated food.

Notwithstanding any other provisions of law, a charitable or nonprofit organization which in good faith receives and distributes, without charge, food which the organization reasonably determines to be apparently wholesome shall not be liable for damages in any civil action based on the doctrine of strict liability in tort for any injury or death because of the condition of such food.

HISTORY:

Laws, 1983, ch. 534, § 3, eff from and after July 1, 1983.

RESEARCH REFERENCES

ALR.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion. 58 A.L.R.4th 7.

§ 95-7-7. Application of chapter.

This chapter shall apply to all good faith donations of perishable food or raw agricultural products which are not readily marketable because of appearance, freshness, grade, surplus supply or other conditions.

HISTORY:

Laws, 1983, ch. 534, § 4, eff from and after July 1, 1983.

§ 95-7-9. Labeling of food.

Any charitable or nonprofit organization distributing food pursuant to this chapter shall affix a label upon such food or upon the individual container or package of such food, or in the dining hall where such prepared foods are served, stating that the food is not for resale and stating that pursuant to state law this organization shall not be liable in any civil action based on strict liability in tort for any injury or death because of the condition of such food.

HISTORY:

Laws, 1983, ch. 534, § 5, eff from and after July 1, 1983.

§ 95-7-11. Sale of donated food prohibited.

It shall be unlawful for any person or charitable or nonprofit organization receiving food pursuant to this chapter to sell or offer to sell such donated food.

Any person violating the provisions of this section shall upon conviction be guilty of a misdemeanor.

HISTORY:
Laws, 1983, ch. 534, § 6, eff from and after July 1, 1983.

Cross References —
Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 95-7-13. Regulations.

The Commissioner of Agriculture and Commerce is hereby authorized to promulgate rules and regulations necessary to carry out the provisions of this chapter.

HISTORY:
Laws, 1983, ch. 534, § 7, eff from and after July 1, 1983.

Joint Legislative Committee Note —
Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in this section. The reference to the "director of the Mississippi Department of Agriculture and Commerce" was changed to read the "Commissioner of Agriculture and Commerce." The Joint Committee ratified the correction at its August 5, 2008, meeting.

Cross References —
Commissioner of department of agriculture and commerce, see §§ 69-1-1 et seq.

CHAPTER 9.

LIABILITY EXEMPTION FOR VOLUNTEERS AND SPORTS OFFICIALS

Sec.
95-9-1. Definitions; liability exemption for volunteers; exceptions.
95-9-3. Liability exemption for sports officials; definitions; exceptions; application of section.
95-9-5. Application of chapter.

§ 95-9-1. Definitions; liability exemption for volunteers; exceptions.

(1) For the purposes of this section, unless the context otherwise requires:

(a) "Qualified volunteer" means any person who freely provides services, goods or the use of real or personal property or equipment, without any compensation or charge, to any volunteer agency in connection with a volunteer activity. For purposes of this chapter, reimbursement of actual expenses, including travel expenses, necessarily incurred in the discharge of a member's duties, insurance coverage and workers' compensation coverage of volunteers, shall not be considered monetary compensation.

(b) "Volunteer agency" means any department, institution, community volunteer organization or any nonprofit corporation designated 501(c)(3) by the United States Internal Revenue Service, except an agency established primarily for the recreational benefit of its stockholders or members. Volunteer agency shall also include any volunteer firefighter association which is eligible to be designated as a nonprofit corporation under 501(c)(3) by the United States Internal Revenue Service.

(c) "Volunteer activity" means any activity within the scope of any project, program or other activity regularly sponsored by a volunteer agency with the intent to effect a charitable purpose or other public benefit, including, but not limited to, fire protection, rescue services, the enhancement of the cultural, civic, religious, educational, scientific or economic resources of the community or equine activity as provided in Section 95-11-1 et seq.

(2) A qualified volunteer shall not be held vicariously liable for the negligence of another in connection with or as a consequence of his volunteer activities.

(3) A qualified volunteer who renders assistance to a participant in, or a recipient, consumer or user of the services or benefits of a volunteer activity shall not be liable for any civil damages for any personal injury or property damage caused to a person as a result of any acts or omissions committed in good faith except:

(a) Where the qualified volunteer engages in acts or omissions which are intentional, willful, wanton, reckless or grossly negligent; or

(b) Where the qualified volunteer negligently operates a motor vehicle, aircraft, boat or other powered mode of conveyance.

HISTORY:

Laws, 1988, ch. 585, § 1; Laws, 1993, ch. 589, § 1; Laws, 1994, ch. 443, § 5; Laws, 2013, ch. 385, § 3, eff from and after passage (approved Mar. 20, 2013).

Editor's Notes —

Laws of 2013, ch. 385, § 6, effective March 20, 2013, provides:

"SECTION 6. This act shall take effect and be in force from and after its passage; volunteer fire departments shall have until July 1, 2013, to obtain and have approved the insurance policies or self-insurance reserves or combination thereof required for political subdivisions under the Tort Claims Act."

Federal Aspects—

For organizations and nonprofit corporations which qualify for 501(c)(3) designation, see 26 USCS § 501(c)(3).

JUDICIAL DECISIONS

1. Volunteer fire departments.

Volunteer firefighter was not immune from suit under the Mississippi Tort Claims Act (MTCA) for claims arising from an automobile accident because the volunteer fire department was not a political subdivision of the State. Under Miss. Code Ann. § 95-9-1(3)(b), the firefighter could be liable for negligent operation of a vehicle. Poppenheimer v. Estate of Coyle, 98 So. 3d 1059, 2012 Miss. LEXIS 486 (Miss. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Volunteer firefighters are protected under state "Good Samaritan" law. 1991 Miss. Op. Att'y Gen. 287.

Depending on particular facts of relationship between volunteer firefighters and governing body, volunteer firemen can, in certain limited circumstances, be considered employees for purpose of workers' compensation; County can contribute funds, equipment, training, etc. to municipal volunteer fire department which provides services in county; however, county does not have authority to provide workers compensation coverage for volunteer firefighters for municipality because these firefighters are not employees of county. 1993 Miss. Op. Att'y Gen. 510.

A parochial school and/or church would come within the definition of a "qualified volunteer" and as such would enjoy the exemptions from liability provided by Miss. Code Ann. § 95-9-1 when providing the use of its buildings or other real property to the Red Cross, Catholic Charities, or other qualified volunteer organizations during an emergency. 2007 Miss. Op. Att'y Gen. 146, 2007 Miss. AG LEXIS 106.

RESEARCH REFERENCES

ALR.

Duty and liability of one who voluntarily undertakes to care for injured person. 64 A.L.R.2d 1179.

Rescue doctrine: negligence and contributory negligence in suit by rescuer against rescued person. 4 A.L.R.3d 558.

Construction of "good Samaritan" statute excusing from civil liability one rendering care in emergency. 39 A.L.R.3d 222.

Liability of charitable organization under respondeat superior doctrine for tort of unpaid volunteer. 82 A.L.R.3d 1213.

Tort immunity of nongovernmental charities – modern status. 25 A.L.R.4th 517.

Construction and application of "Good Samaritan" statutes. 68 A.L.R.4th 294.

Rescue doctrine: liability of one who negligently causes motor vehicle accident for injuries to person subsequently attempting to rescue persons or property. 73 A.L.R.4th 737.

Valuing damages in personal injury actions awarded for gratuitously rendered nursing and medical care. 49 A.L.R.5th 685.

Am. Jur.

57A Am. Jur. 2d, Negligence §§ 193, 194.

§ 95-9-3. Liability exemption for sports officials; definitions; exceptions; application of section.

(1) Sports officials who officiate athletic contests at any level of competi-

tion in this state shall not be liable to any person or entity in any civil action for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

(2) For purposes of this section, sports officials are defined as those individuals who serve as referees, umpires, linesmen and those who serve in similar capacities but may be known by other titles and are duly registered or members of a local, state, regional or national organization which is engaged in part in providing education and training to sports officials.

(3) Nothing in this section shall be deemed to grant the protection set forth to sports officials who cause injury or damage to a person or entity by actions or inactions which are intentional, willful, wanton, reckless, malicious or grossly negligent.

(4) The provisions of this section shall apply only to actions the cause of which accrued on or after July 1, 1988.

HISTORY:

Laws, 1988, ch. 585, § 2, eff from and after July 1, 1988.

JUDICIAL DECISIONS

1. In general.

Umpires who officiated over softball game in which player was injured by thrown bat were statutorily immune from liability as "sport officials," where umpires belonged to local organization and national organization which were both engaged in providing education and training to sports officials. Rolison v. City of Meridian, 691 So. 2d 440, 1997 Miss. LEXIS 81 (Miss. 1997).

RESEARCH REFERENCES

ALR.

Duty and liability of one who voluntarily undertakes to care for injured person. 64 A.L.R.2d 1179.

Rescue doctrine: negligence and contributory negligence in suit by rescuer against rescued person. 4 A.L.R.3d 558.

Construction of "good Samaritan" statute excusing from civil liability one rendering care in emergency. 39 A.L.R.3d 222.

Liability of charitable organization under respondeat superior doctrine for tort of unpaid volunteer. 82 A.L.R.3d 1213.

Tort immunity of nongovernmental charities – modern status. 25 A.L.R.4th 517.

Construction and application of "Good Samaritan" statutes. 68 A.L.R.4th 294.

Rescue doctrine: liability of one who negligently causes motor vehicle accident for injuries to person subsequently attempting to rescue persons or property. 73 A.L.R.4th 737.

Am. Jur.

57A Am. Jur. 2d, Negligence §§ 193, 194.

§ 95-9-5. Application of chapter.

Nothing in this chapter shall be construed to limit the liability of a person acting outside the scope of the volunteer activity, or as limiting a person's right of recovery under provisions required to be contained in an automobile liability insurance policy or contract pursuant to Sections 83-11-101 through 83-11-111, Mississippi Code of 1972, and the liability of the owner or operator of an uninsured motor vehicle shall not be limited as provided in this chapter for purpose of recovery under such a provision.

HISTORY:

Laws, 1988, ch. 585, § 3, eff from and after July 1, 1988.

RESEARCH REFERENCES

ALR.

Construction and application of "Good Samaritan" statutes. 68 A.L.R.4th 294.

CHAPTER 11.

LIABILITY EXEMPTION FOR EQUINE AND LIVESTOCK ACTIVITIES

Sec.	
95-11-1.	Legislative findings and intent.
95-11-3.	Definitions.
95-11-5.	Extent of immunity from liability.
95-11-7.	Posting of warnings.

§ 95-11-1. Legislative findings and intent.

The Legislature recognizes that persons who participate in livestock shows or equine activities may incur injuries as a result of the risks involved in such activities. The Legislature also finds that the state and its citizens derive numerous economic and personal benefits from such activities. The Legislature finds, determines and declares that this chapter is necessary for the immediate preservation of the public peace, health and safety. It is, therefore, the intent of the Legislature to encourage livestock shows and equine activities by limiting the civil liability of those involved in such activities.

HISTORY:

Laws, 1994, ch. 443, § 1; Laws, 2003, ch. 451, § 1, eff from and after July 1, 2003.

OPINIONS OF THE ATTORNEY GENERAL

Section 95-11-1 et seq. protects the board of supervisors of Pearl River County and the Pearl River County Fair Board from liability for the use of the Pearl River County Arena by private rodeo bull/steer owners conducting bull riding training sessions using rough stock bulls and/or steers while practicing in the arena. 2005 Miss. Op. Att'y Gen. 464.

RESEARCH REFERENCES

Am. Jur.

16A Am. Jur. Pl & Pr Forms (Rev), Libel and Slander, Form 70.1 (Allegation – Innuendo – False charge – Plaintiff's character).

§ 95-11-3. Definitions.

As used in this chapter, the following words and phrases shall have the meanings ascribed herein unless the context clearly indicates otherwise:

(a) "Engages in livestock shows or equine activity" means riding, training, providing or assisting in providing medical treatment of, driving, or being a passenger upon an equine or other livestock, whether mounted or unmounted, or any person assisting a participant or show management. The term "engages in livestock shows or equine activity" does not include being a spectator at a livestock show or equine activity, except in cases where the spectator places himself in an unauthorized area and in immediate proximity to the livestock show or equine activity.

(b) "Equine" means a horse, pony, mule, donkey or hinny.

(c) "Livestock" means equines, cattle, swine, sheep and goats.

(d) "Livestock shows or equine activity" means:

(i) Livestock or equine shows, fairs, competitions, performances or parades that involve any or all breeds of livestock or equines and any of the equine disciplines, including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and Western performance riding, endurance trail riding, western games and hunting.

(ii) Equine or livestock training or teaching activities, or both.

(iii) Boarding equines or livestock.

(iv) Riding, inspecting, or evaluating an equine or livestock belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or livestock or is permitting a perspective purchaser of the equine or livestock to ride, inspect or evaluate the equine or livestock.

(v) Rides, trips, hunts, or other equine or livestock activities of any type however informal or impromptu that are sponsored by an equine or livestock activity sponsor.

(vi) Placing or replacing horseshoes on an equine.

(vii) Examining or administering medical treatment to an equine or livestock by a veterinarian.

(e) "Equine or livestock activity sponsor" means an individual, group, club, partnership or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes or provides the facilities for an equine activity or livestock show, including, but not limited to, pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college sponsored classes, programs, and operators, instructors, and promoters of equine or livestock facilities, including, but not limited to, stables, clubhouses, pony ride strings, fairs and arenas at which the activity is held.

(f) "Equine or livestock professional" means a person engaged for compensation in:

(i) Instructing a participant or renting to a participant, an equine or livestock for the purpose of riding, driving or being a passenger upon the equine.

(ii) Renting equipment or tack to a participant.

(iii) Examining or administering medical treatment to an equine or livestock as a veterinarian.

(g) "Inherent risks of equine or livestock activities" means those dangers or conditions which are an integral part of equine or livestock activities, including, but not limited to:

(i) The propensity of an equine or livestock to behave in ways that may result in injury, harm or death to persons on or around them.

(ii) The unpredictability of an equine's or livestock's reaction to such things as sounds, sudden movement and unfamiliar objects, persons or other animals.

(iii) Certain hazards such as surface and subsurface conditions.

(iv) Collisions with other equines or livestock or objects.

(v) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.

(h) "Participant" means any person, whether amateur or professional, who engages in an equine activity or livestock show, whether or not a fee is paid to participate in the equine activity or livestock show.

HISTORY:

Laws, 1994, ch. 443, § 2; Laws, 2003, ch. 451, § 2, eff from and after July 1, 2003.

Cross References —

Owner or possessor of equine, as defined in this section, restricted from bringing it into state or local show or sale facility without infectious anemia certificate, see § 69-15-117.

OPINIONS OF THE ATTORNEY GENERAL

"Equine activity sponsors" as defined include individuals, groups, clubs, partnerships, and corporations which sponsor, organize, or provide facilities for equine activities; however, neither counties nor municipalities fall within the definition of an equine activity sponsor under the Act. 1998 Miss. Op. Att'y Gen. 213.

RESEARCH REFERENCES

Am. Jur.

16A Am. Jur. Pl & Pr Forms (Rev), Libel and Slander, Form 70.1 (Allegation – Innuendo – False charge – Plaintiff's character).

§ 95-11-5. Extent of immunity from liability.

(1) Except as provided in subsection (2) of this section, an equine or livestock activity sponsor, an equine or livestock professional, or any other person, which shall include a corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities or livestock shows and, except as provided in subsection (2) of this section, a participant's representative shall not make any claim against, or recover from an equine or livestock professional, or any other person for injury, loss, damage or death of the participant resulting from any of the inherent risks of equine activities or livestock shows.

(2) Nothing in subsection (1) of this section shall prevent or limit the liability of an equine or livestock activity sponsor, an equine or livestock professional or any other person if the equine or livestock activity sponsor, equine or livestock professional or person:

(a)(i) Provided the equipment or tack and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury.

(ii) Provided the equine or livestock and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or livestock show and to safely manage the particular equine or livestock based on the participant's representations of his ability.

(b) Owns, leases, rents or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known or should have been known to the equine or livestock activity sponsor, equine or livestock professional or person, and for which warning signs have not been conspicuously posted.

(c) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury.

(d) Intentionally injures the participant.

(3) Nothing in subsection (1) of this section shall prevent or limit the liability of an equine or livestock activity sponsor or an equine or livestock professional under liability provisions as set forth in products liability laws.

HISTORY:

Laws, 1994, ch. 443, § 3; Laws, 2003, ch. 451, § 3, eff from and after July 1, 2003.

RESEARCH REFERENCES

ALR.

Liability of owner of horse to person injured or killed when kicked, bitten, knocked down, and the like. 85 A.L.R.2d 1161.

Liability for damage to motor vehicle or injury to person riding therein from collision with runaway horse, or horse left unattended or untied in street. 49 A.L.R.4th 653.

Liability for personal injury or death caused by trespassing or intruding livestock. 49 A.L.R.4th 710.

Am. Jur.

16A Am. Jur. Pl & Pr Forms (Rev), Libel and Slander, Form 70.1 (Allegation – Innuendo – False charge – Plaintiff's character).

§ 95-11-7. Posting of warnings.

(1) Every equine or livestock activity sponsor and every equine or livestock professional shall post and maintain signs which contain the warning notice specified in subsection (2) of this section. Such signs shall be placed in a clearly visible location on or near stables, corrals or arenas where the equine or livestock activity sponsor or the equine or livestock professional conducts equine activities or livestock shows. The warning notice specified in subsection (2) of this section shall appear on the sign in black letters, with each letter to be a minimum of one (1) inch in height. Every written contract entered into by an equine or livestock professional or by an equine or livestock activity sponsor for the providing of professional services, instruction or the rental of equipment or tack, or an equine or livestock participant, whether or not the contract involves equine activities or livestock shows on or off the location or site of the equine or livestock activity sponsor's or the equine or livestock professional's business, shall contain in clearly readable print the warning notice specified in subsection (2) of this section.

(2) The signs and contracts described in subsection (1) of this section shall contain the following warning notice:

WARNING: Under Mississippi law, an equine or livestock activity sponsor or an equine or livestock professional is not liable for an injury to or the death of a participant in equine activities or livestock shows resulting from the inherent risks of equine activities or livestock shows, pursuant to this chapter.

(3) Failure to comply with the requirements concerning warning signs and notices provided in this section shall prevent an equine or livestock activity sponsor or equine or livestock professional from invoking the privileges of immunity provided by this chapter.

HISTORY:

Laws, 1994, ch. 443, § 4; Laws, 2003, ch. 451, § 4, eff from and after July 1, 2003.

RESEARCH REFERENCES

ALR.

Liability of owner of horse to person injured or killed when kicked, bitten, knocked down, and the like. 85 A.L.R.2d 1161.

Liability of youth camp, its agents or employees, or of scouting leader or organization, for injury to child participant in program. 88 A.L.R.3d 1236.

Liability of owner or bailor of horse for injury by horse to hirer or bailee thereof. 6 A.L.R.4th 358.

Am. Jur.

4 Am. Jur. 2d, Animals § 78.

25 Am. Jur. Proof of Facts 2d 461, Failure to Use Due Care in Providing Horses for Hire.

CHAPTER 13.

LIABILITY EXEMPTION FOR NOISE POLLUTION BY SPORT-SHOOTING RANGES

Sec.
95-13-1. Definitions; liability exemption for sport-shooting ranges; notice and hearing; application of section.

§ 95-13-1. Definitions; liability exemption for sport-shooting ranges; notice and hearing; application of section.

(1) As used in this section, unless the context otherwise requires:

(a) "Local unit of government" means a county, municipality or other entity of local government;

(b) "Person" means an individual, proprietorship, partnership, corporation, club, or other legal entity; and

(c) "Sport-shooting range" or "range" means an area designed and operated for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder or any other similar sport shooting which complies with the provisions of subsection (3) of this section.

(2)(a) Notwithstanding any other provision of law to the contrary, a person who operates or uses a sport-shooting range in this state is not subject to civil liability or criminal prosecution for noise or noise pollution resulting from the operation or use of the range if the range is in compliance with all noise control laws, resolutions, ordinances or regulations, issued by a local unit of government, that applied to the range and its operation at the time the range was constructed and began operation.

(b) A person who operates or uses a sport-shooting range is not subject to an action for nuisance, and a court of the state shall not enjoin the use or operation of a range on the basis of noise or noise pollution, if the range is in compliance with all noise control laws, resolutions, ordinances or regulations issued by a unit of local government that applied to the range and its operation at the time the range was constructed and began operation.

(c) A person who subsequently acquires title to or who owns real property adversely affected by the use of property with a permanently located and improved range shall not maintain a nuisance action against the person who owns the range to restrain, enjoin or impede the use of the range where there has not been a substantial change in the nature of the use of the range or by a person using the range.

(d) Rules or regulations adopted by any state department or agency for limiting levels of noise in terms of descried level which may occur in the outdoor atmosphere shall not apply to a sport-shooting range exempted from liability under this section.

(e) Notwithstanding any other provision of law to the contrary, nothing in this section shall be construed to limit civil liability except in the limited case of noise pollution.

(3)(a) In order to qualify for the limitation of liability afforded by this section, a sport-shooting range must be located wholly within a tract or parcel of land consisting of not less than three hundred twenty (320) contiguous acres. All persons owning property any part of which lies within one thousand (1,000) yards of any boundary of the sport-shooting range property shall have standing to appear and object to the location of the sport-shooting range at a hearing to be conducted by the Industrial Development Authority Board.

(b) The person seeking to operate the range and secure the limitation of liability afforded by this section shall bear the expense of the hearing and other costs associated therewith.

(c) Actual notice shall be afforded to all persons having standing to object if the identity and addresses of those persons can be determined by examining the property tax records of the county. Actual notice shall be made in writing mailed via first class mail, postage prepaid, not less than thirty (30) days prior to the date set for the hearing.

(d) Publication shall be made in a newspaper of general circulation in the county once a week for three (3) weeks, the first such publication to be made not less than thirty (30) days prior to the date of the hearing.

(e) Claims of persons who do not appear and object shall be barred as provided in this section.

(f) Notwithstanding any provision of this section to the contrary, the cause of action of any person owning property in the vicinity of the proposed range and having standing to object prior to the time of the hearing shall not be barred by the provisions of this section provided the property owner registers his complaint with the board at or before the hearing.

(4) The provisions of this section shall apply only in a county bordering the State of Tennessee wherein U.S. Highway 78 intersects State Highway 7 and in a county where U.S. Highway 61 and State Highway 4 intersect.

HISTORY:

Laws, 1999, ch. 530, § 1, eff from and after July 1, 1999.

CHAPTER 15.

LIABILITY EXEMPTION FOR REPORT OF SUSPICIOUS ACTIVITY OR BEHAVIOR

Sec.
95-15-1. Limitation of liability for report of suspicious activity or behavior.

§ 95-15-1. Limitation of liability for report of suspicious activity or behavior.

(1) A person who in good faith makes a report of suspicious activity or behavior shall be immune from civil and criminal liability for the making of the report if the report is based on objectively reasonable suspicion.

(2) For purposes of this section, "report of suspicious activity or behavior" means any communication to a law enforcement officer or agency or other appropriate authority of the behavior or activity of another person if the report is made with the reasonable belief that the behavior or activity constitutes or is in furtherance of an act of terrorism.

(3) This section does not apply to the intentional making of a report known to be false, including a violation of Section 97-35-47, or to a report made with reckless disregard for the truth of the report.

HISTORY:

Laws, 2016, ch. 427, § 1, eff from and after passage (approved Apr. 18, 2016).

Editor's Notes —

This act is known as the "Mississippi See Something, Say Something Act."

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